



**Administration of Estates of
Deceased Persons: Report of the
National Committee for Uniform
Succession Laws to the Standing
Committee of Attorneys General**

Report
Volume 1

Queensland
Law Reform Commission

**Administration of Estates of
Deceased Persons: Report of
the National Committee for
Uniform Succession Laws to the
Standing Committee of
Attorneys General**

Volume 1

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To: The Honourable Cameron Dick MP
Attorney-General and Minister for Industrial Relations

In accordance with section 15 of the *Law Reform Commission Act 1968* (Qld), the Commission is pleased to present its Report, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*.

The Honourable Justice R G Atkinson
Chairperson

Mr J K Bond SC
Member

Mr I P Davis
Member

Mr B J Herd
Member

Ms R M Treston
Member

Dr B P White
Member

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Mrs A Lathouras

Address: 7th Floor, 50 Ann Street, Brisbane.
Postal address: PO Box 13312, George Street Post Shop, Qld 4003.
Telephone: (07) 3247 4544.
Facsimile: (07) 3247 9045
Email: LawReform.Commission@justice.qld.gov.au
Website: www.qlrc.qld.gov.au

**MEMBERS OF THE NATIONAL COMMITTEE
FOR UNIFORM SUCCESSION LAWS¹**

Australian Capital Territory:	ACT Department of Justice and Community Safety Professor Charles Rowland
New South Wales:	New South Wales Law Reform Commission² Professor Michael Tilbury, Commissioner Mr Joseph Waugh, Legal Officer
Northern Territory:	Northern Territory Department of Justice Mr Robert Bradshaw Deputy Director, Policy Division Solicitor for the Northern Territory
Queensland:	Queensland Law Reform Commission (co-ordinating agency for the project) The Hon Justice R G Atkinson, Chairperson Ms Claire Riethmuller, Director Ms Shih-Ning Then, Legal Officer
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Victoria:	Victorian Law Reform Commission
Western Australia:	State Solicitor's Office Ms Ilse Petersen, Senior Assistant State Solicitor
Commonwealth:	Australian Law Reform Commission Professor Rosalind Croucher, Commissioner

¹ Although South Australia does not have a representative on the National Committee, an officer of the South Australian Attorney-General's Department holds a watching brief in relation to the project.

² The National Committee acknowledges the contribution to this project of Mr Peter Hennessy who was, until October 2008, the Executive Director of the New South Wales Law Reform Commission.

Previous publications in this project:

Wills

Issues Paper, *Uniform Succession Laws for Australian States and Territories: The Law of Wills* (QLRC MP 10, July 1994, reissued as QLRC WP 46, June 1995; NSWLRC IP 10, February 1996)

Miscellaneous Paper, *Uniform Succession Laws: Wills* (QLRC MP 15, February 1996)

Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills (QLRC MP 29, December 1997; NSWLRC R 85, April 1998)

Report, *The Law of Wills* (QLRC R 52, December 1997)

Supplementary Report, *Wills: The Anti-lapse Rule — Supplementary Report to the Standing Committee of Attorneys General* (QLRC R 61, March 2006)

Family provision

Issues Paper, *Uniform Succession Laws for Australian States and Territories: Family Provision* (QLRC WP 47, June 1995; NSWLRC IP 11, February 1996)

Report to the Standing Committee of Attorneys General on Family Provision (QLRC MP 28, December 1997)

Report, *Uniform succession laws: family provision* (NSWLRC R 110, May 2005)

Supplementary Report, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (QLRC R 58, July 2004)

Intestacy

Issues Paper, *Intestacy* (NSWLRC IP 26, April 2005)

Report, *Uniform succession laws: intestacy* (NSWLRC R 116, April 2007)

Administration of estates

Discussion Paper, *Administration of Estates of Deceased Persons* (QLRC MP 37, June 1999, NSWLRC DP 42, October 1999)

Discussion Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (QLRC WP 55, December 2001)

Issues Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration* (NSWLRC IP 21, May 2002)

Miscellaneous

Miscellaneous Paper, *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (QLRC MP 16, February 1996)

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Chapter 1

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THE UNIFORM SUCCESSION LAWS PROJECT

The four stages of the project

1.1 This Report concludes the fourth and final stage of the Uniform Succession Laws Project. The first three stages of the project to be completed were:

- the law of wills;³
- family provision;⁴ and
- intestacy.⁵

1.2 The Uniform Succession Laws Project is an initiative of the Standing Committee of Attorneys General, and has been undertaken by the National Committee for Uniform Succession Laws.⁶ The membership of the National Committee, which is listed at the beginning of this Report, has included agencies or individuals appointed by the State and Territory Attorneys General to participate in this project.

1.3 The Queensland Law Reform Commission has had the primary carriage of the National Committee's work on wills and family provision and on this final Report dealing with the administration of estates. The New South Wales Law Reform Commission has had the primary carriage of the National Committee's work on intestacy.

Implementation to date

1.4 To date, legislation implementing (wholly or in part) the National Committee's recommendations in relation to the law of wills has been passed in New South Wales,⁷ the Northern Territory,⁸ Queensland,⁹ Tasmania,¹⁰ Victoria¹¹ and Western Australia.¹²

3 See *Wills Report* (1997); *Supplementary Wills Report* (2006).

4 See *Family Provision Report* (1997); *Family Provision Supplementary Report* (2004).

5 See *Intestacy Report* (2007).

6 For a discussion of the history of the project, see *Wills Report* (1997) Preface.

7 *Succession Act 2006* (NSW).

8 *Wills Act* (NT).

9 *Succession Amendment Act 2006* (Qld), which amended the *Succession Act 1981* (Qld).

10 *Wills Act 2008* (Tas).

11 *Wills Act 1997* (Vic).

12 *Wills Amendment Act 2007* (WA), which amended the *Wills Act 1970* (WA).

1.5 In New South Wales, the *Succession Amendment (Family Provision) Act 2008* (NSW), which commenced on 1 March 2009, implements (with some modifications) the National Committee's recommendations in relation to family provision.

1.6 In addition, the *Succession Amendment (Intestacy) Bill 2009* (NSW) will implement, with some modifications, the recommendations made by the National Committee in relation to intestacy.

BACKGROUND TO THIS REPORT

1.7 In June 1999, the National Committee published a Discussion Paper, *Administration of Estates of Deceased Persons*.¹³ The Discussion Paper examined a broad range of general issues of administration, such as the appointment and removal of personal representatives, the powers, duties and liabilities of personal representatives, the vesting of property on the death of a person, the order of payment of debts in an insolvent estate, the application of assets towards the payment of debts in a solvent estate, and the payment of legacies.

1.8 In December 2001, the National Committee published a further Discussion Paper, *Uniform Succession Laws: Recognition of Interstate and Foreign Grants of Probate and Letters of Administration*.¹⁴ That Discussion Paper examined:

- the current resealing provisions of the States and Territories, under which a person may apply to the Supreme Court for the resealing of a grant made in another State or Territory or, in certain circumstances, in another country, so that the grant is effective in the resealing jurisdiction as if it had been made by the Supreme Court of that jurisdiction; and
- as an alternative to the resealing of Australian grants, the development of a scheme of automatic recognition, under which a grant made in an Australian jurisdiction would, in certain circumstances, be effective throughout Australia without the need to be resealed.

¹³ *Administration of Estates Discussion Paper* (1999). Note, the Discussion Paper that was published by the Queensland Law Reform Commission on behalf of the National Committee (QLRC MP 37, June 1999) was subsequently republished and distributed for consultation purposes by the New South Wales Law Reform Commission (NSWLRC DP 42, October 1999). All references in this Report to this Discussion Paper include references to both versions of the Discussion Paper.

¹⁴ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001). Note, the Discussion Paper that was published by the Queensland Law Reform Commission on behalf of the National Committee (QLRC WP 55, December 2001) was subsequently republished, in an abridged format, and distributed for consultation purposes by the New South Wales Law Reform Commission (NSWLRC IP 21, May 2002). All references in this Report to this Discussion Paper also include, where applicable, references to the Issues Paper published by the New South Wales Law Reform Commission.

1.9 Both Discussion Papers were widely distributed to relevant organisations and interested individuals and were made available on the websites of the Queensland Law Reform Commission and the New South Wales Law Reform Commission.¹⁵ They were also the subject of public calls for submissions.¹⁶

1.10 The respondents to the two Discussion Papers are listed, respectively, in Appendix 2 and Appendix 3 to this Report.

1.11 In developing its recommendations about elections to administer for this Report, the National Committee identified the need for further input about various issues that would need to be resolved if elections to administer were to be retained, for certain estates, as an alternative to the making of a grant. Accordingly, in June 2007, the National Committee circulated a brief paper to all respondents who had previously commented on the Administration of Estates Discussion Paper (which included the peak body for trustee companies), as well as to the law societies, bar associations and public trustees of all Australian States and Territories.

1.12 The respondents to that paper are included among the respondents listed in Appendix 2 to this Report.

1.13 The National Committee would like to thank all respondents who have made submissions throughout the course of this part of the project for their contribution to the development of the National Committee's recommendations.

1.14 The National Committee would also like to thank the probate registrars of the States and Territories for their assistance throughout this project. In preparing the Administration of Estates Discussion Paper, the National Committee held meetings with the probate registrars on two separate occasions. The probate registrars have also assisted with the provision of background information for this project, especially the information contained in Chapter 37 about the frequency and nature of resealing applications.

THIS REPORT

The content of this Report

1.15 This Report contains the National Committee's recommendations in relation to three distinct aspects of the administration of estates of deceased persons.

¹⁵ See <www.qirc.qld.gov.au> and <http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_index>. In the case of the *Recognition of Interstate and Foreign Grants Discussion Paper* (2001), the New South Wales Law Reform Commission published the abridged format of that paper on its website.

¹⁶ See, for example, Queensland Law Reform Commission, 'Development of uniform succession laws' (2002) 76(3) *Law Institute Journal* 40.

1.16 General issues of administration law are considered in Chapters 3–29, 36 and 40. These include a wide range of issues, such as:

- the court's jurisdiction to make a grant (Chapter 3);
- the appointment of personal representatives, the order of priority for letters of administration, and specific issues concerning public trustees and trustee companies (Chapters 4–6);
- the transmission of the office of personal representative (Chapter 7);
- notice provisions, caveats, administration bonds and sureties (Chapters 8 and 9);
- the vesting of property (Chapter 10);
- the rights, duties, powers and liabilities of personal representatives (Chapters 11–14);
- the administration of assets — namely, assets for the payment of debts, the payment of debts in an insolvent estate, the order of application of assets towards the payment of debts in a solvent estate, and the payment of legacies and devises (Chapters 15–18);
- the partition of land (Chapter 19);
- obtaining the court's advice and directions, the distribution of an estate after notice, the barring of claims, and the right to follow assets (Chapters 20–22);
- survivorship issues where persons have died, or are presumed to have died, and the order of their deaths is uncertain, and the court's jurisdiction to make a grant on the presumption of death (Chapters 23 and 24);
- the effect of revoking a grant (Chapter 25);
- the survival of actions for the benefit of, and against, the estate of a deceased person (Chapter 26);
- commission (Chapter 27);
- dealings with wills (Chapter 28);
- elections to administer the estate of a deceased person and other mechanisms to facilitate the administration of an estate without a grant (Chapter 29);
- choice of law issues in relation to original grants (Chapter 36); and

- miscellaneous administration issues (Chapter 40).

1.17 The second area considered by the National Committee is the resealing of interstate and foreign grants. Among the issues considered are:

- the grants and other instruments that may be resealed (Chapter 31);
- the countries whose grants may be resealed (Chapter 32);
- the persons who may apply for the resealing of a grant (Chapter 33);
- the effects of resealing (Chapter 34);
- the resealing process (Chapter 35); and
- choice of law issues in relation to resealing (Chapter 36).

1.18 The third area considered by the National Committee is the automatic recognition of certain Australian grants without the need to be resealed. The background to these issues, the National Committee's proposed scheme and the effect of the proposed scheme on other areas of succession law are considered in Chapters 37–39.

1.19 A summary of all the recommendations made in Volumes 1–3 of this Report is included in Volume 4.

The National Committee's approach

1.20 In developing the recommendations in this Report, the National Committee has been guided by four objectives, which are illustrated below.

Simplification of the law

1.21 As part of the simplification of the law, the National Committee has sought to assimilate, to the greatest extent possible, the role of administrators with that of executors.

1.22 For example, in Chapter 7, the National Committee has recommended that the chain of representation, which presently passes through executors only, should also be able to pass through administrators. Where an administrator dies without having completed the administration of the estate, it will enable the executor or administrator of the deceased administrator to continue the administration of the original estate, and avoid the need for a further grant to be obtained.

1.23 Further, in Chapter 9, the National Committee has recommended that administration bonds and sureties, which are not a requirement for a grant of probate, should not be a requirement for a grant of letters of administration.

1.24 The National Committee has also sought to simplify the law in relation to the administration of estates. One of the main areas that has been addressed is the order of application of assets towards the payment of debts in a solvent estate. In Chapter 17, the National Committee has streamlined and clarified the statutory order for the application of assets, which has historically given rise to considerable uncertainty and litigation.

Simplification of processes

1.25 In addition to simplifying the law, the National Committee has sought to simplify the processes for the administration of estates. The major reform proposed, in this respect, is the scheme for the recognition of certain Australian grants without the need for those grants to be resealed. Under the first stage of these proposals, if a person dies domiciled in an Australian State or Territory, it will be possible to obtain a grant that will be effective in the other Australian jurisdictions, rather than needing to obtain a grant, or the resealing of a grant, in each jurisdiction in which there is property to be administered.

The protection of persons with an interest in the estate of a deceased person

1.26 The National Committee recognises an issue that commonly gives rise to disputes in relation to the administration of estates is the lack of information that is provided by some personal representatives. In Chapter 11, the National Committee has sought to clarify the duty of a personal representative to maintain documents about the administration of an estate. It has also provided beneficiaries and other specified persons with a mechanism to obtain access to the documents that must be maintained by a personal representative.

1.27 A second issue that gives rise to complaints about the administration of estates concerns the amount of commission charged by personal representatives (particularly under the provisions of a will). In Chapter 27, the National Committee has recommended that the court have an express power to review the amount that is charged, or proposed to be charged, by a personal representative for administering an estate.

Recognition of the extent of informal administration

1.28 The National Committee has also recognised the extent to which many estates are able to be administered without a grant, and has included provisions to facilitate that course. These issues are considered in Chapter 29, where the National Committee has recommended that:

- elections to administer should be able to be filed by the public trustee, a trustee company or a legal practitioner;
- the model legislation should clarify the liability of a person who administers an estate informally; and

- the model legislation should include a provision to facilitate the payment, by a person who holds money or personal property of a deceased person, of certain amounts without requiring the production of a grant.

The Administration of Estates Bill 2009

1.29 Volume 4 of this Report includes model legislation (the Administration of Estates Bill 2009), which implements the National Committee's recommendations in this Report. The model legislation has been drafted by the Office of the Queensland Parliamentary Counsel.

1.30 The National Committee would like to thank Mr Steven Berg, Deputy Parliamentary Counsel, for his expertise in the drafting of the model legislation.

Currency

1.31 Unless otherwise specified, the law in this Report is stated as at 20 February 2009.¹⁷

17

Where relevant, reference is made to the *Succession Amendment (Family Provision) Act 2008* (NSW), and to the *Wills Act 2008* (Tas), which both commenced on 1 March 2009. Reference is also made to the provisions of the *Supreme Court (Administration and Probate) Rules 2004* (Vic) that commenced on 2 March 2009 and introduced the ability to give notice of intention to apply for a grant by posting a notice on the website of the Supreme Court of Victoria.

Chapter 2

Administration of estates: an overview

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INTRODUCTION

2.1 When a person dies, his or her estate must be dealt with according to law. This is known as the administration of the deceased person's estate. It entails:

- getting in the assets of the estate;
- paying the debts of the estate; and
- distributing any remaining assets according to the deceased's will or, if the deceased died intestate, the relevant intestacy laws.¹⁸

PERSONAL REPRESENTATIVES

2.2 A person who is appointed to administer the estate of a deceased person is known as a personal representative. There are two types of personal representatives: executors and administrators.

Executors

2.3 An executor is a person appointed by a deceased person's will to administer the deceased's estate. It is usual for a will to nominate a person expressly to be the executor of the deceased's will. However, even if a person has not been expressly appointed as executor, in some situations it may nevertheless be implied from the terms of the will that the deceased intended a particular person to be his or her executor — for example, if the will provides that the person is to perform particular executorial functions, such as safeguarding the deceased's assets or paying the debts. A person whose appointment arises in this way is known as an executor according to the tenor of the will.¹⁹

2.4 An executor's authority is generally said to be derived from the will.²⁰ However, if an executor is required to prove title to the property comprised in the deceased's estate, it may be necessary for an executor to apply to the court for a grant of probate of the deceased's will.²¹ A grant of probate is 'conclusive

¹⁸ See *Intestacy Report* (2007), which examines the intestacy laws of the Australian States and Territories and sets out the National Committee's recommendations for model intestacy laws.

¹⁹ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.60]. See also RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [41.25]–[41.27].

²⁰ *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603, 608 (Earl Loreburn, Lord Atkinson, Lord Parker and Lord Sumner). Note, however, that, in some Australian jurisdictions, even if a deceased person leaves a will appointing an executor, the deceased's property vests, on the deceased's death, in the public trustee, and does not vest in the executor until probate is granted. This issue is discussed at [10.11]–[10.16] below.

²¹ See AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.20].

evidence of the executor's title, and of the formal validity and the contents of the will'.²²

Administrators

2.5 An administrator is a person appointed by the Supreme Court, under a grant of letters of administration, to administer the estate of a deceased person. The most common situation in which letters of administration are granted is where a person has died intestate — that is, without leaving a valid will.

2.6 However, there are some situations in which it may be necessary for an administrator to be appointed under a grant of letters of administration, even though the deceased left a valid will. A grant of letters of administration will usually be required if.²³

- the will does not appoint an executor;
- the executor named in the will is either unable or unwilling to act;
- the executor named in the will died before the deceased or died without obtaining a grant of probate of the deceased's will; or
- the executor named in the will is unknown or cannot be found.

2.7 In these circumstances, the court will make what is known as a grant of letters of administration *cum testamento annexo* (abbreviated as *cta*) — that is, letters of administration with the will annexed.

2.8 On the granting of letters of administration (whether on intestacy or with the will annexed), the deceased's property vests in his or her administrator.²⁴ A grant of letters of administration is the official recognition of the administrator's authority to administer the deceased's estate.²⁵

References in this Report to 'personal representative' and 'grant'

2.9 In this Report, the term 'personal representative' is used to refer generally to both executors and administrators. Similarly, the term 'grant' is used to refer generally to both a grant of probate and a grant of letters of administration.

22 JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [1.18].

23 See DM Haines, *Succession Law in South Australia* (2003) [17.16].

24 The vesting of property is considered in Chapter 10 of this Report.

25 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.20].

THE DIFFERENT TYPES OF LETTERS OF ADMINISTRATION

2.10 Letters of administration may be general (where the grant is not subject to any limitations), special (where the grant is made in special circumstances) or limited (where the grant is limited in terms of the period during which it operates, the extent to which it operates over the deceased person's property, or the particular purpose for which it is granted).²⁶

Special grants

2.11 The two most common types of special grants are letters of administration *cum testamento annexo* and letters of administration *de bonis non*.

2.12 As explained above, letters of administration *cta* (or letters of administration with the will annexed) are granted if the deceased left a will, but there is no executor who is able and willing to apply for probate.

2.13 Letters of administration *de bonis non* (abbreviated as *dbn*),²⁷ or letters of administration of the unadministered estate, are granted if:

- the last surviving, or sole, executor of a deceased person's will dies without having completed the administration of the deceased's estate and the chain of representation is broken;²⁸ or
- the last surviving, or sole, administrator of a deceased person's estate dies without having completed the administration of the deceased's estate.

2.14 The purpose of a grant of letters of administration *dbn* is to enable the administration of the estate to be completed.

Limited grants

2.15 The most common types of limited grants, which are considered in more detail in Chapter 4 of this Report, are:²⁹

²⁶ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) 24–01.

²⁷ *Halsbury's Laws of England* (4th ed) vol 17(2), [201]. The full Latin name for this grant is '*de bonis non administratis*' meaning, literally, of the goods not administered: JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [13.01]. It has been observed that the phrase *de bonis non* 'is not strictly accurate since the grant covers land as well as goods': *Halsbury's Laws of England* (4th ed) vol 17(2), [201] note 3.

²⁸ See the discussion in Chapter 7 of this Report of the transmission of the office of personal representative, which can sometimes avoid the need for a grant of letters of administration *de bonis non*.

²⁹ See [4.214]–[4.261] below.

- letters of administration during the minority of the person entitled (*durante minore aetate*), which may be granted if the executor appointed by the deceased's will, or the person entitled to letters of administration of the deceased's estate, is a minor;³⁰
- letters of administration to the attorney of the person entitled, which may be granted if the person entitled to the grant is resident out of the jurisdiction;
- letters of administration during the absence of the personal representative (*durante absentia*), which may be granted if, at the end of a specified period from the deceased's death, the personal representative to whom a grant has been made is residing out of the jurisdiction;
- letters of administration pending litigation (*pendente lite*), which may be granted pending any suit touching on the validity of the deceased's will;
- letters of administration for the purpose of litigation (*ad litem*), which may be granted for the purpose of bringing or defending an action against the estate;
- administration during the incapacity of the person entitled, which may be granted if the executor appointed by the deceased's will, or the person entitled to letters of administration of the deceased's estate, lacks the capacity required to apply for a grant; and
- letters of administration for the collection of assets (*ad colligenda*), which may be made if it is necessary to protect the assets of an estate during the period before a general grant can be made.

COMMON FORM AND SOLEMN FORM GRANTS

2.16 In each Australian jurisdiction, application for a grant may be made to the Supreme Court³¹ by the executor named in the deceased person's will or by a person who claims to be entitled to be appointed as the administrator of the deceased's estate.³² The application may be made for a grant in either 'solemn'

³⁰ On the expiry of a grant of limited duration, such as letters of administration during the minority of the person entitled, a second or cessate grant is made to the person originally entitled, in this case, to the minor who is now an adult: AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.290]. A cessate grant differs from a grant of letters of administration *de bonis non*, as it involves a re-grant of the whole of the deceased's estate, and is not simply a grant of the unadministered estate: JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [13.83].

³¹ The court's jurisdiction to grant probate or letters of administration is considered in Chapter 3 of this Report.

³² The order of priority for letters of administration on intestacy and with the will annexed is considered in Chapter 5 below.

or 'common' form.³³

Grants in common form

2.17 Most applications made for a grant of probate or letters of administration are for a grant in common form. The relevant documentation is filed in the registry and the grant is made by the probate registrar or a registrar, pursuant to his or her delegated power.³⁴

2.18 An application for a grant in common form 'is based on the assumption that there is no litigable issue arising respecting the admission of the will to probate or the grant of letters of administration'.³⁵ A grant in common form may be made where the validity of the will is not contested or questioned.³⁶

Grants in solemn form

2.19 Whereas a grant in common form is made by the probate registrar or a registrar, a grant of probate in solemn form is made after the court has heard evidence, pronounced for the validity of the will, and ordered the issue of the grant.³⁷

2.20 A solemn form grant is likely to be sought where there is an issue touching on the validity of the will, 'such as whether the testator had the requisite capacity or was subject to undue influence'.³⁸ The purpose of seeking a grant in solemn form is to put an end to the litigable issue.³⁹

THE RESEALING OF INTERSTATE AND FOREIGN GRANTS

2.21 As a general proposition, a grant is effective only in the jurisdiction in which it is made. Accordingly, a grant made in one Australian jurisdiction (or in another country) does not give the personal representative appointed under the grant the authority to administer the deceased's estate in another Australian jurisdiction.

³³ Generally, see RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [40.58]–[40.68].

³⁴ *Court Procedures Rules 2006* (ACT) r 6250(2)(o); *Supreme Court Rules 1970* (NSW) Pt 78 r 5(1)(a); *Administration and Probate Act* (NT) s 17; *Supreme Court Rules* (NT) r 88.05(1)(a); *Uniform Civil Procedure Rules 1999* (Qld) r 601(1); *Administration and Probate Act 1919* (SA) ss 7, 7A(1); *Administration and Probate Act 1935* (Tas) s 67, sch 3 cl 9; *Administration and Probate Act 1958* (Vic) s 12(1), (1A); *Non-Contentious Probate Rules 1967* (WA) r 4.

³⁵ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.420].

³⁶ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [26.03].

³⁷ *Ibid.*

³⁸ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.420].

³⁹ *Ibid.*

2.22 Legislation in each Australian State and Territory enables grants made in the other Australian jurisdictions and in certain countries to be ‘resealed’ by the Supreme Court of the particular State or Territory.⁴⁰ Once an interstate or foreign grant has been resealed in a particular State or Territory, it is as effective as if it were an original grant made by the Supreme Court of that jurisdiction. This overcomes the need for the personal representative appointed under the interstate or foreign grant to obtain an original grant in the particular jurisdiction.

40

The relevant legislative provisions are considered in detail in Chapters 30–35 of this Report.

Chapter 3

Jurisdiction to make and revoke grants and to reseal grants made elsewhere

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HISTORICAL BACKGROUND

3.1 Originally, the jurisdiction to grant probate of the will or letters of administration of the personal property of a deceased person, or to revoke such a grant, was exercised by the English ecclesiastical courts.⁴¹ In 1857, the probate jurisdiction of the ecclesiastical courts was vested in the Court of Probate.⁴² From 1 November 1875, various English courts, including the Court of Probate, were united to form a single Supreme Court of Judicature, consisting of the High Court of Justice and the Court of Appeal. The jurisdiction of the Court of Probate was vested in the High Court of Justice, where it was assigned to the Probate, Divorce and Admiralty Division of that Court.⁴³

3.2 The jurisdiction to grant probate and letters of administration was founded on the presence of personal property within the jurisdiction of the court.⁴⁴ The rationale for this requirement was that:⁴⁵

It is not one of the functions of this Court to determine as an abstract question who is the proper representative of a deceased person ... The foundation of the jurisdiction of this Court is, that there is personal property of the deceased to be distributed within its jurisdiction.

3.3 In 1898, the jurisdiction of the High Court of Justice was enlarged to enable the Court to grant probate or letters of administration where the estate of the deceased person consisted of real estate and did not include any personal property.⁴⁶

3.4 The requirement that the deceased must have left property, whether real or personal, within the jurisdiction could be 'very inconvenient':⁴⁷

When an English domiciliary died leaving property abroad, the foreign court would sometimes refuse to make a grant of representation until a grant had been obtained in England. If the deceased had left no property in England the result was an impasse.⁴⁸

41 Sir W Holdsworth, *A History of English Law* (1938) vol XII, 686–7.

42 *Court of Probate Act 1857* (Eng) ss 3, 4.

43 See *Supreme Court of Judicature Act 1873* (UK) ss 3, 4, 34; *Supreme Court of Judicature (Commencement) Act 1874* (UK) s 2. In October 1971, the Probate, Divorce and Admiralty Division of the High Court of Justice was renamed the Family Division: *Administration of Justice Act 1970* (UK) s 1(1), SI No 1244 of 1971.

44 *Evans v Burrell* (1859) 28 LJPM & A 82; *In the Goods of Fittock* (1863) 32 LJPM & A 157; *In the Goods of Tucker* (1864) 3 Sw & Tr 585; 164 ER 1402.

45 *In the Goods of Tucker* (1864) 3 Sw & Tr 585, 586; 164 ER 1402, 1403 (Sir JP Wilde).

46 *Land Transfer Act 1897* (UK) ss 1(3), (5), 25. This change applied where the person died on or after 1 January 1898. It was necessary because the Act also provided that, where a person died after that date, real estate that was vested in that person without a right in any other person to take by survivorship was to vest in the person's personal representative: *Land Transfer Act 1897* (UK) ss 1(1), (5), 25. Previously, where real property was devised by will, the will operated as a conveyance and the property vested directly in the devisee: see the discussion in *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268, 271 (Emmett J).

47 Sir L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 2, [26–004].

48 See, for example, *In the Goods of Tucker* (1864) 3 Sw & Tr 585; 164 ER 1402.

3.5 The jurisdiction of the English High Court of Justice was therefore extended in 1932 to enable it 'to make a grant of probate or administration in respect of a deceased person notwithstanding that the deceased person left no estate'.⁴⁹ Where an application is made in those circumstances, the affidavit in support of the application must state the purpose for which the grant is required.⁵⁰ In the absence of special circumstances, the court will be 'very reluctant' to exercise its discretion to make a grant.⁵¹

ORIGINAL GRANTS: EXISTING LEGISLATIVE PROVISIONS

3.6 In each Australian State and Territory, the jurisdiction to grant probate and letters of administration is vested in the Supreme Court of the particular jurisdiction.⁵² The legislation in some jurisdictions also refers expressly to the court's jurisdiction to revoke a grant.⁵³

Queensland

3.7 Section 6 of the *Succession Act 1981* (Qld), which is arguably the most comprehensive and up to date of the various provisions, provides:

6 Jurisdiction

- (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

⁴⁹ *Administration of Justice Act 1932* (UK) s 2(1), repealed by the *Supreme Court Act 1981* (UK) s 152(4), sch 7. See now *Supreme Court Act 1981* (UK) s 25(1). This is also the position in New Zealand, where the court may make a grant even though the deceased did not leave any property in the country: see *Administration Act 1969* (NZ) s 5(2).

⁵⁰ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [4.216], citing Registrar's Direction, 30 November 1932.

⁵¹ Sir L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 2, [26–004]. See, for example, *Aldrich v Attorney General* [1968] P 281 where the Court held (at 295) that it appeared to 'be contrary to principle for this court to make a grant of representation in the estate of a person domiciled in some other country who died leaving no assets within the jurisdiction of this court'. However, in that case the petitioner was not seeking a grant, but a declaration of his paternity of a person who died leaving property in another country.

⁵² *Administration and Probate Act 1929* (ACT) s 9; *Probate and Administration Act 1898* (NSW) ss 33, 40; *Administration and Probate Act* (NT) s 14; *Succession Act 1981* (Qld) s 6; *Supreme Court Act 1935* (SA) s 18; *Administration and Probate Act 1919* (SA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 6(5); *Administration and Probate Act 1958* (Vic) s 6; *Administration Act 1903* (WA) ss 4, 6.

⁵³ *Succession Act 1981* (Qld) s 6; *Supreme Court Act 1935* (SA) s 18; *Administration and Probate Act 1919* (SA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 6(5). In New South Wales, it has been held that the power to revoke a grant of probate depends on the Court's inherent jurisdiction: *Bates v Messner* (1966) 67 SR (NSW) 187, 191 (Asprey JA). The revocation of grants is considered in Chapter 25 of this Report.

- (2) The court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that the deceased person left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.
- (3) A grant may be made to such person and subject to such provisions, including conditions or limitations, as the court may think fit.
- (4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.
- (5) This section applies whether the death has occurred before or after the commencement of this Act.

3.8 In its 1978 Report, which led to the enactment of the *Succession Act 1981* (Qld), the Queensland Law Reform Commission explained that the policy behind section 6(1) of the Act was ‘to give the Court plenary jurisdiction in respect of all matters in this area of the law’:⁵⁴

Jurisdiction is given in respect of ‘the estate’ as well as ‘the administration of the estate’ to embrace matters affecting estates which may not be strictly speaking administration matters, such as, for instance, questions of family maintenance, and the recognition of foreign decrees.

3.9 The Commission observed that, as a result of the enactment of ‘one brief, all-embracing provision’, a number of provisions that dealt with specific situations in which the court could make a grant could be omitted from the legislation.⁵⁵

3.10 Section 6(2) of the *Succession Act 1981* (Qld) provides expressly that the court may grant probate or letters of administration notwithstanding that the deceased left no estate in Queensland or elsewhere.⁵⁶

3.11 Section 6(2) also confirms that a grant may be made to a person even though the person is not resident or domiciled in Queensland. In its 1978 Report, the Queensland Law Reform Commission noted that, in practice, probate and letters of administration were ‘frequently granted to persons in other Australian States’.⁵⁷ It considered that, since the language of section 6(2) was not mandatory, the court would be able to refuse to make a grant to a

⁵⁴ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 5.

⁵⁵ Ibid.

⁵⁶ This has been the position in the United Kingdom since 1932 (see [3.5] above) and in New Zealand since 1969 (see *Administration Act 1969* (NZ) s 5). This issue is considered in more detail at [3.27]–[3.37] below.

⁵⁷ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 5.

person who was resident or domiciled out of Queensland if no good reason for making the grant could be shown.⁵⁸

3.12 Section 6(3) of the *Succession Act 1981* (Qld) confirms the power of the court to make various types of limited grants.⁵⁹

3.13 In *Baldwin v Greenland*,⁶⁰ McMurdo P commented on the breadth of the jurisdiction conferred by section 6 of the *Succession Act 1981* (Qld):⁶¹

The discretion conferred upon a judge under s 6 is, by the plain meaning of the emphasised words of the section, in the broadest of terms. The discretion is a general one ... Whilst the jurisprudence dealing with the court's inherent jurisdiction prior to the enactment of s 6 is relevant to the exercise of the discretion conferred by s 6, I am not persuaded that s 6 is no more than a statutory restatement of the court's inherent jurisdiction. The proper exercise of the broad discretion conferred on judges by s 6 will always turn on the particular facts of each case.

3.14 In deciding whether to remove an executor under section 6(1) of the *Succession Act 1981* (Qld),⁶² the Supreme Court of Queensland has applied the general principle that:⁶³

A Court will not lightly interfere with a testator's appointment of executors and trustees. Its ultimate concern must be with the due administration of the estate in the interests of creditors and beneficiaries.

3.15 In *Baldwin v Greenland*,⁶⁴ the Queensland Court of Appeal held that it was not necessary, in order to remove an executor under section 6 of the *Succession Act 1981* (Qld), to find that the executor was not a fit and proper person to carry out the duties of executor,⁶⁵ as the 'ultimate basis' for the exercise of the court's discretion under section 6 is 'the due and proper administration of the estate'.⁶⁶

58 Ibid 6. It is clear that the courts have 'a general power to grant probate to an executor, whether resident or not resident': *In the Goods of Blackwood* (1881) 2 LR (NSW) Eq 83, 85 (Manning J). In *In the Will of Wagner* (1901) QLJ 57, Griffith CJ commented (at 58): 'this Court is not bound to grant probate to persons out of its jurisdiction, but may inquire whether there are any circumstances which would justify them in refusing to do so'. In *Estate of Kruttschnitt* (1941) 42 SR (NSW) 79, the Supreme Court of New South Wales granted letters of administration to a person residing out of the jurisdiction, although it insisted on the provision of sureties within the jurisdiction.

59 Limited grants are considered at [4.210]–[4.271] below.

60 [2007] 1 Qd R 117.

61 Ibid 119.

62 This issue is considered further at [25.14]–[25.17] in vol 2 of this Report.

63 *Williams v Williams* [2005] 1 Qd R 105, 115 (Wilson J).

64 [2007] 1 Qd R 117.

65 Ibid 130, 131 (Jerrard JA).

66 Ibid 130.

Other Australian jurisdictions

3.16 The provisions in the legislation of the other Australian jurisdictions are either not as comprehensive,⁶⁷ or are expressed in terms that are not as clear, as section 6 of the *Succession Act 1981* (Qld). For example, section 5 of the *Administration and Probate Act 1919* (SA) provides:

5 Probate jurisdiction of Supreme Court

- (1) The like voluntary and contentious jurisdiction and authority as immediately before the coming into operation of this Act belonged to or were vested in the Supreme Court, in relation to granting or revoking probate of wills and letters of administration of the effects of deceased persons, shall be vested in and exercised by the said Court in relation to granting or revoking probate of wills and letters of administration of the estate, as well real as personal, of deceased persons within the said State; and the Court shall have the same power of granting probate or administration, where the only estate within the State consists of realty, as if such estate comprised both realty and personalty.
- (2) The said Court shall also have and exercise the like powers, and its grants and orders shall have the like effect within the said State, in relation to the real and personal estate therein of deceased persons, as immediately before the coming into operation of this Act the said Court and its grants and orders respectively had within the said State, in relation to those matters and causes testamentary, and those effects of deceased persons, which were within the jurisdiction of the said Court.
- (3) All duties which by statute or otherwise were, immediately before the coming into operation of this Act, imposed on or to be performed by the said Supreme Court in respect to probates, or administrations, or matters or causes testamentary within its jurisdiction shall continue to be performed by such Court within the said State.

3.17 Similarly, section 6(5) of the *Supreme Court Civil Procedure Act 1932* (Tas) provides:

6 How jurisdiction to be exercised

...

- (5) The Court, and every judge thereof, shall, in relation to probate and letters of administration, have—
 - (a) all such voluntary and contentious jurisdiction and authority in relation to granting or revoking of probate and administration of the real and personal estates of deceased persons, as is vested in or exercisable by the Court at the commencement of this Act;

⁶⁷

See, for example, *Administration and Probate Act 1929* (ACT) s 9; *Probate and Administration Act 1898* (NSW) ss 33, 40; *Administration and Probate Act* (NT) s 14; *Administration Act 1903* (WA) ss 4, 6.

- (b) within and with respect to this State, the like voluntary and contentious jurisdiction and authority in relation to granting and revoking of probate and administration of the effects of deceased persons, as at the commencement of the Imperial statute intituled the *Court of Probate Act 1857*, was exercisable within and with respect to England, or any part thereof, by any court or person in England, together with full authority to hear and determine all questions relating to testamentary causes and matters;
- (c) like powers within and with respect to this State, in relation to the personal estate in this State of deceased persons, as the Prerogative Court of Canterbury had immediately before the commencement of the Imperial statute intituled the *Court of Probate Act 1857* in the Province of Canterbury, or in the parts thereof within its jurisdiction, in relation to those testamentary causes and matters, and those effects of deceased persons, which were at that date within the jurisdiction of that court;
- (d) such like jurisdiction and powers with respect to the real estate of deceased persons as are hereinbefore mentioned with respect to the personal estate of deceased persons—

and the Court shall, in the exercise of such jurisdiction and authorities, perform within this State all such like duties with respect to the estates of deceased persons as were immediately before the commencement of the Imperial statute intituled the *Court of Probate Act 1857* to be performed in England, or any part thereof, by ordinaries generally or by the Prerogative Court of Canterbury in respect of probates, administrations, and testamentary causes and matters which were at that date within their respective jurisdictions.

ISSUES FOR CONSIDERATION

3.18 An examination of the existing provisions gives rise to the following issues:

- whether the model legislation should include a provision to the general effect of section 6 of the *Succession Act 1981* (Qld) so that a broad jurisdiction is conferred on the court to make and revoke grants; and
- if so, whether the model provision should provide, like section 6 of the *Succession Act 1981* (Qld), that the court may make a grant even though the deceased person did not leave property within the jurisdiction.

Inclusion of a broad provision conferring jurisdiction

Discussion Paper

3.19 In the Discussion Paper, the National Committee expressed the view that a significant advantage of section 6 of the *Succession Act 1981* (Qld) is that it collects all the powers and jurisdiction of the court in relation to the

administration of estates and the making of grants into one section. In other jurisdictions (as in Queensland before the enactment of the *Succession Act 1981* (Qld)) the court has these powers, although they are not conveniently collected.⁶⁸

3.20 The National Committee considered that the powers given by the Queensland provision are wide enough to cover the powers given in other jurisdictions by a number of other provisions, and that the enactment of a provision to the effect of section 6 would mean that those other provisions would no longer be required.⁶⁹

3.21 The National Committee considered it an advantage that section 6 of the *Succession Act 1981* (Qld) deals with matters of substance, and omits reference to matters of practice, which are instead left to be regulated by the rules of court.⁷⁰

3.22 The National Committee therefore proposed that the model legislation should include a provision to the effect of section 6 of the *Succession Act 1981* (Qld). It suggested that, if any additional powers are to be conferred on the court, those powers should be expressed to be in addition to, and not in derogation from, the broad general provision.⁷¹

Submissions

3.23 The National Committee's proposal was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law and the New South Wales Law Society.⁷²

3.24 Trust Company of Australia Limited expressed a concern that 'the Queensland provision may vest wider powers in the Court than is currently provided for in the other States':⁷³

For example, in relation to the removal of executors and trustees. Section 34 of the Victorian *Administration and Probate Act* sets out circumstances where the Court may remove an executor and trustee.

The Victorian Act allows removal essentially where the executor and trustee wishes to be discharged, refuses to act or where the executor is unfit or incapable. To remove these requirements will increase the potential to initiate

68 *Administration of Estates Discussion Paper* (1999) QLRC 15; NSWLRC [3.6].

69 *Ibid*, QLRC 15–16; NSWLRC [3.7].

70 *Ibid*, QLRC 16; NSWLRC [3.9].

71 *Ibid*, QLRC 18; NSWLRC 28 (Proposal 4). In Chapter 4, the National Committee has considered whether additional provisions are required to deal with the making of specific types of limited grants.

72 Submissions 1, 3, 8, 11, 12, 15.

73 Submission 10.

litigation to remove trustees and executors, even though the Trustees are properly discharging their duties in accordance with the wishes of a testator.

3.25 Although the Queensland provision is expressed in broad terms, this concern would appear to be unfounded. As mentioned previously, the Supreme Court of Queensland has held that it will not lightly interfere with a testator's appointment of executors and trustees, and that the court's ultimate concern is the due administration of the estate.⁷⁴

The National Committee's view

3.26 The model legislation should include provisions to the general effect of section 6 of the *Succession Act 1981* (Qld). Section 6 confers a very broad jurisdiction, ensuring that the court can make and revoke grants, hear and determine all testamentary matters, and hear and determine all matters relating to the estate and the administration of the estate of any deceased person. Section 6 is also expressed in clear terms and avoids the archaic language found in some of the other Australian provisions dealing with the court's jurisdiction.

Absence of a property requirement

3.27 Within Australia, there is a divergence as to whether the court's jurisdiction to grant probate or letters of administration is founded on the presence of property within the particular State or Territory.

Jurisdictions requiring property

3.28 In New South Wales, South Australia, Tasmania, Victoria and Western Australia, the court does not have jurisdiction to make a grant unless the deceased left property, whether real or personal, within the particular State.⁷⁵ Any property, real or personal, is sufficient.⁷⁶ No other connection with the jurisdiction is required.⁷⁷

3.29 It has been held that this rule also applies where an application is made for a grant of letters of administration *ad litem* (a grant made for the purpose of appointing an administrator to represent the estate of a deceased person in proceedings brought or to be brought in that jurisdiction).⁷⁸ It appears,

⁷⁴ See [3.14] above.

⁷⁵ *Probate and Administration Act 1898* (NSW) s 40; *Administration and Probate Act 1919* (SA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 6(5); *Administration and Probate Act 1958* (Vic) s 6; *Administration Act 1903* (WA) s 6.

⁷⁶ See, for example, *In the Goods of Rowley* (1863) 2 W & W (IE & M) 115 where the only property of an intestate in Victoria was a sum of money deposited in a Melbourne bank.

⁷⁷ It does not matter that the deceased was domiciled in another jurisdiction: *Re Aldis* (1898) 16 NZLR 577; *Robinson v Palmer* [1901] 2 IR 489; *Re Falconer* [1958] QWN 42.

⁷⁸ *Re Aylmore* [1971] VR 375, where an application for the appointment of an administrator *ad litem* was refused because the Court was not satisfied that the deceased left property in Victoria. For a discussion of that decision see *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) note 735.

however, that the court may grant letters of administration *de bonis non administratis* (often referred to as a grant *de bonis non* or *dbn*)⁷⁹ despite the absence of property within the jurisdiction, provided there is property somewhere that remains to be administered.⁸⁰

Jurisdictions not requiring property

3.30 In the ACT, the Northern Territory and Queensland, the court's jurisdiction to make a grant is not founded on the presence of property within the particular Territory or State.

3.31 The provisions in the ACT and the Northern Territory are virtually identical. The court has jurisdiction to make a grant if the deceased person left property, whether real or personal, within the Territory.⁸¹ In addition, the court has jurisdiction to make a grant, even though the deceased did not leave property within the Territory, if the court is satisfied that the grant 'is necessary'.⁸²

3.32 The Queensland provision is expressed more generally and does not require the court to be satisfied that the grant is necessary. Section 6(2) of the *Succession Act 1981* (Qld) provides that the court may make a grant:⁸³

notwithstanding that the deceased person left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.

3.33 There are a number of good reasons for enabling a grant to be made even though the deceased did not leave property within the jurisdiction. In its 1978 Report, the Queensland Law Reform Commission referred to one of the main reasons for doing so:⁸⁴

Today there is an additional reason for stressing that the Court has jurisdiction even though there is no estate at all at the date of the death: this is where litigation is contemplated against an 'estate' where the 'estate' is merely a cover for litigation against the deceased's insurers ...

79 This means literally 'of the unadministered goods'. A grant of letters of administration *de bonis non* is made to enable the grantee to complete the administration of a partly unadministered estate: AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.230].

80 *Wimalaratna v Ellies* (Unreported, Full Court, Supreme Court of Western Australia, Burt CJ, Wallace and Brinsden JJ, 9 October 1984). For a detailed discussion of this decision, see *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 165–7.

81 *Administration and Probate Act 1929* (ACT) s 9(1); *Administration and Probate Act* (NT) s 14(1).

82 *Administration and Probate Act 1929* (ACT) s 9(2); *Administration and Probate Act* (NT) s 14(2).

83 *Succession Act 1981* (Qld) s 6(2). Note, however, that English authority suggests that, if the deceased left no property in England and was not domiciled there, the court will be very reluctant to exercise its discretion to make a grant: see *Aldrich v Attorney General* [1968] P 281, 295 (Ormrod J).

84 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 5.

3.34 Because section 6 of the *Succession Act 1981* (Qld) does not found the court's jurisdiction to make a grant on the presence of property within the jurisdiction, it has been possible for the Supreme Court of Queensland to make a grant for the purpose of empowering the personal representative so appointed 'to determine where the body of the deceased ought be buried', even though the deceased had not left any property within Queensland.⁸⁵

3.35 When the Law Reform Commission of Western Australia reviewed the jurisdictional requirements for original grants and for the resealing of grants in the 1980s, it identified the following reasons for enabling a grant to be made (or resealed)⁸⁶ even though the deceased did not leave property within the jurisdiction.⁸⁷

- (a) The making of a grant may have effects on foreign revenue laws beneficial to the estate.⁸⁸
- (b) If a testator died leaving property in one jurisdiction, but none in a second, and his executor obtained a grant only after a trespasser had removed the testator's movable property from the first to the second, probate could not be resealed in the second, if property there was required.⁸⁹
- (c) Certain foreign countries apparently require a grant by the country of nationality of the deceased before themselves making a grant.⁹⁰
- (d) Where a will only appoints a testamentary guardian, the will is not admissible to probate.⁹¹
- (e) There may be litigation to which the deceased estate may be a party but where in reality any judgment would be payable by the deceased's insurers.⁹² (some notes substituted)

3.36 The Western Australian Commission also referred to comments made by the then Victorian Registrar of Probates, who said that in Victoria the problem could be overcome by filing an affidavit to the effect that the deceased

⁸⁵ *Re Dempsey* (Unreported, Supreme Court of Queensland, Ambrose J, 7 August 1987).

⁸⁶ The property requirements for the resealing of a grant are specifically considered at [3.47]–[3.61] below.

⁸⁷ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [9.27].

⁸⁸ Citing *In the Estate of Wayland* [1951] 2 All ER 1041.

⁸⁹ Citing O Wood and NC Hutley, *Hutley, Woodman and Wood: Cases and Materials on Succession* (3rd ed, 1984) 414. However, see now *Wimalaratna v Ellies* (Unreported, Full Court, Supreme Court of Western Australia, Burt CJ, Wallace and Brinsden JJ, 9 October 1984), referred to at note 80 above.

⁹⁰ See, for example, *In the Goods of Tucker* (1864) 3 Sw & Tr 585; 164 ER 1402.

⁹¹ Citing *The Lady Chester's Case* (1673) 1 Ventris 207; 86 ER 140.

⁹² Citing as an example *Kerr v Palfrey* [1970] VR 825.

had left personal property within the jurisdiction to a value of say \$10.⁹³ The Commission considered that such artifices were undesirable and an indication of the need for reform.⁹⁴

3.37 Accordingly, the Law Reform Commission of Western Australia recommended that, in all Australian jurisdictions, the court should be able to make, or reseal, a grant even though the deceased left no property within the jurisdiction.⁹⁵ It suggested that provisions based on section 6 of the *Succession Act 1981* (Qld) would be desirable,⁹⁶ and subsequently confirmed this recommendation when it reviewed the *Administration Act 1903* (WA).⁹⁷

Discussion Paper

3.38 As noted above, the National Committee proposed in the Discussion Paper that the model legislation should include a provision to the effect of section 6 of the *Succession Act 1981* (Qld). Accordingly, that provision would provide that a grant may be made even though the deceased did not leave property within the jurisdiction or elsewhere. However, the National Committee sought submissions on whether the model provision should be 'restricted in its operation to matters involving a direct connection with the jurisdiction in which proceedings are brought'.⁹⁸

Submissions

3.39 The Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, and the ACT and New South Wales Law Societies were of the view that some restriction should be imposed.⁹⁹

3.40 The New South Wales Law Society argued that the primary reason for obtaining a grant was to administer assets within that jurisdiction. Accordingly, it was of the view that 'it is an exception to the general rule for legislation to provide that a grant can still be made even though the deceased did not leave any property within the jurisdiction'.¹⁰⁰ The Law Society commented that it had

⁹³ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [9.28] note 1. See, however, *In the Goods of Wilson* [1929] St R Qd 59 where the Court observed (at 64) that the property existing in Queensland was 'so small as to be practically negligible'. In view of that fact and the considerable delay in applying for letters of administration, the application was refused.

⁹⁴ Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [9.28] note 1.

⁹⁵ *Ibid* [11.5] Recommendation (33).

⁹⁶ *Ibid* [9.31].

⁹⁷ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.35].

⁹⁸ *Administration of Estates Discussion Paper* (1999) QLRC 18; NSWLRC 28.

⁹⁹ Submissions 6, 7, 14, 15.

¹⁰⁰ Submission 15.

no philosophical difficulty with a grant being made, notwithstanding the absence of property within a jurisdiction, provided there 'is good reason and some nexus'. It commented that the first limb of section 6(2) of the *Succession Act 1981* (Qld) 'gives the impression that the exception is the rule', and suggested that the model provision that is based on section 6(2) of the *Succession Act 1981* (Qld) should add that a grant may be made in those circumstances 'where there are good grounds to do so'.¹⁰¹

3.41 The Bar Association of Queensland, on the other hand, argued that the model provision that is based on section 6 of the *Succession Act 1981* (Qld) 'should not be restricted in its operation to matters involving a direct connection with the jurisdiction in which proceedings are brought'.¹⁰² In its view, the power given to the court is discretionary and there are good practical reasons for it.

3.42 An academic expert in succession law was also satisfied with the absence of a property requirement in section 6 of the Queensland legislation.¹⁰³

The National Committee's view

3.43 As explained above, there are a number of reasons why it may be desirable for the court to be able to make a grant even though the deceased did not leave any property within the jurisdiction or elsewhere.¹⁰⁴

3.44 There is a further important reason why the jurisdiction to make a grant should not be restricted to where the deceased has left property within the jurisdiction. In Chapter 38 of this Report, the National Committee has recommended a scheme under which certain grants made by the court of an Australian jurisdiction will be effective without the need to be resealed. The National Committee has recommended that that scheme be implemented in two stages. Under the first stage, a grant made in one Australian jurisdiction will be effective in all other Australian jurisdictions if the grant was made in the Australian jurisdiction in which the deceased was domiciled at the time of death.¹⁰⁵ It is essential for the effective operation of stage one of that scheme that the court of the jurisdiction in which a deceased person died domiciled is always able to make a grant with respect to the deceased's estate. Any restriction of jurisdiction by the need to establish that the deceased left property within the jurisdiction would make the first stage of that scheme unworkable.

3.45 For these reasons, the National Committee is of the view that the model legislation should include a provision to the effect of section 6(2) of the

101 Ibid.

102 Submission 1.

103 Submission 12.

104 See [3.33]–[3.35] above.

105 Under the second stage of the proposed scheme, all Australian grants will be recognised, regardless of the jurisdiction in which the deceased died domiciled.

Succession Act 1981 (Qld) and provide expressly that the court may make a grant of probate of the will or letters of administration of the estate of a deceased person even though the deceased did not leave any property within the jurisdiction or elsewhere. The model provision should provide that the court ‘may’ do so, rather than that it ‘may in its discretion’ do so, as section 6(2) of the *Succession Act 1981* (Qld) presently provides. The use of ‘may’ in itself confers a discretion on the court. The National Committee considers that the expression ‘may in its discretion’ has the potential to cause confusion about whether there is some additional matter of which the court must be satisfied before exercising its discretion to make a grant. It also has the potential to cause confusion where other powers are conferred on the court without express reference to the court’s discretion.

3.46 The National Committee notes that it received a number of submissions that queried the constitutional validity of section 6 of the *Succession Act 1981* (Qld), suggesting that the absence of a property requirement could be read as purporting to give extra-territorial effect to a grant.¹⁰⁶ However, section 6 does not operate extra-territorially. Although the section enables a grant to be made despite the absence of property within Queensland, a grant made under that section is effective only in Queensland and does not enable the personal representative appointed under it to administer the deceased’s property in any other Australian jurisdiction — hence the need for provisions dealing with the resealing of grants and the National Committee’s proposed scheme to enable certain Australian grants to be effective throughout Australia without being resealed.¹⁰⁷

THE RESEALING OF GRANTS: JURISDICTIONAL REQUIREMENTS

Introduction

3.47 Although the legislation in all Australian jurisdictions specifies whether or not property within the jurisdiction is required for the court to be able to make an original grant,¹⁰⁸ the legislation in most Australian jurisdictions is silent as to

¹⁰⁶ Submissions 6, 7, 15. The Bar Association of Queensland, however, commented that it has never been suggested or argued that s 6 of the *Succession Act 1981* (Qld) is unconstitutional: Submission 1.

¹⁰⁷ Moreover, the courts have taken a very broad view of the constitutional power to make laws for the ‘peace, welfare and good government’ or for the ‘peace, order and good government’ of a State. In *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10, the High Court (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ) held:

within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words ‘for the peace, order and good government’ are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of the court, the legislation does not promote or secure the peace, order and good government of the colony.

¹⁰⁸ See [3.27]–[3.37] above.

whether property within the jurisdiction is required for the court to be able to reseal a grant made in another jurisdiction.

3.48 For those jurisdictions where the legislation is silent, it is necessary to consider whether the jurisdictional requirements for the making of an original grant apply when an application is made for the resealing of a grant.

Jurisdictions where property is expressly required: Tasmania, Victoria

3.49 The legislation in Tasmania and Victoria provides expressly that the court may reseal a grant only if the deceased person left property, whether real or personal, within that State.¹⁰⁹

3.50 This is consistent with the jurisdictional requirement in these States for the making of an original grant.¹¹⁰

Jurisdictions where property is not expressly required

3.51 In the Australian jurisdictions other than Tasmania and Victoria, the legislation does not expressly impose a property requirement for the resealing of a grant. The issue therefore arises as to whether, in these other jurisdictions, the requirements for the resealing of a grant are the same as the jurisdictional requirements for the making of an original grant.

New South Wales, South Australia, Western Australia

3.52 As explained earlier, the legislation in New South Wales, South Australia and Western Australia provides that the court has jurisdiction to make an original grant only if the deceased left property within the particular State.¹¹¹

3.53 The extent to which the principles governing the making of an original grant should also apply to the resealing of a grant was considered in *Re Carlton*.¹¹² That case concerned an application made in Victoria for the resealing of an exemplification of a grant of probate made in New Zealand. Although the deceased had left property in Victoria, it was arguable that the will did not dispose of any of that property.¹¹³ The Registrar of the Supreme Court therefore referred the application to the Court.

109 *Administration and Probate Act 1935* (Tas) s 48(1); *Administration and Probate Act 1958* (Vic) s 81(1).

110 See [3.28] above.

111 *Ibid.*

112 [1924] VLR 237.

113 The will did, however, revoke all prior wills and appoint an executor: [1924] VLR 237, 242 (Cussen ACJ, Schutt J and Weigall AJ).

3.54 The Full Court of the Supreme Court of Victoria held in *Re Carlton*¹¹⁴ that the provision enabling a grant to be resealed, section 51 of the *Administration and Probate Act 1915* (Vic), had to be construed together with, and in the light of, the other provisions in the legislation that dealt with resealing.¹¹⁵ Those provisions had the effect that a resealed grant would operate in Victoria as an original grant. The Court therefore held that it would be justified in refusing to reseat a grant 'in a case where an original grant should, as a matter of law, be refused',¹¹⁶ but that it should reseat a grant where the application complied with section 51 and, in the circumstances of the case, 'the making ... of an original grant would not, as a matter of law, be improper'.¹¹⁷ The Court considered that the fact that a will did not purport to dispose of property in Victoria was not, of itself, a sufficient reason for refusing a grant of probate.¹¹⁸ It therefore directed that the exemplification be resealed.¹¹⁹

3.55 The issue in *Re Carlton*¹²⁰ was whether the Court should exercise its discretion to reseat the grant in question, not the threshold question of whether the Court had jurisdiction to reseat that grant.¹²¹ Nevertheless, it is arguable that, if a resealed grant is to have the same effect as an original grant, the principles governing the making of an original grant should apply not only to the exercise of the court's discretion to reseat a grant, but also to the issue of the court's jurisdiction to reseat a grant.

3.56 The legislation in New South Wales, South Australia and Western Australia provides that, on resealing, a grant has the same force, effect and operation as if it had been originally granted by the resealing court.¹²²

3.57 The Supreme Court of South Australia has recently held in *In the Estate of Rogowski*¹²³ that the Court has jurisdiction to reseat a grant only if the

114 [1924] VLR 237.

115 Ibid 242. In this respect, the Court referred to ss 52–55 of the *Administration and Probate Act 1915* (Vic). Those sections provided that a person could lodge a caveat against the resealing of a grant and such a caveat would have the same effect and be dealt with in the same way as a caveat against the making of an original grant (s 52); that a grant was not to be resealed until an affidavit had been filed stating that at least fourteen days had elapsed since notice of the application was published and no caveat had been lodged (s 52); that a grant was not to be resealed until such probate stamp and other duties and fees (if any) had been paid as would have been payable if the grant had been originally granted by the Supreme Court of Victoria (s 54); and that a resealed grant was to operate as an original grant (s 55).

116 [1924] VLR 237, 242 (Cussen ACJ, Schutt J and Weigall AJ).

117 Ibid 242–3.

118 Ibid 240. The Court commented that '[t]he mere appointment of an executor by a duly executed testamentary instrument not purporting to dispose of any property may suffice to entitle such executor to a grant of probate'.

119 [1924] VLR 237, 243 (Cussen ACJ, Schutt J and Weigall AJ).

120 [1924] VLR 237.

121 As noted at [3.53] above, the deceased had left property within Victoria.

122 *Probate and Administration Act 1898* (NSW) s 107(2); *Administration and Probate Act 1919* (SA) s 17; *Administration Act 1903* (WA) s 61(2). See the discussion of this issue in Chapter 34 of this Report.

123 *In the Estate of Rogowski* (2007) 248 LSJS 274.

deceased left property in South Australia.¹²⁴ In coming to this view, the Court observed that its jurisdiction to make an original grant is limited to cases where the deceased left property within South Australia, and that the effect of resealing is that the resealed grant has the same force, effect and operation as if it had been originally granted by the resealing court.

3.58 In view of the decisions in *In the Estate of Rogowski* and *Re Carlton*, it is suggested that, as the legislation in New South Wales and Western Australia requires the presence of property for the making of an original grant, the legislation should be construed to impose the same requirement in relation to the resealing of a grant, notwithstanding the absence of an express requirement to that effect.¹²⁵

3.59 A contrary view has been suggested by some commentators on the New South Wales legislation.¹²⁶ In their view, section 107 of the *Probate and Administration Act 1898* (NSW), under which the court is given the power to reseal a grant, should not be given a narrow interpretation by being read in conjunction with section 40 of that Act, which limits the court's jurisdiction to make a grant to estates where the deceased left property within New South Wales. However, these commentators do not appear to have considered the effect of *Re Carlton*¹²⁷ in this context.¹²⁸

Australian Capital Territory, Northern Territory, Queensland

3.60 In the ACT, the Northern Territory and Queensland, the legislation is also silent as to whether the presence of property within the relevant Territory or State is required in order for the court to have jurisdiction to reseal a grant.¹²⁹ However, in contrast with the position in New South Wales, South Australia and Western Australia, the legislation in the ACT, the Northern Territory and Queensland provides that the court may make an original grant whether or not the deceased person left property within the particular jurisdiction.¹³⁰

124 Ibid 275–6 (Gray J).

125 Indeed, it would be a curious result if, in a particular case, the court had jurisdiction to reseal a foreign grant, but did not have jurisdiction to make an original grant.

126 R Hastings and G Weir, *Probate Law and Practice* (2nd ed, 1948) 310; RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 625 (the latter text being expressed to be based on the former text).

127 [1924] VLR 237.

128 These commentators have suggested, however, that, in the absence of property within the jurisdiction, the court would be 'reluctant to reseal unless there were good grounds' for doing so: R Hastings and G Weir, *Probate Law and Practice* (2nd ed, 1948) 310; RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 625.

129 See *Administration and Probate Act 1929* (ACT); *Administration and Probate Act* (NT); *British Probates Act 1898* (Qld).

130 See [3.30]–[3.34] above.

3.61 Consequently, on either the approach adopted in *Re Carlton*¹³¹ or on the view preferred by the commentators on the New South Wales legislation,¹³² it can be assumed that a grant may be resealed in these jurisdictions even if the deceased person did not leave property within the particular jurisdiction.

Discussion Paper

3.62 In the Discussion Paper,¹³³ the National Committee noted that, when the Probate Registrars considered this issue at their 1990 conference, they agreed with the recommendation of the Law Reform Commission of Western Australia that the court should have jurisdiction to make or reseal a grant, despite the absence of property within the jurisdiction, provided it was made clear that the court would retain its discretion to refuse to make or reseal a grant for lack of good cause. In that respect, they suggested that, if there was no property within the jurisdiction, the affidavit in support of the application should include some statement of the purpose for which the grant was required.¹³⁴

3.63 The preliminary view expressed in the Discussion Paper was that the model legislation should give the court jurisdiction to reseal a grant despite the absence of property within the jurisdiction. It was further suggested that the relevant provision should be drafted in terms that are consistent with section 6 of the *Succession Act 1981* (Qld).¹³⁵

Submissions

3.64 The submissions received from the former Principal Registrar of the Supreme Court of Queensland, the Public Trustee of New South Wales, the Victorian Bar and the New South Wales Bar Association all agreed with the preliminary view expressed in the Discussion Paper.¹³⁶

3.65 The Trustee Corporations Association of Australia did not comment directly on this issue. It appeared, however, to support the view that the court's jurisdiction to make an original grant should not be founded on the presence of property within the jurisdiction. It suggested that, where a grant was sought in a jurisdiction in which the deceased had not left property, the application should be accompanied by a statement of the purpose for which the grant was sought, and the registrar should have the right to refuse a grant for lack of good

¹³¹ [1924] VLR 237. See [3.53]–[3.55] above.

¹³² See [3.59] above.

¹³³ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 174.

¹³⁴ *Recognition of Interstate and Foreign Grants of Probate and Administration: Report of the Conference of Probate Registrars* (Melbourne, 2–4 May 1990, unpublished) 19.

¹³⁵ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 174. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [7.9].

¹³⁶ Submissions R1, R2, R4, R5.

cause.¹³⁷ The Association suggested that this requirement should also apply in relation to the resealing of grants.¹³⁸

The National Committee's view

3.66 As explained earlier in this chapter, the making or resealing of a grant may be desirable in a number of situations, notwithstanding the absence of property within the jurisdiction.¹³⁹ For that reason, the National Committee has proposed earlier in this chapter, in relation to the making of an original grant, that the model legislation should include provisions to the effect of section 6 of the *Succession Act 1981* (Qld)¹⁴⁰ and, specifically, that the model legislation should provide that the court may make a grant even though the deceased did not leave any property within the jurisdiction or elsewhere.¹⁴¹

3.67 When a grant is resealed, it operates as if it were an original grant made in the resealing jurisdiction. The National Committee is therefore of the view that the jurisdictional requirements for the making of an original grant and for the resealing of a grant should be the same. Accordingly, the model legislation should provide that the court may reseal a grant even though the deceased did not leave any property within the jurisdiction or elsewhere.

3.68 The National Committee does not favour the approach adopted in the ACT and the Northern Territory, where the court has jurisdiction to make a grant notwithstanding that the deceased did not leave property within the jurisdiction, but only if it is satisfied that the grant 'is necessary'.¹⁴² The National Committee is concerned that the adoption of a provision incorporating that requirement may be too restrictive. In any event, the National Committee considers that such a restriction is not required. Although the jurisdiction to reseal a grant may be conferred on the court in general terms, the court nevertheless has a discretion whether or not to reseal a grant in a particular case.¹⁴³

3.69 As the National Committee does not propose, in circumstances where a person dies without leaving property within the jurisdiction, to restrict the court's jurisdiction to reseal a grant to those cases where the court considers the resealing of the grant to be 'necessary', the National Committee is of the view that an applicant for the resealing of a grant should not be required, in these circumstances, to state the purpose for which the resealing of the grant is sought.

137 Submission R6.

138 Ibid.

139 See [3.33]–[3.36] above.

140 See [3.26] above.

141 See [3.43]–[3.46] above.

142 See [3.31] above.

143 See the discussion of the court's discretion at [35.94]–[35.101] in vol 3 of this Report.

RECOMMENDATIONS

3-1 The model legislation should include provisions to the effect of section 6 of the *Succession Act 1981* (Qld):

- (a) including, in particular, a provision to the effect of section 6(2) of the *Succession Act 1981* (Qld), so that the court may grant probate of the will or letters of administration of the estate of a deceased person even though the deceased person did not leave property within the jurisdiction or elsewhere; but
- (b) omitting the unnecessary words 'in its discretion', which appear in section 6(2) of the *Succession Act 1981* (Qld).¹⁴⁴

See Administration of Estates Bill 2009 cll 300, 301, 302(1), 303, 307.

3-2 The model legislation should provide that the court may reseal a grant even though the deceased person did not leave property within the jurisdiction or elsewhere.¹⁴⁵

See Administration of Estates Bill 2009 cl 353(3)(a).

144 See [3.26], [3.43]–[3.46] above.

145 See [3.66]–[3.69] above.

Chapter 4

Appointment of personal representatives

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INTRODUCTION

4.1 The appointment of personal representatives covers the granting of probate of a will to an executor, as well as the granting of letters of administration of the estate of a deceased person to an administrator. This chapter examines a number of issues that arise in relation to the appointment of executors and administrators, including:

- the granting of probate to one or more of the executors named in a deceased person's will, reserving leave to the other executor or executors to apply at a future time;
- the granting of probate, following the death of the last surviving, or sole, executor, to an executor to whom leave to apply for probate was reserved;
- the cessation of an executor's right to prove a will (that is, to obtain a grant of probate);
- the effect of intermeddling on an executor's right to renounce;
- the effect of renunciation on any right to apply for a grant in another capacity;
- the retraction of a renunciation of probate or administration;
- the appointment of administrators;
- particular circumstances in which the court may pass over a named executor or a person who would otherwise be entitled to a grant;
- specific types of limited and special grants;
- the age at which an individual may be appointed as an executor or administrator;
- whether there should be a limit on the number of personal representatives who may be appointed at any given time; and
- whether there are particular circumstances in which the court should make a grant to at least two or more personal representatives.

ENTITLEMENT TO A GRANT OF PROBATE

4.2 Probate of a will may normally be granted only to a person who is appointed by the will as an executor.¹⁴⁶ If, for some reason, a person who is named in a will as the sole executor does not apply for a grant of probate or the court declines to grant probate to the executor, it is not the practice for a grant of probate to be made to another person. Instead, the court will usually grant letters of administration with the will annexed to another person.¹⁴⁷

GRANT TO ONE EXECUTOR RESERVING LEAVE TO OTHERS TO APPLY

Background

4.3 Although a will might appoint several persons as executors, all the named executors might not necessarily want to apply for probate. For example, if one of the executors resides out of the jurisdiction, it may not be convenient for that person to act, although he or she may not want to renounce probate. Alternatively, it might be that a will names more than four persons as executors and the relevant legislation provides for a maximum of four persons to be appointed at any one time under a grant.¹⁴⁸ In these circumstances, the court may grant probate on the application of one or some of the named executors (up to a maximum of four), and 'reserve leave' to the other executor or executors to apply at a future time:¹⁴⁹

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See, however, *Re Wild* [2003] 1 Qd R 459, where the executor named in the will suffered from dementia and was incapable of taking out probate of her husband's estate. White J observed that s 32(1) of the *Powers of Attorney Act 1998* (Qld) enables an attorney under an enduring power of attorney to do anything in relation to a financial matter (which includes a legal matter) for the principal that the principal could lawfully do by an attorney if he or she had capacity for the matter when the power is exercised. Her Honour held (at 463) that 'an application for a grant of probate is a legal matter which the holder of an enduring power of attorney has power to bring', noting (at 464):

The rejection of this approach would require letters of administration to be taken out either by the holder of the power of attorney or some other qualified person with the extra expense which that would entail and which the legislature, in recent years, has been at pains to avoid.

Probate was granted subject to the limitation that, should the executor become capable, the grant of probate to the attorney was to be surrendered.

Further, s 5(1)(a) of the *Trustee Companies Act 1947* (ACT) provides that, if a person is entitled to apply for and obtain a grant of probate without reserving leave to any other person to apply for probate, that person may join with a trustee company in an application for a grant of probate of the will to that person and the trustee company jointly. It therefore enables a trustee company to be appointed as an executor under a grant of probate, notwithstanding that it is not named as executor in the will. *Trustee Companies Act 1984* (Vic) s 10(1) has a similar effect. These provisions and the similar provisions in other Australian jurisdictions are considered at [6.4]–[6.10] below.

147

Of course, if the person is appointed by the will as one of several executors, it may still be possible for the court to grant probate of the will to the other executors.

148

In this Report, the National Committee has recommended that a maximum of four personal representatives may be appointed at any given time: See [4.276]–[4.285] below.

149

Re Mathew [1984] 1 WLR 1011, 1014 (Anthony Lincoln J).

Thus where a grant of probate is made to one of several executors and at that time the remaining executors have not as yet made an application for a grant, the latter are not shut out from seeking entry into the administration of the estate. These words are used to preserve the right of the remaining executors to make application subsequently.

4.4 Where an executor to whom leave was reserved subsequently applies for a grant of probate, the grant obtained is called a grant of 'double probate'.¹⁵⁰ A grant of double probate 'runs concurrently with the first grant if any of the first grantees are still living'.¹⁵¹

Existing legislative provisions

4.5 The legislation in the ACT, New South Wales, the Northern Territory and Western Australia provides expressly that the court may, on granting probate, reserve leave to one or more of the executors named in the will to apply at a future time.¹⁵²

4.6 Section 41 of the *Probate and Administration Act 1898* (NSW), which is typical of the various provisions, is in the following terms:

41 Probate to one or more executors, reserving leave to others to prove subsequently

The Court may, if it thinks fit, grant probate to one or more of the executors named in any will, reserving leave to the other or others who have not renounced to come in and apply for probate at some future date.

4.7 It has been observed that the purpose of section 41 is:¹⁵³

to make it clear that, where leave is reserved to another person to come in and prove later, it is within the competence of the Court to act accordingly. The section does not alter the ordinary rule that prima facie all persons entitled to a grant, if they wish to take the grant, should have their request granted.

¹⁵⁰ Ibid. See also JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [13.122].

¹⁵¹ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [13.122].

¹⁵² *Administration and Probate Act 1929* (ACT) s 10B; *Probate and Administration Act 1898* (NSW) s 41; *Administration and Probate Act* (NT) s 19; *Administration Act 1903* (WA) s 7.

Although the *Administration and Probate Act 1919* (SA) does not include a provision about reserving leave to an executor to apply for probate at a future time, the forms made under *The Probate Rules 2004* (SA) include a form for a grant of double probate: see Form 41. In Tasmania, the rules provide that, '[w]here there are more than 4 executors who have not renounced and are competent to take probate, the grant shall bear a notation that power is reserved to the other executors to apply on vacancies occurring': *Probate Rules 1936* (Tas) r 60.

¹⁵³ *Bowler v Bowler* (Unreported, Supreme Court of New South Wales, Young J, 7 June 1990) 4. The court's power to pass over a named executor is considered at [4.117]–[4.208] below.

The National Committee's view

4.8 Although there is no doubt that it is within the court's inherent jurisdiction to make a grant to one or more of the executors named in a will, reserving leave to those who have not renounced to apply at a future time, the National Committee considers that the inclusion of such a provision may be of assistance to lay executors. Further, in Chapter 35 of this Report the National Committee has made recommendations about the resealing of interstate and overseas grants of double probate. A provision conferring the express power to reserve leave to an executor to apply for probate at a future time, which may ultimately lead to an application being made for a grant of double probate, is consistent with the recommendation made in relation to resealing.

4.9 Accordingly, the model legislation should include a provision to the effect of section 41 of the *Probate and Administration Act 1898* (NSW), and provide that the court may make a grant of probate to one or more of the executors named in a will, reserving leave to the executor or executors who have not applied for probate and have not renounced their executorship to apply for probate at a later time.

THE GRANTING OF PROBATE, FOLLOWING THE DEATH OF THE LAST SURVIVING, OR SOLE, EXECUTOR, TO AN EXECUTOR TO WHOM LEAVE TO APPLY FOR PROBATE WAS RESERVED

Background

4.10 There are a number of situations in which a person to whom leave to apply for probate at a later time was reserved (a 'non-proving executor') may wish to apply for a grant of probate.¹⁵⁴ One situation in which a non-proving executor may wish to do so is where the last surviving, or sole, executor appointed under the grant of probate has died.

4.11 In Chapter 7 of this Report, the National Committee has recommended that, on the granting of probate in these circumstances to a previously non-proving executor, a person who in the meantime had become an executor by representation of the deceased person's will should cease to be the executor by representation.¹⁵⁵ That recommendation recognises the higher right to a grant of a person who has been named as executor in the deceased's will.

The National Committee's view

4.12 The court has an inherent power, on the death of a last surviving, or sole, proving executor to grant probate to a non-proving executor to whom

¹⁵⁴ The further grant of probate is known as a grant of double probate: see [4.4] above.

¹⁵⁵ See Recommendations 7-10 and 7-11 below.

leave to apply for probate at a later time was reserved. Further, the court will have jurisdiction, under the model provision that is based on section 6(1) of the *Succession Act 1981* (Qld), to make a further grant in this situation.¹⁵⁶

4.13 Accordingly, it is not necessary for the model legislation to include a specific provision dealing with the court's power to make a further grant of probate to a non-proving executor to whom leave to apply for a grant of probate was reserved.

4.14 However, the model provision that gives effect to the recommendation in Chapter 7 about the ending of the executorship by representation will need to describe the circumstances in which the further grant is made, namely:

- a grant of probate is made to only one or some of the executors (the 'proving executors') named in a deceased person's will;
- leave to apply for a grant of probate at a later time was reserved to other executors who have not renounced their executorship (the 'non-proving executors');
- the last surviving, or sole, proving executor dies; and
- the court makes a grant of probate to one or more of the non-proving executors.

CESSATION OF RIGHT OF EXECUTOR TO PROVE WILL

Existing legislative provisions

4.15 All Australian jurisdictions have provisions setting out the circumstances in which a person's right to the executorship of a will ceases.¹⁵⁷

4.16 Section 46 of the *Succession Act 1981* (Qld), which is typical of these provisions, provides:

46 Cesser of right of executor to prove

Where a person appointed executor by a will—

- (a) survives the testator but dies without having taken out probate of the will; or

¹⁵⁶

See Recommendation 3-1 above and Administration of Estates Bill 2009 cl 301(1)(a).

¹⁵⁷

Administration and Probate Act 1929 (ACT) s 20; *Probate and Administration Act 1898* (NSW) s 69; *Administration and Probate Act* (NT) s 28; *Succession Act 1981* (Qld) s 46; *Administration and Probate Act 1919* (SA) s 36; *Administration and Probate Act 1935* (Tas) s 8; *Administration and Probate Act 1958* (Vic) s 16; *Administration Act 1903* (WA) s 32. These provisions are in similar terms to s 5 of the *Administration of Estates Act 1925* (UK).

- (b) renounces probate;¹⁵⁸ or
- (c) after being duly cited¹⁵⁹ or summoned¹⁶⁰ fails to apply for probate;

the person's rights in respect of the executorship shall wholly cease, and the representation of the testator and the administration of the testator's estate shall devolve and be committed in like manner as if that person had not been appointed executor. (notes added)

4.17 Commentators on the equivalent New South Wales provision explain how this provision affects the future representation of the testator's estate:¹⁶¹

the ordinary principles apply: if another executor or a substitute executor is appointed by the will, that executor or substitute executor is, subject to the terms of the will, entitled to the administration; if not, a general grant of administration of the estate will be made ... or, if appropriate, some special or limited grant will be made.

Discussion Paper

4.18 In the Discussion Paper, the National Committee proposed that a provision to the effect of section 46 of the *Succession Act 1981* (Qld) be included in the model legislation.¹⁶²

Submissions

4.19 The National Committee's preliminary proposal was supported by all the respondents who addressed the issue of the cessation of an executor's right to prove a will — namely, by the Bar Association of Queensland, the National Council of Women of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁶³

¹⁵⁸ See [4.23] below.

¹⁵⁹ A citation is an instrument issued by the court calling on the party cited (the 'citee') 'to take or renounce a grant, to propound testamentary papers, or to bring in a grant for the purpose of having it revoked': AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.510].

¹⁶⁰ The corresponding Victorian provision, s 16 of the *Administration and Probate Act 1958* (Vic), refers to a person who is cited to take out probate, but who does not appear to the citation. In *Re Giggins* [1969] VR 208, Gowans J noted (at 212) that the practice of issuing citations had fallen into disuse in Victoria, and held that the procedure of issuing a summons under s 15 of the Act calling on an executor appointed by will to show cause why he should not prove or renounce is not the same thing as citing the person to take out probate. The Queensland provision, in referring to an executor who is 'cited or summoned' would appear to be sufficiently broad to apply in jurisdictions where the citation procedure still applies, as well as in those jurisdictions where a summons is now used to call on an executor to renounce or prove a will.

¹⁶¹ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [69.10]. JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [15.60].

¹⁶² *Administration of Estates Discussion Paper* (1999) QLRC 49; NSWLRC 73 (Proposal 20).

¹⁶³ Submissions 1, 3, 8, 11, 12, 14, 15.

The National Committee's view

4.20 The National Committee is of the view that the model legislation should include a provision to the general effect of section 46 of the *Succession Act 1981* (Qld). Although there are circumstances in which the court may, in the exercise of its discretion, decline to make a grant of probate to a person who is named as an executor in a will,¹⁶⁴ the model provision provides certainty as to those circumstances that, of themselves, bring to an end an executor's entitlement to a grant of probate.

4.21 However, the model provision should be framed in more modern language. Instead of providing that 'the representation of the testator and the administration of the testator's estate shall devolve and be committed in like manner' as if the person had not been appointed executor, it should instead provide that:

The testator's personal representative is to be determined, and the administration of the testator's estate is to be dealt with, as if the person had never been appointed executor.

4.22 Further, the model legislation should include an additional provision, not found in section 46 of the *Succession Act 1981* (Qld) or its counterparts in the other Australian jurisdictions, to confirm that nothing in the section affects the person's liability for an act or omission happening before the person's rights in relation to the executorship end.

RENUNCIATION AND THE EFFECT OF INTERMEDDLING ON AN EXECUTOR'S RIGHT TO RENOUNCE THE EXECUTORSHIP OF A WILL

Introduction

4.23 A person who is named as the executor of a will may choose whether or not to accept the nomination and act as executor.¹⁶⁵ If the person does not wish to act as executor, the person may 'renounce' the executorship of the will. Renunciation is 'a formal act in writing by which a person having a right to probate or administration waives and abandons that right'.¹⁶⁶

4.24 In all Australian jurisdictions except Queensland, a person nominated as executor may lose the right to renounce by intermeddling in the estate — that is, by taking steps to administer the estate. The effect of intermeddling on an executor's right to renounce and the acts that may be held to be sufficient to preclude renunciation are considered below.

¹⁶⁴ See [4.117]–[4.120] below.

¹⁶⁵ See AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.170].

¹⁶⁶ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [30–01].

The existing law

Jurisdictions other than Queensland

4.25 Under the general law, an executor who has intermeddled in an estate may not ordinarily renounce the executorship of the will.¹⁶⁷ This is because '[t]he act of intermeddling is taken to be an indication of an intention to accept the executorship and will constitute an acceptance of that office by the person named as executor in the will'.¹⁶⁸

4.26 An executor who has intermeddled may be compelled to accept the executorship and prove the will.¹⁶⁹ If the executor refuses to do so, the court 'can, by a harsh process of attachment or committal to prison, seek to compel the citee to take out a grant of probate of the will'.¹⁷⁰

4.27 Given the effect of intermeddling on an executor's right to renounce, the practice of the courts is 'to require the executor as part of the formal act of renunciation, to declare that he has not intermeddled in the estate of the deceased and that he will not thereafter intermeddle therein with intent to defraud creditors'.¹⁷¹

4.28 The purpose of the rule is to protect the interests of the beneficiaries and creditors of the estate.¹⁷² It has been observed that:¹⁷³

an executor who has administered the estate without taking probate is liable only for what he has actually received, and is not liable to account on the basis of wilful default ... On the other hand, an executor who has proved the will is accountable on the basis of wilful default.¹⁷⁴ This being so, to allow an executor who had intermeddled in the estate to renounce might well seriously affect the rights of infant beneficiaries ... (note added)

4.29 However, in a proper case, the court may accept the renunciation of an executor who has intermeddled — for example, where all the beneficiaries have legal capacity, have had their legal rights fully explained to them, and desire that the grant be made to another person.¹⁷⁵ Further, the court may in special

¹⁶⁷ *Re Badenach* (1864) 3 SW & Tr 465; 164 ER 1355.

¹⁶⁸ *Howling v Kristofferson* (Unreported, Supreme Court of New South Wales, Cohen J, 14 October 1992) 11.

¹⁶⁹ *Mordaunt v Clarke* (1868) LR 1 P & D 592; *In the Will of Lyndon* [1960] VR 112, 113 (Pape J).

¹⁷⁰ *Re Biggs* [1966] P 118, 123 (Rees J).

¹⁷¹ *In the Will of Lyndon* [1960] VR 112, 113 (Pape J). See, for example, Form 59 (Renunciation of Probate) under *The Probate Rules 2004* (SA), which uses this form of words.

¹⁷² RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [69.03].

¹⁷³ *In the Will of Lyndon* [1960] VR 112, 115 (Pape J)

¹⁷⁴ A trustee who is required to account on the basis of wilful default 'is accountable not only for money which he has in fact received but also for money he could with reasonable diligence have received': *Armitage v Nurse* [1998] Ch 241, 252 (Millet LJ).

¹⁷⁵ *In the Will of Lyndon* [1960] VR 112, 115 (Pape J).

circumstances exercise its discretion to pass over an intermeddling executor and to make a grant to another person.¹⁷⁶

4.30 There is a considerable degree of inconsistency in terms of the acts that have been held to amount to intermeddling and, therefore, to prevent an executor from renouncing:¹⁷⁷

Some of the older authorities have held very slight acts of intermeddling to be sufficient to make a person executor *de son tort*; whilst other cases have decided that acts which, at first glance, appear to be a considerable interference, are not an intermeddling. Taking a bedstead, or a dog, or a Bible belonging to deceased were held to be sufficient intermeddling. One old authority held that milking the cows of the deceased was sufficient, but the same authority considered that directing the funeral and defraying the expenses thereof even out of the deceased's effects was an act of charity and not sufficient to make the person doing so an executor *de son tort*. Many of these older authorities appear to be somewhat conflicting, and it is difficult to find a coherent principle running through them.

4.31 In quite old cases, decided in the 1820s and 1830s, executors who had taken the oath of office (which is a prerequisite of obtaining probate), but who renounced their executorship before probate was granted, were permitted to renounce.¹⁷⁸

4.32 In *Long and Feaver v Symes and Hannam*,¹⁷⁹ however, which was decided at about the same time as those earlier cases, the executors named in the will published an advertisement requesting persons having any claim against the deceased's estate to send their accounts to them as executors. The Prerogative Court observed that there 'are certain acts of necessity, such as feeding the deceased's cattle and the like, which do not bind a party ... but otherwise slight circumstances are obligatory and sufficient to compel a person to take probate if really executor, or to render him executor *de son tort* if not really executor'.¹⁸⁰ The Court held that, by placing the advertisement, the executors had intermeddled to an extent that they could be compelled to take out probate:¹⁸¹

nothing can be a more strong intermeddling than the insertion of such an advertisement, and expressly in the character of executors. It does not merely 'shew an intention to take upon them the executorship,' but it is an absolute acceptance of the executorship.

176 *Re Biggs* [1966] P 118.

177 G Weir, 'Intermeddling by an Executor and Renunciation' (1935) 9 *Australian Law Journal* 187, 188.

178 *Jackson and Wallington v Whitehead* (1821) 3 Phill Ecc 577; 161 ER 1420; *M'Donnell v Prendergast* (1830) 3 Hagg Ecc 212; 162 ER 1134.

179 (1832) 3 Hagg Ecc 771; 162 ER 1339.

180 *Ibid* 1340–1 (Sir John Nicholl).

181 *Ibid* 1341.

4.33 That decision has been distinguished by the Supreme Court of New South Wales in *In the Will of Colless*.¹⁸² In that case, the executors published an advertisement advising of their intention to apply for probate and requiring all creditors of the estate to send particulars of their claims to the executors' solicitor. The Court considered that, in *Long and Feaver v Symes and Hannam*, the executors impliedly promised to pay the debts and described themselves as executors, whereas in this case the executors had not described themselves as executors and had not impliedly undertaken to pay the debts, but had only asked for particulars of claims to be sent to their solicitor so that they could be properly assessed.¹⁸³ The Court therefore held that:¹⁸⁴

If an executor may renounce after taking the oath he may, I hold, renounce after inserting an advertisement that he is about to apply for probate.

4.34 More recently, the English Court of Appeal considered that the acts of opening an executors' bank account, endorsing insurance policies in the names of the persons named as executors and instructing solicitors to act for the executors in the administration of the estate were 'so technical and trivial' that they should not have had the effect of preventing a renunciation of probate by one of the executors.¹⁸⁵

4.35 This view was followed in *Mulray v Ogilvie*,¹⁸⁶ where Needham J suggested that 'the trend of the more modern cases is to take a more lenient view of acts of nominated executors'.¹⁸⁷ In that case, on the day after the deceased's death, a person named as executor in the deceased's will signed a document giving permission for the deceased to be cremated, describing himself as executor. He also signed a document prepared by the funeral director, again as executor, accepting responsibility for the funeral charges. Needham J held that those acts did not deprive the executor of his right to renounce.¹⁸⁸ It has also been held that acts taken to protect or preserve property, for example, by installing a caretaker in premises, will not amount to intermeddling.¹⁸⁹

4.36 A commentator on succession law and practice has suggested that '[a]cts of active intermeddling may be equivocal, according to the intention governing them and may be divided into two classes', with each having a

182 (1941) 41 SR (NSW) 133.

183 Ibid 134 (Nicholas CJ in Eq).

184 Ibid.

185 *Holder v Holder* [1968] 1 Ch 353, 397 (Danckwerts LJ). However, as it had been conceded on behalf of the particular executor that he had intermeddled and could not therefore renounce, the Court was required to act on that admission.

186 (1987) 9 NSWLR 1.

187 Ibid 6. See also *In the Will of Colless* (1941) 41 SR (NSW) 133, 134 (Nicholas CJ in Eq) for a similar view.

188 (1987) 9 NSWLR 1, 6 (Needham J).

189 *Howling v Kristofferson* (Unreported, Supreme Court of New South Wales, Cohen J, 14 October 1992) 14–15.

different result in terms of the effect of the intermeddling on the right to renounce.¹⁹⁰

- (a) Acts showing an intention to assert dominion (eg taking possession with a view to managing, paying debts, realising assets), which preclude renunciation,
- (b) acts performed as an act of necessity or an office of kindness without any such intention (eg, caring for animals, preserving goods, arranging funeral as a friend), which do not preclude renunciation.

4.37 In his view, some acts may 'show an intention to administer (eg, advertising for claims to be sent to the person advertising and describing himself as executor) and ... therefore fall within class (a) above, [but] may not be followed by any more active steps to administer'.¹⁹¹ In those cases, it has been suggested that:¹⁹²

the Court may on consideration of all the circumstances and particularly the benefit of the estate decide to accept the renunciation notwithstanding the technical act of intermeddling.

4.38 The rules discussed above apply only to a person named as executor in a will. A person who is merely entitled to letters of administration may renounce the administration of the estate even though he or she has intermeddled in the estate.¹⁹³ Such a person is not required to declare that he or she has not intermeddled in the estate,¹⁹⁴ and cannot be compelled to take out a grant.¹⁹⁵

Queensland

4.39 In Queensland, intermeddling does not prevent an executor from renouncing. Section 54(2) of the *Succession Act 1981* (Qld) provides:

54 Protection of persons acting informally

- (1) ...
- (2) An executor who has intermeddled in the administration of the estate before applying for a grant of probate may renounce his or her executorship notwithstanding his or her intermeddling.

190 G Weir, 'Intermeddling by an Executor and Renunciation' (1935) 9 *Australian Law Journal* 187, 189.

191 *Ibid.*

192 *Ibid.*

193 *Re the Goods of Fell* (1861) 2 Sw & Tr 126; 164 ER 941.

194 *Ibid.*

195 *Re the Goods of Davis* (1860) 4 Sw & Tr 213 (Supp); 164 ER 1498.

4.40 This provision was recommended by the Queensland Law Reform Commission in its 1978 Report to overcome what was perceived to be the harshness of the then existing law:¹⁹⁶

At present if an executor intermeddles he will normally not thereafter be allowed to renounce probate. This may, in some cases, be rather harsh, particularly where a person who happens to be nominated executor performs acts of administration in the emergency following a death without any intention of taking up his executorship. We recommend that it should be made clear that an executor may renounce despite his intermeddling.

4.41 On a practical level, if intermeddling does not constitute a bar to renunciation, it avoids the need to determine whether particular acts amount to intermeddling and therefore preclude an executor from renouncing the executorship of a will.

Proposals in other jurisdictions

4.42 In its 1990 Report on its administration legislation, the Law Reform Commission of Western Australia considered the effect of intermeddling on an executor's right to renounce. The Commission recommended that an executor who had acted informally in administering an estate should be able to renounce the office of executor at any time before obtaining probate. The Commission noted that section 54(2) of the *Succession Act 1981* (Qld) had this effect.¹⁹⁷

Discussion Paper

4.43 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the general effect of section 54(2) of the *Succession Act 1981* (Qld), but that the leave of the court should be required before an executor who has acted in the administration of the estate without a grant may renounce his or her executorship.¹⁹⁸

Submissions

4.44 The National Committee's proposal was supported by the ACT and New South Wales Law Societies.¹⁹⁹

4.45 However, the Public Trustee of Queensland and the Queensland Law Society disagreed with the National Committee's proposal that the provision to be based on section 54(2) of the *Succession Act 1981* (Qld) should add a

¹⁹⁶ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37.

¹⁹⁷ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.9].

¹⁹⁸ *Administration of Estates Discussion Paper* (1999) QLRC 155; NSWLRC 221 (Proposal 65).

¹⁹⁹ Submissions 14, 15.

requirement of court approval for effective renunciation.²⁰⁰ The Public Trustee of Queensland commented:²⁰¹

Without evidence of some abuse which requires rectification, the necessity of involving the court is not demonstrated and merely adds to cost and effort.

4.46 An academic expert in succession law also appeared to disagree with the addition of this requirement:²⁰²

The trouble with the proposal is that it leaves us with the problem of whether a personal representative has intermeddled or not. Quite small acts can amount to intermeddling, such as paying a bill or receiving moneys due to the deceased. By enabling a personal representative to renounce despite intermeddling those questions are by-passed. We are already agreeing that such a person must account for what he or she has done. That should be a sufficient protection.

4.47 The Public Trustee of New South Wales merely observed that the National Committee's proposal 'seems to condone informal administration'.²⁰³

Issues for consideration

4.48 The following issues arise for consideration:

- whether the model legislation should provide generally that a person named as executor in the will of a deceased person may renounce his or her executorship of the will;
- whether an executor should be able to renounce the executorship of the will if he or she has intermeddled in the estate; and
- whether renunciation in those circumstances should be subject to court approval.

4.49 The Ontario Law Reform Commission considered these issues in its review of the administration of estates of deceased persons. It noted that the existing law 'reflects the historical dichotomy between executors and administrators that we have sought to erase'.²⁰⁴ It considered that these differences should not be continued, and that the correct approach is that which applies in respect of administrators.²⁰⁵ It therefore recommended that an executor or a person otherwise entitled to a grant should be entitled to renounce

200 Submissions 5, 8.

201 Submission 5.

202 Submission 12.

203 Submission 11.

204 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 29.

205 Ibid 30.

that right, subject to remaining liable for any loss caused by the intermeddling:²⁰⁶

In principle we see no reason why intermeddling in the estate should be of any consequence in determining whether an uninterested person should be required to serve as estate trustee over an extended period of time. If the intermeddling has benefited the estate, the person should not be punished for such acts by being denied the normal right of refusing the office of [personal representative]. If the intermeddling has been detrimental to the estate, such person should be liable to the estate on the normal principles of liability governing interference with the property of others. Indeed, to preclude renunciation in such circumstances would require an estate to have [a personal representative] who not only is unwilling, but has demonstrated his lack of ability or dedication to the proper administration of the estate. Such a result, to say the least, would be curious.

The National Committee's view

General right to renounce

4.50 Although there is no doubt that a person who is named as executor of a will may renounce his or her executorship, the National Committee is of the view that it may assist lay executors for the model legislation to include a provision to this effect.

Renunciation despite intermeddling

4.51 If a person who is named as executor in a will does not wish to take out a grant, it must, as a matter of principle, be undesirable to compel the person to do so for the sole reason that he or she has intermeddled in the estate. In this respect, the National Committee agrees with the observations of the Ontario Law Reform Commission. The only real issue can be whether the difference between the liability of an executor appointed under a grant of probate and a person named as executor who has not taken out probate (that is — that the latter cannot be required to account on the basis of wilful default) should be a reason for not adopting section 54(2) of the *Succession Act 1981* (Qld) in its current form, and for requiring court approval where a person who has intermeddled wishes to renounce the executorship.

4.52 In Chapter 29 of this Report, the National Committee has recommended that the model legislation should include a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld).²⁰⁷ That section provides:

54 Protection of persons acting informally

- (1) Where any person, not being a person to whom a grant is made, obtains, receives or holds the estate or any part of the estate of a deceased person otherwise than for full and valuable consideration, or

²⁰⁶ Ibid.

²⁰⁷ See [29.274]–[29.282] and Recommendation 29-7 in vol 3 of this Report.

effects the release of any debt or liability due to the estate of the deceased, the person shall be charged as executor in the person's own wrong to the extent of the estate received or coming into the person's hands, or the debt or liability released, after deducting any payment made by the person which might properly be made by a personal representative to whom a grant is made. (emphasis added)

4.53 It would be inconsistent with the adoption of that provision, under which a person who administers an estate without a grant is liable only to the extent of the assets that come into the person's hands and not on the basis of wilful default, not to allow an executor who has intermeddled to renounce for the sole reason that he or she cannot later be required to account on the basis of wilful default.

4.54 Further, the National Committee has sought in this Report to remove any remaining distinctions between the rights and powers of executors and those of administrators.²⁰⁸ In that respect, it notes that a person entitled to letters of administration may renounce that entitlement even if he or she has intermeddled.²⁰⁹ The assimilation of the position of executors and administrators is a further reason for allowing a person named as executor in a will to renounce the executorship even though he or she has intermeddled in the estate.

4.55 This recommendation will also have the effect of reducing the need for the court to determine whether particular acts of a person named as executor are of such a degree that they should prevent the person from renouncing the executorship.²¹⁰

4.56 For these reasons, the National Committee is of the view that the model legislation should include a provision to the general effect of section 54(2) of the *Succession Act 1981* (Qld).

Timing of renunciation

4.57 Given that persons named as executors have been permitted to renounce even where they have taken the oath of office²¹¹ or have published an advertisement advising of their intention to apply for probate,²¹² the National Committee is of the view that the model legislation should be expressed to permit an executor who has intermeddled to renounce at any time before

208 See, for example, the National Committee's recommendations in Chapter 7 that the doctrine of executorship by representation should be extended so that the office of personal representative devolves regardless of whether any personal representative in a chain of personal representatives was, or is, an executor appointed under a grant of probate or an administrator appointed under a grant of letters of administration.

209 See [4.38] above.

210 Note, however, the National Committee's recommendation at [7.72]–[7.79] below in relation to renunciation by an executor by representation.

211 See [4.31] above.

212 See [4.33] above.

probate is granted, rather than, as section 54(2) of the *Succession Act 1981* (Qld) provides, 'before applying for a grant of probate'.

EFFECT OF RENUNCIATION ON ANY RIGHT TO APPLY FOR A GRANT IN ANOTHER CAPACITY

Background

4.58 In some situations, a person who is named as the executor of a will may also have an entitlement to apply for letters of administration in another capacity — for example, where the person is a beneficiary under the will. Similarly, a person who is entitled to letters of administration in one capacity may also have an entitlement to apply in another (and lower) capacity — for example, where the person is the deceased's spouse or a relative and also a creditor of the deceased.²¹³ This raises the issue of whether a person who renounces in one capacity should still be able to obtain a grant in another capacity or whether a renunciation in one capacity should preclude a person from obtaining a grant in any other capacity.

4.59 In England, the old rule dealing with non-contentious applications was in the following terms:²¹⁴

50 Renunciations

No person who renounces probate of a will or letters of administration of the personal estate and effects of a deceased person in one character is to be allowed to take a representation to the same deceased in another character.

4.60 The rule meant that, 'where a man under a will occupies in reference to the testator two different characters, he shall not select either one he pleases as the basis of his grant, but must take administration on the largest ground. He cannot throw aside probate and take a more limited grant'.²¹⁵ It was held, however, that, although the rule provides general guidance for the business in the registry, it was capable of modification where sufficient reason was shown for departing from it.²¹⁶ The current English rule does not limit the right of an executor to obtain a grant in another capacity.²¹⁷

213 The order of priority for letters of administration with the will annexed and on intestacy is considered in Chapter 5 of this Report.

214 *Rules and Orders of 1862* (Eng) r 50. Those rules dealt with non-contentious or common form business under the *Court of Probate Act 1857* (Eng).

215 *In the Goods of Russell* (1869) LR 1 P & D 634, 635 (Sir JP Wilde).

216 *In the Goods of Loftus* (1864) 3 Sw & Tr 307; 164 ER 1293, 1294–5 (Sir JP Wilde).

217 *Non-Contentious Probate Rules 1987* (UK) r 37(1). See [4.64] and note 222 below.

Existing provisions in Australian court rules

4.61 A number of Australian jurisdictions have court rules that deal with the effect of renunciation on a person's right to apply for a grant in another capacity.

4.62 In the ACT, New South Wales and the Northern Territory, a person who has renounced either probate or administration must not be granted representation of the estate in another capacity.²¹⁸ The practice in New South Wales is to enforce the rule strictly.²¹⁹

4.63 In Western Australia, the registrar has a discretion to allow a person who has renounced probate of the will or administration of the estate of a deceased person to take a grant in another capacity. Rule 28 of the *Non-contentious Probate Rules 1967 (WA)* provides:

28 Effect of renunciation

Unless the Registrar otherwise directs, a person who has renounced probate of the will or administration of the estate of a deceased person in one capacity may not take a representation to the same deceased in another capacity.

4.64 In South Australia and Tasmania, different rules apply depending on whether the person who renounced was an executor or a person entitled to letters of administration. In relation to executors, the rules provide that renunciation by an executor does not operate as a renunciation of any right that the executor may have to a grant of administration in another capacity unless the executor expressly renounces that right.²²⁰ However, unless the registrar (in South Australia) or a judge in chambers (in Tasmania) directs otherwise, a person who has renounced administration in one capacity may not obtain a grant of administration in another capacity.²²¹ This is the same as the position under the current English rules.²²²

4.65 The Queensland rules are silent as to the effect of renunciation on a person's entitlement to apply for a grant in another capacity.

4.66 The rules dealing with the effect of renunciation were not considered in the Discussion Paper and the National Committee did not receive any submissions about them.

218 *Court Procedures Rules 2006 (ACT)* r 3014; *Supreme Court Rules 1970 (NSW)* Pt 78 r 14(1); *Supreme Court Rules (NT)* r 88.13.

219 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [69.10] note 41.

220 *The Probate Rules 2004 (SA)* r 48.03; *Probate Rules 1936 (Tas)* r 67(1).

221 *The Probate Rules 2004 (SA)* r 48.04; *Probate Rules 1936 (Tas)* r 67(2).

222 See *Non-Contentious Probate Rules 1987 (UK)* r 37(1), (2).

The National Committee's view

4.67 Although it is not part of this project to develop uniform rules for the administration of estates, the variation between the jurisdictions as to the effect of renunciation on a person's right to apply for a grant in another capacity is an impediment to achieving uniformity in relation to the effect of renunciation more generally. For that reason, the National Committee considers that it needs to address this issue.

4.68 The National Committee favours a provision to the general effect of rule 28 of the *Non-contentious Probate Rules 1967 (WA)*. Where a person has renounced probate or administration, but would otherwise be entitled to apply for a grant in another capacity, a provision to this effect avoids the need for a person having a lower entitlement to letters of administration to clear off that person with respect to the second capacity in which he or she may be entitled to a grant. The National Committee accepts, however, that there will sometimes be situations where it is appropriate for a person who has renounced to be permitted to apply for a grant in another capacity, and the Western Australian provision preserves a degree of flexibility by allowing the registrar to direct that a person may do so in an appropriate case.

4.69 Because of the effect of this provision on the National Committee's other recommendations about renunciation, this provision should be contained in the model legislation.

4.70 However, the National Committee considers it more appropriate for the model legislation to confer this power on the Supreme Court, and for individual jurisdictions to determine how to allocate responsibilities between their judges, registrars and masters (if any). Accordingly, the model provision that is based on rule 28 of the *Non-contentious Probate Rules 1967 (WA)* should refer to the 'Supreme Court', rather than to the 'registrar'.

RETRACTION OF RENUNCIATION OF PROBATE AND ADMINISTRATION

Introduction

Retraction of renunciation of probate

4.71 As explained above, the legislation in all Australian jurisdictions provides that a person's rights to the executorship of a will are to 'wholly cease' if the person renounces probate.²²³ It has been held, however, in relation to the original English provision in which the various Australian provisions have their origins,²²⁴ that the provision does not prevent the court from permitting the

223 See [4.15]–[4.16] above.

224 *Court of Probate Act 1857 (Eng)* s 79.

retraction of a renunciation of probate in a proper case.²²⁵

I think that the words ‘the rights of such person shall wholly cease’ are to be read in connection with those which follow, and that the effect is merely that, when an executor has renounced, it shall not afterwards be necessary to cite him.

4.72 It is not a sufficient reason for permitting the retraction of a renunciation that the person has simply changed his or her mind.²²⁶ There is, however, a question as to what will constitute a proper case for permitting a retraction.

4.73 *Re Gill*²²⁷ is commonly cited as authority for the proposition that retraction will be permitted only if it will be for the benefit of the estate or those interested under the will,²²⁸ which is the principle stated in the headnote of that case. However, in *Re Lawrence*,²²⁹ Brooking J observed that the proposition stated in the headnote of *Re Gill*²³⁰ and repeated in the textbooks was not actually expressed in those terms in Sir James Hannen’s judgment, and that, in refusing the executor’s application for leave to retract, Sir James Hannen had merely stated:²³¹

The only reason given here is that [the applicant] has changed his mind; it does not appear that it will be for his own profit or for that of anyone else that he shall be allowed to retract.

4.74 Brooking J stated that, without expressing any view on the question, he was content to proceed on the basis that the applicants for retraction must show that the retraction will be for the benefit of the estate or of those interested under the will as, on the facts of that case, the applicants *had* shown such a benefit.²³²

4.75 More recently, Young CJ in Eq has described the principle commonly attributed to *Re Gill* as an ‘overstatement’, although his Honour acknowledged that ‘the principle is true to a certain extent, ie that it must be in the interests of the estate for it to be properly administered, so long as there is no change in the line of administration’.²³³ His Honour suggested that, provided ‘there is a

²²⁵ *Re Stiles* [1898] P 12, 14 (Jeune P). See also *Re Thurston* [2001] NSWSC 144, [13]. Leave to retract is not necessary if the renunciation has not yet been filed in court: *Re Morant* (1874) LR 3 P & D 151.

²²⁶ *Re Gill* (1873) LR 3 P & D 113.

²²⁷ (1873) LR 3 P & D 113.

²²⁸ See JI Winegarten, R D’Costa and T Synak, *Tristram and Coote’s Probate Practice* (30th ed, 2006) [15.66]; *Halsbury’s Laws of England* (4th ed) vol 17(2), [28]; *Halsbury’s Laws of Australia*, 395 Succession, ‘3 Grants’ [395–2475] (at 21 February 2009).

²²⁹ [1982] VR 826.

²³⁰ (1873) LR 3 P & D 113.

²³¹ *Re Lawrence* [1982] VR 826, 829 (Brooking J), citing *Re Gill* (1873) LR 3 P & D 113, 115 (Sir James Hannen).

²³² *Ibid.*

²³³ *Re Thurston; Thurston v Fuz* [2001] NSWSC 144, [18].

reason for retracting the renunciation, the Court should normally grant the application':²³⁴

This is because it is the right of any testator to choose who shall administer his estate. Once that choice is made then it is only on very special grounds that the Court would choose some other person. If the person renounces for a particular reason and that reason ceases to be operative, then the renunciation should be allowed to be withdrawn.

4.76 Young CJ in *Eq* commented on the extent to which the court would consider what is in the interests of the estate.²³⁵

The Court does not in my view examine, in this sort of case, whether one or other of the next of kin, including the person nominated as executor, who has previously renounced, would more speedily wind up the estate or might have less problems in so doing. The Court permits the person nominated by the testatrix to perform that duty in accordance with her wishes. All that has to be explained is why, having once renounced, the person renouncing should be permitted to withdraw.

4.77 An executor may be permitted to retract his or her renunciation notwithstanding that a co-executor has proved the will.²³⁶ For example, in *Re Stiles*,²³⁷ where the executor who obtained probate absconded, the executor who had originally renounced probate was allowed to retract his renunciation so that he could take out probate.

4.78 However, retraction of a renunciation of probate will not generally be permitted where, following the renunciation of probate, letters of administration with the will annexed have been granted to an administrator, as allowing the executor to retract his or her renunciation could revive a chain of representation that had previously been broken.²³⁸ The concern of the courts is the effect that the retraction of the renunciation, if permitted, might have if the deceased testator was the executor of other testators, given the operation of the doctrine of executorship by representation.²³⁹

4.79 This issue arose in *Re Thornton*,²⁴⁰ where the executor named in the deceased's will renounced probate, following which letters of administration with the will annexed were granted to the deceased's widow. When she died without

234 Ibid [17].

235 Ibid [19].

236 *Re Stiles* [1898] P 12, 14 (Jeune P).

237 [1898] P 12.

238 *Re Thornton* (1826) 3 Add 274; 162 ER 479. See also *Re Stiles* [1898] P 12, 14 (Jeune P).

239 Under the doctrine, an executor who has proved the will of his or her testator becomes the executor, by representation, of any will of which the deceased testator had been granted probate or of which the deceased testator was an executor by representation. This doctrine, together with its extension to administrators, is considered in Chapter 7 of this Report.

240 (1826) 3 Add 274; 162 ER 479.

having completed the administration of the deceased's estate, one of the original executors sought to retract his renunciation in order to take out a grant of probate. His application was opposed 'on the ground of possible inconvenience that might accrue, in other quarters, from chains of executorship once broken, being thus suffered to revive':²⁴¹

Should the deceased, for instance, ... have been the surviving executor of other testators, and should administrations, have been granted of their effects, on the renunciation of his executors, if the chain of executorship were to revive, as now proposed, there would be double and conflicting representations of such testators, the one by grant of administration, as above; the other, by the revived chain of executorship.

4.80 This objection was upheld, with the result that the Court refused the application to retract the renunciation of probate.²⁴² To the extent that this reasoning is relevant to the circumstances in which retraction should be permitted, it is important to have regard to the fact that, in Chapter 7 of this Report, the National Committee has recommended that the doctrine of executorship by representation should be extended so that the office of personal representative devolves without regard to whether any personal representative in the chain of personal representatives was, or is, an executor appointed under a grant of probate or an administrator appointed under letters of administration.²⁴³

Retraction of renunciation of administration

4.81 The courts may also permit a person who has renounced his or her right to letters of administration to retract the renunciation of administration.²⁴⁴ It has been suggested that '[r]etractation of a renunciation by a person entitled to administration ... is sanctioned more freely' than retraction of a renunciation by an executor.²⁴⁵

Existing legislative provisions and court rules

4.82 In most Australian jurisdictions, the retraction of a renunciation of probate or administration is governed by the general law.

4.83 However, several jurisdictions have, or have had, legislative provisions or court rules dealing with this issue. In South Australia, the rules deal with the retraction of a renunciation of both probate and administration. In Tasmania and Victoria, the Administration and Probate Acts deal with the retraction of a renunciation of probate only, although the Tasmanian rules also address the

241 Ibid 480.

242 Ibid.

243 See Recommendation 7-1 below.

244 *In the Goods of Thacker* [1900] P 15; *Re Heathcote* [1913] P 42.

245 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 31.

retraction of a renunciation of both probate and administration. The previous Queensland rules included a provision dealing with the retraction of a renunciation of administration only.

4.84 These provisions and rules are considered below.

Queensland

4.85 At the time of the publication of the Discussion Paper, the *Rules of the Supreme Court 1900* (Qld), which have since been replaced by the *Uniform Civil Procedure Rules 1999* (Qld), included a rule dealing with the retraction of a renunciation of administration. Order 71, rule 86 of the former rules provided:

86 Retraction of renunciation

Any person who has renounced the person's right, or prior right, to a grant of administration may, by leave of the Court or a Judge, retract the person's renunciation.

4.86 The *Uniform Civil Procedure Rules 1999* (Qld) do not include any rule dealing with the retraction of a renunciation, whether of probate or administration.

South Australia

4.87 In South Australia, rules 48.06 and 48.07, which assume the existence of the court's power to grant leave to retract a renunciation, deal with the requirements of an application to retract a renunciation of probate or administration.²⁴⁶

48 Renunciation of probate and administration

...

48.06 An application for leave to retract a renunciation of probate or administration must be made to the Registrar by summons:

Provided that only in exceptional circumstances may leave be given to an executor to retract a renunciation of probate after a grant has been made to some other person entitled in a lower degree.

48.07 An application under Rule 48.06 must be supported by an affidavit showing that the retraction of the renunciation is for the benefit of the estate, or of the parties interested.

4.88 The effect of rule 48.07 is that an applicant seeking leave to retract a renunciation of probate or administration must always show that the retraction is for the benefit of the estate or of the parties interested. However, where the

²⁴⁶

The corresponding English rule, *Non-Contentious Probate Rules 1987* (UK) r 37(3), is similar to *The Probate Rules 2004* (SA) r 48.06, in that it also refers to the situation where a 'grant' has been made to some other person entitled in a lower degree.

applicant is an executor seeking leave to retract the renunciation of probate and a grant has been made to another person with a lower entitlement, the applicant must, in addition, show that there are 'exceptional circumstances'. This is required because, under the proviso to rule 48.06, the court has the power to permit a retraction in that situation only in exceptional circumstances.

Tasmania

4.89 The Tasmanian legislation deals with the retraction of a renunciation of probate. Section 9 of the *Administration and Probate Act 1935* (Tas), which is virtually identical to the current English provision,²⁴⁷ provides:

9 Withdrawal of renunciation

Where an executor who has renounced probate has been permitted, whether before or after the commencement of this Act, to withdraw the renunciation and prove the will, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of, and notices to, any other personal representative who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate shall be endorsed on the original probate or letters of administration.

4.90 It has been noted that the corresponding English provision 'confers no express power on the court to give leave to an executor to withdraw a renunciation', but 'proceeds upon the basis that such a power exists and, indeed, existed before the enactment of the Act of 1925':²⁴⁸

That section gives recognition to the long established practice whereby the court, if it thought fit, would give leave to an executor to retract the renunciation that had been filed, a practice which was not affected by the enactment of the *Court of Probate Act 1857* ... s 79 ...

4.91 Although the Tasmanian legislation deals only with the retraction of a renunciation of probate, the *Probate Rules 1936* (Tas) address the retraction of renunciations of both probate and administration. Rule 67 provides in part:

67 Effect of renunciation of probate: Renunciations withdrawable in certain cases

...

- (3) Subject to subrule (4), a renunciation of probate or administration may be withdrawn at any time on the order of a judge in chambers.
- (4) Notwithstanding subrule (3), leave to withdraw a renunciation of probate shall not be given to an executor after a grant of probate has been made to another person who is entitled thereto in a lower capacity, unless the judge to whom the application for leave is made is

²⁴⁷ *Administration of Estates Act 1925* (UK) s 6.

²⁴⁸ *Re Lawrence* [1982] VR 826, 828 (Brooking J).

satisfied that there are exceptional circumstances which justify the granting of the application. (emphasis added)

4.92 The requirement in rule 67(4) that there must be ‘exceptional circumstances’ reflects the reluctance of the courts under the general law to allow an executor to retract his or her renunciation of probate where an administrator has since been appointed under a grant of letters of administration with the will annexed.²⁴⁹

4.93 However, the reference in rule 67(4) to the situation where a ‘grant of probate’ has been made to a person in a lower capacity is curious.²⁵⁰ It is not clear when probate would be granted to a person entitled to a grant in a lower capacity. In the ordinary course, following the renunciation of an executor, either a grant of probate would be made to another executor, if there were one (who would be a person of the same capacity as the renouncing executor), or a grant of letters of administration with the will annexed would be made to an administrator (who would be a person in a lower capacity than the renouncing executor).²⁵¹

Victoria

4.94 In contrast to the Tasmanian provision, the Victorian provision confers an express power on the court to permit an executor who has renounced probate to retract the renunciation. Section 16(2) of the *Administration and Probate Act 1958* (Vic) provides:

16 Cesser of right of executor to prove

...

- (2) An executor who has renounced probate may notwithstanding anything in the last preceding sub-section contained be permitted by the Court to withdraw the renunciation and prove the will and where an executor who has renounced probate has been so permitted, whether before or after the commencement of this Act, the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other personal representative who has previously proved the will or taken out letters of administration, and a memorandum of the subsequent probate shall be indorsed on the original grant.

4.95 It has been said that the Victorian provision ‘preserve[s] the old practice of applying for leave to retract a renunciation’.²⁵² It ‘gives statutory effect to the

²⁴⁹ See [4.78]–[4.80] above.

²⁵⁰ The corresponding South Australian rule simply refers to the situation where a ‘grant’, rather than a ‘grant of probate’, has been made to another person entitled in a lower degree: see *The Probate Rules 2004* (SA) r 48.06, which is set out at [4.87] above.

²⁵¹ The Tasmanian rules prescribing the priority for letters of administration on intestacy and letters of administration with the will annexed are set out at [5.18]–[5.20] below.

²⁵² *Re Lawrence* [1982] VR 826, 829 (Brooking J).

view taken by the courts on the question whether s 79 of the Act of 1857 affected the practice whereby leave might be given to retract a renunciation'.²⁵³ It has been held, however, that the reference in section 16(2) of the *Administration and Probate Act 1958* (Vic) to the fact that an executor may be permitted to 'prove the will' does not add anything to the section.²⁵⁴

[The words] do no more than indicate, as is of course clear, that once leave to withdraw the renunciation has been granted, the executor will be in a position to apply for probate; they do not confer a discretion to decide, not only whether the executor should be permitted to retract his renunciation, but also whether he should be permitted to apply for probate.

4.96 Section 16(2) of the *Administration and Probate Act 1958* (Vic) is virtually identical to the current New Zealand provision,²⁵⁵ which was considered by the National Committee in the Discussion Paper.²⁵⁶

Discussion Paper

4.97 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the effect of Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld) to enable the retraction of a renunciation of probate.²⁵⁷ Although the National Committee did not expressly say so, it is obvious that the model provision could not follow the former Queensland rule exactly,²⁵⁸ but would need to refer specifically to the retraction of an executor's renunciation of probate.

4.98 The National Committee expressed the view that the then Queensland rule was a simpler and more appropriate provision than the New Zealand provision (which is in the same terms as section 16(2) of the *Administration and Probate Act 1958* (Vic)), which might be seen as encouraging executors who have renounced probate to seek to withdraw that renunciation notwithstanding that an administrator had been appointed in the meantime.²⁵⁹

4.99 The National Committee sought submissions on the following issues:²⁶⁰

253 Ibid 828. This view is set out at [4.71] above.

254 Ibid 828–9.

255 *Administration Act 1969* (NZ) s 12.

256 *Administration of Estates Discussion Paper* (1999) QLRC 49–50; NSWLRC [7.9].

257 Ibid, QLRC 51; NSWLRC 76 (Proposal 21).

258 As explained at [4.85] above, O 71 r 86 of the *Rules of the Supreme Court 1900* (Qld) applied only to the retraction of a renunciation of administration.

259 *Administration of Estates Discussion Paper* (1999) QLRC 51; NSWLRC [7.13].

260 Ibid, QLRC 51; NSWLRC 76.

- whether the model legislation should include a provision to the effect of Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld) to enable the withdrawal of a renunciation of probate;
- if so, whether it was necessary to codify the circumstances in which the court might permit withdrawal, for example, by including in the model legislation a requirement similar to the South Australian and Tasmanian requirement of exceptional circumstances;²⁶¹
- whether the model legislation should include a requirement, as provided in rule 48.07 of *The Probate Rules 2004* (SA), for the application to be supported by affidavit.

Submissions

Inclusion of a provision expressly permitting the retraction of a renunciation of probate

4.100 Almost all the submissions that addressed the issue of retraction were of the view that the model legislation should, in some form, provide that the court may permit an executor to retract his or her renunciation of probate.²⁶²

4.101 The National Committee's specific proposal to include a provision to the effect of Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld) was endorsed by the Bar Association of Queensland and the Public Trustee of New South Wales.²⁶³ The New South Wales Law Society, although expressing some support for a provision to the effect of the former Queensland rule, suggested that the National Committee might consider whether a combination of that rule and rules 48.06 and 48.07 of *The Probate Rules 2004* (SA) would be more desirable.²⁶⁴

4.102 The National Council of Women of Queensland did not comment specifically on the inclusion of a provision to the effect of the former Queensland rule, but did agree that the model legislation should enable a renunciation of probate to be retracted.²⁶⁵

4.103 An academic expert in succession law was opposed to the inclusion of a provision to the effect of the former Queensland rule, but only because the rule was limited in its application to the retraction of a renunciation of

261 As explained earlier, however, these jurisdictions do not require exceptional circumstances to be established in all applications for retraction, only where the application is made by an executor and a grant has since been made to a person entitled in a lower degree.

262 Submissions 1, 2, 3, 6, 10, 11, 12, 14, 15.

263 Submissions 1, 11.

264 Submission 15.

265 Submission 3.

administration.²⁶⁶ He considered that '[p]ermission to retract should be the same for all personal representatives'. In his view, section 6 of the *Succession Act 1981 (Qld)*²⁶⁷ gave the court a sufficient power to permit the retraction of a renunciation.

4.104 Only one respondent, the Queensland Law Society, was of the view that the retraction of a renunciation of probate should not be permitted under any circumstances.²⁶⁸ Although the Law Society acknowledged that it is currently possible for a renunciation to be retracted, it expressed the view that a renunciation, once filed, should be final.

The circumstances in which retraction should be permitted

4.105 As noted above, the Bar Association of Queensland and the Public Trustee of New South Wales supported a provision to the effect of the former Queensland rule,²⁶⁹ which was silent as to the circumstances in which the court may grant leave to retract the renunciation of a grant of administration. In the view of the Bar Association of Queensland, it is unnecessary and inappropriate to codify the circumstances in which the court may permit a renunciation to be retracted:²⁷⁰

There is no good reason to follow the SA or Tasmanian requirement for 'exceptional circumstances'. With the wide variety of possible explanations or circumstances, the Court's discretion should not be fettered.

4.106 An academic expert in succession law was also opposed to restricting the retraction of a renunciation to cases where there were exceptional circumstances.²⁷¹ In his view:

the procedure should be consensual, that is, the person wishing to resume the administration should have to have the agreement with the person to whom a grant has been made following the renunciation, and the court should be satisfied that the change in mid stream is in the interests of the administration. The phrase exceptional circumstances is pointless.

4.107 However, a former ACT Registrar of Probate, the Trustee Corporations Association of Australia, Trust Company of Australia Limited, and the ACT and New South Wales Law Societies were all of the view that the model legislation

266 Submission 12.

267 Section 6(1) of the *Succession Act 1981 (Qld)* confers a very broad jurisdiction on the court. It provides that the court 'has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person ...'. See Recommendation 3-1 above, where the National Committee has recommended the inclusion in the model legislation of provisions to the effect of s 6 of the *Succession Act 1981 (Qld)*.

268 Submission 8.

269 See [4.101] above.

270 Submission 1.

271 Submission 12.

should provide that the court may permit the retraction of a renunciation only where there are exceptional circumstances.²⁷²

Procedural issues

4.108 Several submissions responded to the question about whether the model legislation should include a requirement for a supporting affidavit when an application is made for the retraction of a renunciation in exceptional circumstances, as provided for in rule 48.07 of *The Probate Rules 2004* (SA).

4.109 The requirement for an affidavit in support of an application for leave to retract a renunciation was endorsed by the Bar Association of Queensland, a former ACT Registrar of Probate, the Trustee Corporations Association of Australia and the New South Wales Law Society.²⁷³

The National Committee's view

The court's power to permit retraction of renunciation

4.110 In the National Committee's view, there are circumstances where it will clearly be in the interests of an estate for a person to be permitted to retract his or her renunciation of probate or administration in order to apply for a grant. The model legislation should therefore include a provision giving the court the express power to permit the retraction of a renunciation of probate or administration.

Retraction generally

4.111 The model provision should specify the circumstances in which retraction should be permitted. In the National Committee's view, the appropriate general test is that the court is satisfied that the retraction would be for the benefit of the estate or of the persons interested in the estate.

Retraction where letters of administration have been granted to a person in a lower degree

4.112 Where leave to retract a renunciation is given after a grant has been made to another person entitled in a lower degree, with a view to making a new grant in favour of the person who has been given leave to retract, it has the potential to lead to a change in the administration of the estate in question. However, if the deceased was the executor, administrator, or executor or administrator by representation of the will or estate of another person, it also has the potential to affect the continuity of the administration of the other

²⁷² Submissions 2, 6, 10, 14, 15.

²⁷³ Submissions 1, 2, 6, 15.

person's estate.²⁷⁴

4.113 Accordingly, the National Committee is of the view that leave to retract should not be so readily granted in this situation. Under the Tasmanian and South Australian rules, the court may not permit an executor to retract a renunciation of probate if a grant has been made to another person who is entitled in a lower capacity unless there are 'exceptional circumstances'.²⁷⁵ The National Committee does not favour this test. In its view, the requirement of 'exceptional circumstances' does not sufficiently indicate the circumstances that will weigh in favour of permitting retraction.

4.114 The model legislation should provide that, if a grant has been made to another person entitled in a lower degree, the court may permit an executor or a person who would, apart from his or her renunciation, be entitled to letters of administration to retract the renunciation only if the court is satisfied that it would be to the detriment of the estate or the persons interested in the estate for the person appointed as administrator to continue as administrator.

4.115 The National Committee notes that section 9 of the *Administration and Probate Act 1935* (Tas), which is virtually identical to section 16(2) of the *Administration and Probate Act 1958* (Vic), provides that, if an executor who has renounced probate has been permitted to withdraw the renunciation and prove the will:

the probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of, and notices to, any other personal representative who has previously proved the will or taken out letters of administration.

4.116 In the National Committee's view, it is not necessary for the model legislation to include a provision to this effect. If the previous grant is revoked and a fresh grant is made in favour of the executor who is given leave to withdraw his or her renunciation, the previous grant is not void ab initio,²⁷⁶ but is revoked only from the date of the revocation and the making of the subsequent grant.²⁷⁷ While the previous grant was on foot, the person who was for the time being the executor or administrator appointed under it had all the powers of a personal representative.²⁷⁸

²⁷⁴ Note, in Chapter 7, the National Committee has recommended that the office of personal representative should be able to be transmitted through an administrator, as well as through an executor.

²⁷⁵ See [4.87]–[4.88], [4.91]–[4.92] above.

²⁷⁶ *Hewson v Shelley* [1914] 2 Ch 13, 36 (Buckley LJ).

²⁷⁷ *Beeson v The West Australian Trustee, Executor & Agency Co, Ltd* (1929) 31 WAR 108, 111 (Burnside J).

²⁷⁸ *Hewson v Shelley* [1914] 2 Ch 13, 29 (Cozens-Hardy MR).

THE COURT'S POWER TO APPOINT AN ADMINISTRATOR AND ITS DISCRETION TO PASS OVER A PERSON WHO WOULD OTHERWISE BE ENTITLED TO A GRANT

Introduction

4.117 This part of the chapter examines the following issues in relation to the appointment of personal representatives:

- the circumstances in which the court may pass over an executor or a person who would otherwise be entitled to letters of administration;
- whether the model legislation should contain an express provision particularising the circumstances (or at least the most common circumstances) in which the court may:
 - appoint an administrator; or
 - pass over an executor or a person who would otherwise be entitled to letters of administration; and;
- the scope of the court's discretion in passing over such a person and how that discretion should be framed in the model legislation.

4.118 Prima facie, every person nominated to the office of executor by a testator is entitled to a grant of probate.²⁷⁹ However, the court has an inherent power, in certain limited circumstances, to pass over a named executor.²⁸⁰ The principle underlying the exercise of the power, as articulated by Jeune P in *In the Goods of Loveday*,²⁸¹ is that:²⁸²

the real object which the Court must always keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto; ...

4.119 Executors have been passed over where:

- the executor had been convicted of murdering the testator and was serving a term of imprisonment,²⁸³

279 *Evans v Tyler* (1849) 2 Rob Ecc 128; 163 ER 1266, 1267 (Sir Herbert Jenner Fust).

280 *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977) 2; *Re Crane* (2005) 93 SASR 198.

281 [1900] P 154.

282 Ibid 156, applied in *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977).

283 *Re Pedersen* (Unreported, Supreme Court of New South Wales, Holland J, 17 June 1977).

- the executor had persistently failed to accept the role of executor;²⁸⁴
- the executor was unlikely, because of a conflict of interest, to consent to the estate asserting rights in relation to particular assets;²⁸⁵
- the grant of probate would indirectly result in the enforcement of a foreign claim to recover taxes.²⁸⁶

4.120 However, the fact that the beneficiaries under a will are hostile to the named executor is not a sufficient justification for passing over the executor.²⁸⁷

Existing legislative provisions

Australian Capital Territory, New South Wales, Northern Territory

4.121 The legislation in the ACT, New South Wales and the Northern Territory sets out a number of circumstances in which the court may grant letters of administration.²⁸⁸ In addition, the legislation deals with the court's power to grant letters of administration where a deceased person leaves a will that appoints an executor, but the executor named in the will neglects or refuses to prove the will or to renounce probate.²⁸⁹

4.122 Sections 74 and 75 of the *Probate and Administration Act 1898* (NSW), which are very similar to the provisions in the ACT and the Northern Territory, provide:

74 Power as to appointment of administrator

The Court may, in any case where a person dies:

- (a) intestate, or
- (b) leaving a will, but without having appointed an executor thereof, or
- (c) leaving a will and having appointed an executor thereof, where such executor:

²⁸⁴ *Re Shephard* (1982) 29 SASR 247, 254–5 (Legoe J); aff'd (1982) 30 SASR 1.

²⁸⁵ *Re Crane* (2005) 93 SASR 198, 206–7 (Besanko J), where the executor asserted that, shortly before the testator's death, the testator had transferred certain property to him.

²⁸⁶ *Bath v British & Malayan Trustees Ltd* [1969] 2 NSW 114.

²⁸⁷ *Re Jensen* [1998] Qd R 374 (hostility arising from religious differences between the beneficiaries and the executor).

²⁸⁸ *Administration and Probate Act 1929* (ACT) s 24; *Probate and Administration Act 1898* (NSW) s 74; *Administration and Probate Act* (NT) s 33. These provisions are supplemented by an additional provision that states in broad terms the persons to whom letters of administration may be granted when the deceased dies intestate: see [5.5]–[5.7] below.

²⁸⁹ *Administration and Probate Act 1929* (ACT) s 25; *Probate and Administration Act 1898* (NSW) s 75; *Administration and Probate Act* (NT) s 34.

- (i) is not willing and competent to take probate, or
- (ii) is resident out of New South Wales,

if it thinks it necessary or convenient, appoint some person to be the administrator of the estate of the deceased or of any part thereof, upon the appointed person giving such security (if any) as the Court directs, and every such administration may be limited as the Court thinks fit. (emphasis added)

75 Proceeding where executor neglects to prove will

(1) In any case where the executor named in a will:

- (a) neglects or refuses to prove the same or to renounce probate thereof within three months from the death of the testator or from the time of such executor attaining the age of eighteen years, or
- (b) is unknown or cannot be found,

the Court may upon the application of:

- (i) any person interested in the estate, or
- (ii) the Public Trustee or a trustee company,²⁹⁰ or
- (iii) any creditor of the testator,

order that probate of the said will be granted to such executor or order that administration with such will annexed be granted to the applicant or make such other order for the administration of the estate as appears just. (note added)

4.123 In *Bath v British & Malayan Trustees Ltd*,²⁹¹ the Supreme Court of New South Wales held, in relation to section 74 of the *Probate and Administration Act 1898* (NSW), that the expression 'necessary or convenient' gives the court an extremely wide discretion.²⁹²

it seems to me that where circumstances arise in which the Court is empowered to appoint an administrator under s 74, then having regard to matters of necessity or convenience as to whether any appointment should be made, the Court is given a discretion regarding an appointee, and the choice of competing appointees, which discretion is wider if anything than the discretion

²⁹⁰ Under the corresponding provision in the Northern Territory, the application may be made by 'a professional personal representative', which means not only the Public Trustee or a trustee company but also a legal practitioner: see *Administration and Probate Act* (NT) ss 6(1) (definition of 'professional personal representative'), 34(1)(d).

²⁹¹ [1969] 2 NSW 114.

²⁹² *Ibid* 118 (Helsham J). In this case, the executor named in the will was a trustee company resident in Singapore.

to choose “such person as the Court shall think fit”, under the English ancestor of this section (s 73 of the *Court of Probate Act 1857*).²⁹³ (note added)

4.124 The Court held that, in exercising this discretion, it follows the approach adopted by Jeune P in *In the Goods of Loveday*²⁹⁴ ‘in relation to revocation of a grant and substitution of an administrator’:²⁹⁵

After all the real object which the Court must keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto ...

Queensland

4.125 In Chapter 3 of this Report, the National Committee has recommended the inclusion in the model legislation of provisions to the effect of section 6 of the *Succession Act 1981* (Qld),²⁹⁶ which provides:

6 Jurisdiction

- (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.
- (2) The court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that the deceased person left no estate in Queensland or elsewhere or that

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Court of Probate Act 1857 (Eng) s 73 provided:

73 Discretionary power as to appointment of administrator in certain cases

Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be the administrator of the personal estate of the deceased, or of any part of such personal estate, other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not passed, would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator, upon his giving such security (if any) as the Court shall direct; and every such administration may be limited as the Court shall think fit.

Court of Probate Act 1857 (Eng) s 73 has been replaced by s 116 of the *Supreme Court Act 1981* (UK), which is set out at note 299 below.

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[1900] P 154.

295

Bath v British & Malayan Trustees Ltd [1969] 2 NSW 114, 118 (Helsham J), referring to *In the Goods of Loveday* [1900] P 154, 156.

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See Recommendation 3-1 above.

the person to whom the grant is made is not resident or domiciled in Queensland.

- (3) A grant may be made to such person and subject to such provisions, including conditions or limitations, as the court may think fit.
- (4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.
- (5) This section applies whether the death has occurred before or after the commencement of this Act. (emphasis added)

4.126 Section 6 of the *Succession Act 1981* (Qld) is the sole provision in the Act dealing with the appointment of an administrator. It confers a very broad jurisdiction on the court in relation to the making and revocation of grants. However, it has been held that section 6(3), which provides that the court may make a grant 'to such person ... as the court may think fit', does not enable the court to pass over a person who has not renounced as executor and who is not otherwise unsuitable for appointment:²⁹⁷

The Court has jurisdiction under section 6(3) of the *Succession Act 1981* to make a grant to any person subject to such provisions, including conditions or limitations, as the Court may think fit. That jurisdiction ought not, in my view, to be read as going against the general law relating to executors. Section 46 of the *Succession Act 1981*²⁹⁸ supports that conclusion as do the *Uniform Civil Procedure Rules* relating to probate business. There is no equivalent to section 116 of the English *Supreme Court Act of 1981*²⁹⁹ which empowers the Court to pass over prior claims to a grant where it appears to the Court to be necessary or expedient to appoint some other person over a person who would otherwise be entitled to a grant. (notes added)

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E Carr & Son Pty Ltd v Hood [2003] QSC 453 (White J). In that case, the testator appointed his adult son and daughter as executors. The daughter disputed a debt that her brother alleged was owed by the estate to a company of which he was a major shareholder and director. The company, as creditor, sought to have an administrator appointed to administer the trusts under the will. Both the son and daughter, neither of whom had applied for probate, were agreeable to having an administrator appointed. However, as the daughter did not wish to renounce her executorship, she was only agreeable to the administrator being appointed under a limited grant, in order to get in the estate and investigate the company's claims against the estate. The Court held that it could not pass over the daughter as executor. It therefore made a limited grant of administration, rather than appointing an administrator under a general grant of administration.

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Succession Act 1981 (Qld) s 46 is set out at [4.16] above.

299

Supreme Court Act 1981 (UK) s 116 provides:

116 Power of court to pass over prior claims to grant

- (1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this section, would in accordance with probate rules have been entitled to the grant, the court may in its discretion appoint as administrator such person as it thinks expedient.
- (2) Any grant of administration under this section may be limited in any way the court thinks fit. (emphasis added)

4.127 It is doubtful, however, whether, in this case, the claim of the executor could have been passed over even under a provision framed in terms of section 74 of the New South Wales legislation, as the executor was willing and competent to take probate and was not resident out of the jurisdiction.

South Australia

4.128 The South Australian legislation does not include an express provision setting out the nature of the court's discretion in appointing an administrator or the circumstances in which the court may do so.

Tasmania

4.129 The Tasmanian legislation does not include an express provision setting out the circumstances in which the court may grant letters of administration. However, section 13(b) of the legislation refers to the court's discretion to grant administration to a person who would not ordinarily be entitled to a grant under the principles that govern the order of entitlement to a grant.³⁰⁰ Section 13 of the *Administration and Probate Act 1935* (Tas) provides:

13 Discretion of Court as to persons to whom administration is to be granted and limitation of grant

In granting letters of administration the Court shall have regard to the rights of all persons interested in the real and personal estate of the deceased person, or the proceeds of sale thereof and, in particular, administration with the will annexed may be granted to a devisee or legatee, and any such administration may be limited in any way the Court thinks fit. Provided that—

- (a) where the deceased died wholly intestate as to his real and personal estate, administration shall, if application is made for that purpose, be granted to some one or more of the persons interested in the residuary estate of the deceased; and
- (b) if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the Court may, in its discretion, notwithstanding anything contained in section 14,³⁰¹ appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the Court thinks fit. (note added)

Victoria

4.130 The Victorian legislation does not set out all the circumstances in which the court may grant letters of administration. However, it includes a provision

³⁰⁰ Order of entitlement to a grant is considered separately at [5.16]–[5.20] below.

³⁰¹ Section 14 of the *Administration and Probate Act 1935* (Tas) deals with grants of administration where there is a minor beneficiary or where a life interest arises under the will: see [4.290]–[4.291] below.

that applies where the executor named in a will neglects to prove the will or to renounce probate within six weeks of the testator's death. Section 15 of the *Administration and Probate Act 1958* (Vic) provides:

15 Executor etc. neglects to prove, renounce or bring in the will

The Court shall continue to have power to summon any person named as executor in any will to prove or renounce probate of the will and to do such other things concerning the will as have heretofore been customary and in particular and without limiting the generality or effect of the foregoing provision in any case where the executor named in a will or any person having possession of any will neglects to bring such will into court within six weeks from the death of the testator or where the executor named in a will neglects to prove the same or renounce probate thereof within six weeks from the death of the testator any party interested under such will or in the estate or the State Trustees or any creditor of the testator may apply to the Court for an order calling upon the executor or any person having possession of such will to show cause why he should not bring such will into court or why such executor should not prove the same or renounce probate thereof or in the alternative why administration with such will annexed should not be granted to the applicant and upon proof of service of the summons, if the executor or such person does not appear or show sufficient cause as aforesaid, it shall be lawful for the Court to make an order upon such executor or person to bring such will into court and make such order in the premises and as to costs as appears just and the Court may grant administration of the estate to such applicant.

4.131 Under section 15, if the executor named in a will neglects to prove the will or to renounce probate within six weeks of the testator's death, any party interested under the will, State Trustees Limited³⁰² or any creditor of the testator, may apply to the court for an order calling on the executor to show cause why he or she should not prove the will or renounce probate or why administration with the will annexed should not be granted to the applicant. The court may, upon proof of service of the summons if the executor does not appear or if the executor does not show sufficient cause, grant administration of the estate to the applicant.³⁰³

4.132 The *Administration and Probate Act 1958* (Vic) does not refer, in section 15 or elsewhere, to the nature of the court's discretion in granting letters of administration.

Western Australia

4.133 The *Administration Act 1903* (WA) provides, in section 25(1), that the court may grant administration of the estate of a person dying intestate to

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State Trustees Limited performs a function similar to the public trustee in other jurisdictions. It is a State owned company and a trustee company under the *Trustee Companies Act 1984* (Vic): see *State Trustees (State Owned Company) Act 1994* (Vic).

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Administration and Probate Act 1958 (Vic) s 15 also applies where the executor or any person having possession of the will neglects to bring the will into court within six weeks of the testator's death. The same parties may apply for an order calling on the executor or person having possession of the will to show cause why he or she should not bring the will into court, and the court may order that the will be brought into court.

certain persons.³⁰⁴ The Act also contains a provision setting out the circumstances in which the court may grant letters of administration with the will annexed. Section 36 of the *Administration Act 1903* (WA) provides:

36 Administration with the will annexed

Where a person dies leaving a will but without having appointed an executor, or leaving a will and having appointed an executor who is not willing and competent to take probate or is resident out of Western Australia, the Court may appoint an administrator of the estate of the deceased, or of any part thereof, and such administration may be limited as the Court thinks fit.

4.134 Section 36 is similar to section 74(b) and (c) of the *Probate and Administration Act 1898* (NSW). Like the New South Wales provision, it includes, as a circumstance in which the court may grant letters of administration, that the executor is resident out of the jurisdiction.

4.135 The Western Australian legislation also includes a provision in similar terms to section 75 of the *Probate and Administration Act 1898* (NSW), except that it refers to a period of two months, rather than three, from the death of the testator or from when the executor turns 18. Section 37 of the *Administration Act 1903* (WA) provides:

37 Probate or administration if executor, etc. absent or neglects to obtain probate, etc.

Where an executor neglects to obtain or to renounce probate within 2 months from the death of the testator or from the time of such executor attaining the age of 18 years, or where an executor is unknown or cannot be found, the Court may, upon the application of any person interested in the estate, or of any creditor of the testator, grant administration with the will annexed to the applicant, and such administration may be limited as the Court thinks fit.

Discussion Paper

Appointment of an administrator generally

4.136 In the Discussion Paper, the National Committee expressed the view that sections 74 and 75 of the *Probate and Administration Act 1898* (NSW) did not really add anything to the very wide powers conferred on the court by section 6 of the *Succession Act 1981* (Qld), which the National Committee had agreed, on a preliminary basis, to adopt. However, the National Committee suggested that the New South Wales provisions might be of assistance to lay people by providing guidance as to the particular circumstances in which an administrator may be appointed.³⁰⁵

³⁰⁴ *Administration Act 1903* (WA) s 25 is set out at [5.23] below.

³⁰⁵ *Administration of Estates Discussion Paper* (1999) QLRC 27–8; NSWLRC [5.7], [5.9]–[5.10].

4.137 Although the National Committee considered that it might therefore be useful for the model legislation to include similar provisions, it considered that the model legislation should make it clear that those provisions do not detract from the general jurisdiction conferred by the model provision that it proposed be based on section 6 of the *Succession Act 1981* (Qld).³⁰⁶

4.138 Further, the National Committee noted that section 74 of the New South Wales legislation provides, as one of the circumstances in which the court may grant administration, that the executor appointed by the will is resident out of New South Wales.³⁰⁷ It considered that, 'with the greater ease of communication over distances, it was no longer appropriate to include as a ground for the appointment of an administrator that the executor was resident out of the particular jurisdiction'.³⁰⁸

4.139 Subject to these two matters, the National Committee proposed that the model legislation should include a provision based on what it described as a 'redraft' of sections 74 and 75 of the *Probate and Administration Act 1898* (NSW).³⁰⁹ The redrafted provision provided, relevantly:³¹⁰

- (1) Without derogating from the generality of section 6(1) [*Succession Act 1981* (Qld)], where the court finds that there is a reasonable likelihood that were probate to be granted to the executor named in the will the grant would subsequently have to be revoked, the court may—
 - (a) refuse temporarily or permanently to grant probate to the person named in the will; and
 - (b) grant probate to some other person named in the will as executor, or grant administration to some other person; and
 - (c) make such other orders as to the court seem fit.
- (2) Without derogating from the generality of section 6(1), the court may, in any case where a person dies—
 - (a) intestate; or
 - (b) leaving a will, but without having appointed an executor thereof; or

306 Ibid, QLRC 28; NSWLRC [5.9].

307 Ibid, QLRC 29; NSWLRC [5.11]. The ACT and Northern Territory provisions also include the circumstance that the executor is resident out of the Territory: *Administration and Probate Act 1929* (ACT) s 24(c)(ii); *Administration and Probate Act* (NT) s 33(c)(ii).

308 *Administration of Estates Discussion Paper* (1999) QLRC 29; NSWLRC [5.12].

309 Ibid, QLRC 31; NSWLRC 46 (Proposal 10).

310 Ibid, QLRC 28–9; NSWLRC [5.11]. Subsection (2) of the National Committee's redrafted provision was based on s 74 of the *Probate and Administration Act 1898* (NSW). However, subsection (1) was not based on s 75 of that Act.

- (c) leaving a will and having appointed an executor thereof, where—
- (i) such executor is not willing and competent to take probate; or
- (ii) ...

if it considers it necessary or convenient, appoint some person to be the administrator of the estate of the deceased or of any part thereof, upon the appointed person giving such security (if any) as the court directs, and any such administration may be limited as the court thinks fit.

Passing over in specific circumstances

4.140 In the Discussion Paper, the National Committee noted that the court will not lightly interfere with a testator's choice of executor,³¹¹ and considered that it would be desirable to enlarge the circumstances in which the court may pass over a named executor. The National Committee acknowledged that the executor was chosen by the testator, but also recognised that beneficiaries have a very real interest in having estates administered in an efficient and cost effective manner.³¹² It noted that, in some cases, a particular executor may have been chosen because the beneficiaries were minors at the time the will was made, and suggested that, where the beneficiaries are of full age and capacity by the time the testator dies, it may be that the original choice of executor is no longer justified.³¹³

4.141 The National Committee therefore proposed that the model legislation should include a provision to facilitate the passing over of a named executor.³¹⁴ It raised the following draft provision for consideration:³¹⁵

- (1) Without derogating from the generality of section 6(1) [*Succession Act 1981* (Qld)],³¹⁶ the court may, in any case where a person dies leaving a will and having appointed an executor thereof, where—
- (a) there are grounds for believing that such executor has committed an offence relating to the testator's death;

311 *Administration of Estates Discussion Paper* (1999) QLRC 29, note 67; NSWLRC [5.13], note 67.

312 *Ibid.*, QLRC 29; NSWLRC [5.13].

313 *Ibid.*, QLRC 29; NSWLRC [5.14].

314 *Ibid.*, QLRC 31; NSWLRC 46 (Proposal 10).

315 *Ibid.*, QLRC 30; NSWLRC [5.16].

316 This was a reference to the proposed provision concerning the court's jurisdiction to grant probate, which the National Committee proposed was to be based on s 6 of the *Succession Act 1981* (Qld). The court's jurisdiction to grant probate and administration is considered in Chapter 3 of this Report.

- (b) there are grounds for believing that the grant of probate to such executor is likely to prejudice the due and proper administration of the estate or the interests of persons who are or may be interested in the estate or lead to unnecessary expense; or
- (c) all beneficiaries being of full age and capacity agree that the grant be made to some other person;

if it thinks it necessary or convenient, pass over that named executor and grant probate to some other named executor, or appoint some other person to be the administrator of the estate of the deceased or of any part thereof, upon the appointed person giving such security (if any) as the court directs,³¹⁷ and every such administration may be limited as the court thinks fit.

- (2) The court shall take into account any statement signed by the testator giving reasons for nominating a particular executor. (notes added)

4.142 The draft provision, in part, reflects the court's inherent power to pass over a named executor where it is in the interests of the administration of the estate and of the beneficiaries to do so.³¹⁸ However, the reference in subsection (1)(b) to 'unnecessary expense' and the inclusion of subsection (1)(c) represent a significant extension of the court's power to pass over a named executor. In particular, those provisions would potentially enable professional executors to be passed over in the absence of any issue being raised about their suitability to carry out the duties of the office of executor.

4.143 Although the National Committee was concerned that subsection (1)(b) of the draft provision might detract from the principle of giving effect to the testator's wishes, it noted that the effect of that subsection was qualified by subsection (2), which required the court to take into account the testator's reasons for nominating a particular executor.³¹⁹

4.144 The National Committee expressed the view that the effect of subsection (1)(c) of the draft provision would promote cost effectiveness in the administration of estates and, by facilitating a change of service provision, would give effect to competition policy. The National Committee noted that, although the probate registrars agreed that it should be possible for the court to pass over a named executor, they were of the view that, where all the beneficiaries were of full age and capacity and agreed that the grant should be made to some other person, the court should not have a discretion in the matter.³²⁰

³¹⁷ Note that the National Committee has recommended in Chapter 9 of this Report that the requirement for administration bonds and sureties be abolished. See Recommendation 9-1 below.

³¹⁸ See the discussion of *In the Goods of Loveday* [1900] P 154 at [4.117] above.

³¹⁹ *Administration of Estates Discussion Paper* (1999) QLRC 30; NSWLRC [5.17].

³²⁰ *Ibid*, QLRC 30; NSWLRC [5.18].

Submissions

Appointment of an administrator generally

4.145 The overwhelming majority of respondents who commented on the National Committee's proposal were concerned with the related issue of the specific circumstances in which the court should be able to pass over a named executor.³²¹ As a result, very few submissions addressed the primary proposal to include a provision based on a redraft of sections 74 and 75 of the *Probate and Administration Act 1898* (NSW).

4.146 Only the Bar Association of Queensland and the ACT Law Society commented on this proposal. Both organisations supported the inclusion of a provision based on the redraft of sections 74 and 75 of the New South Wales legislation.³²²

Passing over in specific circumstances

Submissions opposed to the National Committee's proposal

4.147 The majority of submissions that addressed this issue, most of which were from professional executors and trustees, strongly disagreed with the National Committee's proposal about the circumstances in which the court should be able to pass over a named executor. The main reasons advanced for rejecting the National Committee's proposal were that:

- the testator's choice of executor should be respected;
- the proposal would cause delays and increase the cost of administering estates; and
- the proposal would create uncertainty as to who was entitled to exercise the powers of an executor.

4.148 These matters are considered in turn below.

THE PARAMOUNTCY OF THE TESTATOR'S WISHES

4.149 The Public Trustees of South Australia and Queensland, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia and Trust Company of Australia Limited expressed the view that, unless there is good cause, the wishes of the testator about who is to be appointed executor should be paramount.³²³

³²¹ See [4.147]–[4.177] below.

³²² Submissions 1, 14.

³²³ Submissions 4, 5, 6, 7, 10.

4.150 The Public Trustee of New South Wales also commented that the testator's selection should be respected.³²⁴ As a corollary, he argued that a testator should not be expected to know that he or she must explain the reasons for nominating a particular executor when making a will.³²⁵

4.151 The Trustee Corporations Association of Australia was critical of the fact that the draft provision would, in effect, require an executor to state the reasons for nominating a particular executor:³²⁶

If the statement of a testator's reasons is to be taken into account, why is the expressed, clear appointment in the will per se, not to be given any weight? Why is it that the desires of persons whom the testator has *chosen* to include in his bounty can join together to overwhelm *other choices* made by the testator such as the appointment of an executor? (emphasis in original)

4.152 The Public Trustee of South Australia noted that there 'are many reasons why a testator, after careful consideration, may choose to appoint a corporate executor'.³²⁷

4.153 Trust Company of Australia Limited commented on the factors that may affect a testator's choice of executor:³²⁸

when a testator makes a choice of executor, it is done with his or her full knowledge about the capabilities of other possible choices. ...

... the proposal also opens the door for strong willed beneficiaries to coerce other beneficiaries. Testators who select independent executors make choices of executors based on their intimate knowledge of the personalities, skills and bias of all beneficiaries.

4.154 The Public Trustee of South Australia disagreed with the National Committee's argument that a particular executor might have been an appropriate choice at the time the will was made, but might not still be an appropriate choice by the time the testator dies. In her view, if a testator wishes to change the selection of executor, the testator can make a new will or alter the existing will to effect that change.³²⁹

324 Submission 11.

325 Ibid.

326 Submission 6. This submission was endorsed by the Queensland State Council of the Trustee Corporations Association of Australia: Submission 7.

327 Submission 4.

328 Submission 10.

329 Submission 4.

4.155 This view was shared by the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia and the Public Trustee of New South Wales.³³⁰ The Trustee Corporations Association of Australia stated:³³¹

The fact that a testator has not made a new will changing the appointment of his executor as the circumstances of his beneficiaries change should usually be prima facie evidence that he considered no change was warranted.

4.156 Trust Company of Australia Limited expressed a similar view.³³²

testators generally speaking, have that opportunity to regularly revise their Wills and should be presumed to be cognisant of the choices available to them.

4.157 The Public Trustee of Queensland commented that public policy considerations require that only in extreme circumstances will a court intervene to override the wishes of a testator. He noted that, although public policy required this to be possible in the area of family provision, where it was necessary to provide redress for dependants for whom the testator had failed to make adequate provision.³³³

a procedural matter such as the appointment of an executor does not affect the rights of a testator's family or dependants and is not in the same category as that of a testator who has not complied with the moral obligation to provide for dependants. The former circumstance can hardly be deserving of the public policy considerations attributable to the latter.

4.158 Several respondents addressed the issue of the fees charged by professional executors, and expressed the view that these were taken into account by the testator at the time of making the will.

4.159 The Public Trustee of South Australia commented:³³⁴

It would appear that the committee has not taken into account the policies of full disclosure of fees which are followed by the Public Trustees and trustee companies. This policy means that testators make an informed choice of executor at the time of preparing their wills. The principles of open competition are therefore exercised at the time of making the will and not on the death of the testator. Therefore the argument of the committee concerning competition policy ... shows, in my view, a fundamental misunderstanding of the point of choice.

330 Submissions 6, 7, 11.

331 Submission 6. This submission was endorsed by the Queensland State Council of the Trustee Corporations Association of Australia: Submission 7.

332 Submission 10.

333 Submission 5.

334 Submission 4.

4.160 This point was also made by the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia.³³⁵

4.161 Trust Company of Australia Limited noted that its usual practice is to ensure that the testator is well aware of and acknowledges the rates of commission to be charged. It was therefore of the view that the testator demonstrated a willingness to accept these costs, and that the issue of cost effectiveness can be presumed to have been addressed.³³⁶

4.162 The Public Trustee of South Australia, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia considered that the cost involved in having an estate administered by a public trustee or trustee company was justified having regard to the skill, experience and professionalism of the executor.³³⁷

4.163 Two respondents commented on the circumstances in which it would be appropriate for the court to pass over a named executor.

4.164 Trust Company of Australia Limited considered that executors should be passed over only if they are unwilling or incapable of acting. It was suggested that to go beyond that usurps the testator's wishes.³³⁸

4.165 The Trustee Corporations Association of Australia commented that a court should be able to pass over a named executor only where there were 'reasonable' grounds for believing that the administration of the estate would be prejudiced. It suggested that subsection (1)(b) of the proposed draft provision would, in contrast, allow courts to remove an executor simply because it was 'necessary or convenient' and there were 'some grounds' for finding against the executor.³³⁹ In the view of the Association, a provision to the effect of section 6 of the *Succession Act 1981* (Qld)³⁴⁰ would 'allow the court sufficient discretion to pass over a named executor in appropriate circumstances'.³⁴¹ The Association considered that:³⁴²

335 Submissions 6, 7.

336 Submission 10.

337 Submissions 4, 6, 7.

338 Submission 10.

339 Submission 6. This submission was endorsed by the Queensland State Council of the Trustee Corporations Association of Australia: Submission 7.

340 The inclusion in the model legislation of a provision to this effect was proposed by the National Committee in the Discussion Paper (see *Administration of Estates Discussion Paper* (1999) QLRC 18; NSWLRC 28 (Proposal 4)) and has been recommended in Chapter 3 of this Report: see Recommendation 3-1 above.

341 Submission 6.

342 Ibid.

Opportunities to interrupt an estate administration merely to suit the convenience or comfort of beneficiaries should not be provided.

4.166 Trust Company of Australia Limited expressed a similar view. It argued that:³⁴³

The administration of an estate in accordance with the wishes of a testator should not be interrupted, merely for the convenience and immediate personal interests of beneficiaries.

COST AND DELAY

4.167 Many respondents were of the view that the proposed provision would not create efficiencies, and that a contested challenge to an appointed executor would result in increased costs and delays in the administration of the estate. This was the view of the South Australian and Queensland Public Trustees, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, Trust Company of Australia Ltd and the Public Trustee of New South Wales.³⁴⁴

UNCERTAINTY

4.168 The Trustee Corporations Association of Australia considered that the enlargement of the circumstances in which the court may pass over a named executor would create uncertainty:³⁴⁵

on the death of a testator there would be complete uncertainty as to who would be executor, because of the wide powers given by the draft section to remove the executor.

4.169 The Queensland Law Society was also of the view that the proposal would create uncertainty.³⁴⁶

OTHER CONCERNS

4.170 The Public Trustee of Queensland suggested that, if appointments of executors could be overridden, 'citizens may lose faith in the integrity of testamentary instruments and appointments made thereunder, and may well question the wisdom of outlaying the time and expense involved in making a will'.³⁴⁷

4.171 Several respondents who were opposed to the National Committee's proposal queried how particular aspects of the draft provision would operate.

³⁴³ Submission 10.

³⁴⁴ Submissions 4, 5, 6, 7, 8, 10, 11.

³⁴⁵ Submission 6. This submission was endorsed by the Queensland State Council of the Trustee Corporations Association of Australia: Submission 7.

³⁴⁶ Submission 8.

³⁴⁷ Submission 5.

4.172 The Trustee Corporations Association of Australia noted that the draft provision was silent about who may make an application to pass over the executor.³⁴⁸

is it confined to beneficiaries or could an application be made by a non-beneficiary eg the parent of an infant beneficiary?

4.173 The New South Wales Law Society queried whether the person who was to be appointed in substitution for the named executor would be required to consent.³⁴⁹

Submissions in support of the National Committee's proposal

4.174 The National Committee's proposal was supported by the Bar Association of Queensland, the National Council of Women of Queensland and the ACT Law Society.³⁵⁰ The National Council of Women of Queensland was of the view that, where all the beneficiaries had legal capacity and were of the one mind, the court should generally act in accordance with the wishes of the beneficiaries.

4.175 The New South Wales Law Society also expressed some support for the National Committee's draft provision, but only in so far as the circumstances in which the court may pass over the executor are those stated in paragraphs (a) and (b) of subsection (1) of the proposed draft provision. It considered, however, that the National Committee's proposal could be seen to 'encourage rather than discourage litigation in estates'.³⁵¹

4.176 Although the ACT Law Society supported the National Committee's proposal, it doubted whether, in practice, the proposed provision would be of much use. It suggested that, in its experience, beneficiaries become 'outraged by the costs of a professional trustee during the administration of the estate', by which time the ability to remove the executor is limited.³⁵²

4.177 In this respect, the National Committee received a submission that referred to the cost of having an estate administered by a trustee company. This respondent explained that, following his father's death, his father's estate was administered by a trustee company that charged almost \$9000. He noted that, under Queensland trustee legislation, a trustee company can charge up to 5 per cent of the value of the estate.³⁵³ He advised that he had been informed

348 Submission 6. This submission was endorsed by the Queensland State Council of the Trustee Corporations Association of Australia: Submission 7.

349 Submission 15.

350 Submissions 1, 3, 14.

351 Submission 15.

352 Submission 14.

353 See *Trustee Companies Act 1968* (Qld) s 41(1). This provision also enables trustee companies to charge up to 6 per cent commission on the income received by the trustee company on account of the estate.

that a lawyer's professional fees for undertaking the administration of the estate would have been approximately \$800. The respondent queried whether there was some way that 'older surviving widows can be advised of these costs and traps, or helped to avoid them'.³⁵⁴

The National Committee's view

4.178 In the National Committee's view, the model legislation should achieve three objectives in relation to the appointment of personal representatives. It should:

- ensure that the court's jurisdiction to make a grant is conferred in the broadest possible terms;
- specify the ordinary circumstances in which the court may grant letters of administration; and
- ensure that the court's power, in an appropriate case, to pass over a person who would otherwise be entitled to a grant and to make a grant to a person who would not otherwise be entitled is conferred in sufficiently broad terms.

Jurisdiction to grant probate and letters of administration

4.179 It is important for the model legislation to confer on the court, in the broadest possible terms, the jurisdiction to make a grant. In Chapter 3 of this Report, the National Committee has recommended that the model legislation should include provisions to the effect of section 6 of the *Succession Act 1981* (Qld). The model provision that is based on section 6(1) confers on the court a very broad jurisdiction in relation to the making of grants, which is supplemented by the model provision that is based on section 6(4).

Grant of letters of administration in ordinary circumstances

4.180 Although section 6(1) of the *Succession Act 1981* (Qld) confers a very broad discretion on the court with respect to the making of grants, it does not set out the circumstances in which it will ordinarily be necessary for the court to grant letters of administration. For the assistance of lay personal representatives, the model legislation should include a separate provision that specifies the usual circumstances in which the court may grant letters of administration.

4.181 The model provision should generally be based on section 74 of the *Probate and Administration Act 1898* (NSW), but should omit the circumstance referred to in section 74(c)(ii) of that Act that the executor appointed by the will is resident out of the jurisdiction. As the National Committee commented in the

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Submission 16.

Discussion Paper, that circumstance is no longer appropriate as a ground for appointing an administrator.³⁵⁵

4.182 Further, as the National Committee has recommended in Chapter 9 of this Report that administration bonds and sureties be abolished, the model provision should not provide, as section 74 of the *Probate and Administration Act 1898* (NSW) does, that the court may direct the appointed person to give security.

4.183 Accordingly, the model provision should apply where a person dies:

- intestate;
- leaving a will, but without having appointed an executor; or
- leaving a will and having appointed an executor or executors, if the executor, or if more than one executor is appointed, each of the executors either:
 - renounces his or her executorship of the will; or
 - lacks legal capacity to act as executor; or
 - is not willing to act.

4.184 As the model provision that is based on section 6(3) of the *Succession Act 1981* (Qld) provides that a grant may be made to such person and subject to any conditions or limitations that the court considers appropriate,³⁵⁶ the model provision that is based on section 74 of the *Probate and Administration Act 1898* (NSW) need not repeat those matters, but can be confined to specifying the circumstances in which the court may grant letters of administration.

The power to pass over a person who would otherwise be entitled to a grant: a general power

4.185 Although section 6(3) of the *Succession Act 1981* (Qld), which enables the court to appoint such person as the court may think fit, is expressed in very broad terms, the National Committee notes that it has been held not to confer on the court as broad a jurisdiction as section 116 of the *Supreme Court Act 1981* (UK).³⁵⁷ Section 116 of the latter Act enables the court to pass over a person who would otherwise be entitled to a grant and to appoint some other

³⁵⁵ *Administration of Estates Discussion Paper* (1999) QLRC 29; NSWLRC [5.12].

³⁵⁶ See Administration of Estates Bill 2009 cl 303.

³⁵⁷ See [4.126] above.

person if it appears, by reason of any special circumstances, necessary or expedient to do so.³⁵⁸

4.186 In the National Committee's view, the model provision that is based on section 6(3) of the *Succession Act 1981* (Qld) should therefore be supplemented by a specific provision to give the court the power, in appropriate circumstances, to pass over a person with a prior claim to a grant and to make a grant to a person who would not otherwise be entitled. However, the court's power should not be limited by the need for 'special circumstances' to be established, as that requirement has the potential to be construed in a restrictive manner.

4.187 In the Discussion Paper, the National Committee proposed that the court should be able to pass over a named executor where there are grounds for believing that a grant of probate to the executor is likely to prejudice the due and proper administration of the estate or the interests of the persons who are, or who may be, interested in the estate.³⁵⁹ In the National Committee's view, the model provision should not be confined to passing over a named executor, but should also enable the court to pass over a person who would otherwise be entitled to letters of administration.

4.188 The court's power to pass over a person who would otherwise be entitled to a grant should be based on a modified form of the principle enunciated in *In the Goods of Loveday*.³⁶⁰ The Court held in that case that the overriding principle when deciding whether to revoke a grant was 'the due and proper administration of the estate and the interests of the parties beneficially entitled thereto'. In the National Committee's view, the court should have the power, on application, to pass over a person who would otherwise be entitled to a grant if it is appropriate for the due and proper administration of the estate and in the interests of the persons who are, or who may be, interested in the estate — that is, beneficiaries or, where an estate is, or becomes, insolvent, creditors. That formulation is preferred to the one used in *Loveday* as it is clearer that, in the case of an insolvent estate, a creditor would be a person with an interest in the estate, even though the creditor might not be 'beneficially entitled' to the estate.

4.189 In these circumstances the court should be able, on application, to make a grant to:

³⁵⁸ Section 116 of the *Supreme Court Act 1981* (UK) is set out at note 299 above. Section 13(b) of the *Administration and Probate Act 1935* (Tas) is expressed in similar terms, and provides that the court may do so if, 'by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient'.

³⁵⁹ See [4.140]–[4.142] above.

³⁶⁰ [1900] P 154, 156 (Jeune P), which is considered at [4.118] above.

- without limiting the following paragraph, if more than one person is entitled to the grant — any or all of the other persons entitled;³⁶¹ or
- any person the court considers appropriate.

The power to pass over a person in specific circumstances

4.190 Without limiting the court's general power to pass over a person who would otherwise be entitled to a grant, the model legislation should also confer a power to pass over a person in the specific situations considered below.

Where the person committed an offence relating to the deceased's death

4.191 The first situation is where there are grounds for believing that the person who would otherwise be entitled to the grant has committed an offence relating to the deceased's death. In the Discussion Paper, the National Committee framed this proposal in terms of an *executor* who had committed an offence relating to the *testator's* death.³⁶² However, the National Committee considers that this ground is just as relevant where the person, although not named as executor, is nevertheless a person who would otherwise be entitled to letters of administration of the deceased's estate.

4.192 The model legislation should therefore provide that, in these circumstances, the court may, on application make a grant to:

- without limiting the following paragraph, if more than one person is entitled to the grant — any or all of the other persons entitled;³⁶³ or
- any person the court considers appropriate.

Where all the beneficiaries under the will are adults and they agree that an executor or one of the executors should be passed over

4.193 In the following situation, where all the beneficiaries under a deceased person's will are adults, the court should be able to pass over the named executor and make a grant in accordance with the wishes of the beneficiaries.

4.194 The model legislation should provide that the court may, on application, pass over a named executor if all the beneficiaries under a deceased person's will are adults and agree that:

- without limiting the following paragraph, if there is more than one executor named in the will — probate of the deceased person's will

361 The appropriate grant will be a grant of probate if the other person or persons entitled are named as executors in the deceased's will; otherwise the appropriate grant will be a grant of letters of administration.

362 See [4.141] above.

363 The appropriate grant will be a grant of probate if the other person or persons entitled are named as executors in the deceased's will; otherwise the appropriate grant will be a grant of letters of administration.

should be granted to one or more of the executors nominated by the beneficiaries, but not all of the executors;³⁶⁴ or

- letters of administration should be granted to a nominated person other than the executor or executors.

4.195 The model legislation should further provide that in these circumstances the court may pass over the named executor and, in accordance with the wishes of the beneficiaries:

- if the executor is named in the will as one of two or more executors — grant probate of the will to the other executor or executors named in the will; or
- grant letters of administration with the will annexed to the person nominated by the beneficiaries.

4.196 If one or more of the beneficiaries under the will lack legal capacity, it should still be possible for the court to pass over a named executor. However, the model legislation should ensure that the interests of those beneficiaries who lack legal capacity are represented by a substitute decision-maker who is not also one of the beneficiaries.

4.197 Accordingly, the model legislation should provide that, if a beneficiary of an estate lacks legal capacity to enter into the agreement, a reference to the beneficiary is taken to be a reference to a person, other than a person who is also a beneficiary of the estate, who has lawful authority, including under a law of another State or Territory, to make binding decisions for the beneficiary for the agreement.³⁶⁵

4.198 Although this proposal will have the effect of overriding the wishes of a testator, the National Committee is of the view that, in these circumstances, the appointment of an administrator, or of only one or some of the named executors, may actually result in a more harmonious administration than where the beneficiaries are hostile to the executor.

4.199 It is important to note that the model provision will not apply if:

- one or more of the beneficiaries is a minor; or

³⁶⁴ For provisions giving beneficiaries a direct role in the appointment and retirement of trustees, see *Trusts of Land and Appointment of Trustees Act 1996* (UK) ss 19–21.

³⁶⁵ See, for example, *Powers of Attorney Act 2006* (ACT) ss 10, 13(2); *Guardianship and Management of Property Act 1991* (ACT) s 8; *Powers of Attorney Act 2003* (NSW) ss 21, 43; *Guardianship Act 1987* (NSW) ss 25E, 25M; *Protected Estates Act 1983* (NSW) s 24(2)(m); *Powers of Attorney Act* (NT) s 13; *Powers of Attorney Act 1998* (Qld) ss 32, 69; *Guardianship and Administration Act 2000* (Qld) ss 12, 33(2), sch 2, pt 1; *Powers of Attorney and Agency Act 1984* (SA) s 6; *Aged and Infirm Persons' Property Act 1940* (SA) ss 10, 13(2); *Guardianship and Administration Act 1993* (SA) ss 35, 39; *Powers of Attorney Act 2000* (Tas) ss 30, 31; *Guardianship and Administration Act 1995* (Tas) ss 51, 56; *Instruments Act 1958* (Vic) ss 115, 125E; *Guardianship and Administration Act 1986* (Vic) ss 46, 48; *Guardianship and Administration Act 1990* (WA) ss 64, 69, 104.

- one or more of the beneficiaries is an adult who lacks legal capacity for the decision and does not have a substitute decision-maker for the agreement; or
- any of the adult beneficiaries who have legal capacity, or any of the substitute decision-makers for adult beneficiaries who lack legal capacity, does not agree as to who should be appointed as administrator instead of the named executor or as to which of the named executors should be granted probate.

4.200 In these situations, it must be assumed that the testator has chosen the executor with a view to protecting the interests of all the beneficiaries.

4.201 This proposal, which gives paramount effect to the wishes of the beneficiaries, is premised on the solvency of the estate. Where an estate is insolvent, however, the wishes of the beneficiaries regarding the identity of the personal representative will not be relevant. It is therefore important that the operation of this provision should be limited, as far as possible, to estates that are solvent. The practical difficulty in framing the appropriate limitation is that the financial position of an estate may not be known at the time the application to pass over is made, and it may not be reasonable to require the beneficiaries to swear to the solvency of the estate. In the National Committee's view, the model legislation should provide that, on an application to pass over the named executor, made with the agreement of the beneficiaries, the court may not make the grant of probate under the provision unless it is satisfied that the applicant for the grant, or someone else with relevant knowledge, reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate. This requirement should be included in the model legislation.

4.202 The model legislation should not require the court to take into account any reasons given by the testator for nominating a particular executor. If such a requirement is imposed, it then becomes necessary to prescribe the manner in which reasons may be made. In the absence of any provision, it is open to the court, in the exercise of its discretion, to have regard to any admissible evidence regarding the testator's reasons.

4.203 Although the National Committee proposed in the Discussion Paper that the court should be able to pass over an executor if there were grounds for believing that the grant to the executor would lead to unnecessary expense,³⁶⁶ the National Committee is now of the view that the model legislation should not include that ground. The term 'unnecessary expense' is not sufficiently precise and the inclusion of a ground based on that term has the potential to result in litigation about whether the expense that would result from the appointment of a particular executor (especially a professional executor) is necessary or not.

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See [4.141] above, paragraph (1)(b) of the draft provision.

Where all the intestacy beneficiaries are adults and they agree that a grant should be made to a person other than the person or all of the persons otherwise entitled

4.204 The provision recommended above will apply where all the beneficiaries under a will are adults and they, or their relevant substitute decision-makers, agree that the court should make a grant to a nominated person other than the executor named in the will or to only some of the executors named in the will.

4.205 The National Committee has considered whether that provision should be framed more generally so that it would apply not only in the case of beneficiaries under a will, but also in the case of intestacy beneficiaries. In the latter case, the provision would have a slightly different operation as the order of priority for a grant on intestacy generally confers entitlement to a grant on the intestacy beneficiaries, according to their interest in the estate.³⁶⁷ Consequently, for the extended provision to apply, one or more of the intestacy beneficiaries would usually have to agree that the grant should be made to some person other than themselves.

4.206 However, the National Committee can envisage circumstances in which it would be desirable for the court to have an express power to grant administration to a person nominated by the adult intestacy beneficiaries. There has historically been some reluctance, at least in the absence of special circumstances, to grant letters of administration to a 'stranger' to the estate.³⁶⁸ In Chapter 3 of this Report, the National Committee has recommended a provision giving the court a very broad discretion as to the person to whom a grant may be made. Although the exercise of the court's discretion should not be constrained by those earlier decisions, it is nevertheless desirable that, where all the beneficiaries are adults and they agree that a grant should be made to a person or persons, other than all the persons who would otherwise be entitled to a grant, or to another nominated person, it is clear that the court may grant administration to the other person or persons or the nominated person.

4.207 Earlier in this chapter, the National Committee has recommended that the court should have the power to pass over a person who would otherwise be entitled to a grant if it is appropriate for the due and proper administration of the estate and in the interests of the persons who are, or who may be, interested in the estate.³⁶⁹ That recommendation gives statutory effect to the principle in *In*

³⁶⁷ The National Committee's recommendations about the order of priority for letters of administration on intestacy are set out in Chapter 5 of this Report.

³⁶⁸ See *Re McCormack* (1902) 2 SR (NSW) B & P 48, where the Supreme Court of New South Wales held that the consent of the beneficiaries was not a special circumstance that would justify making a grant to a person nominated by the beneficiaries. See also *Re Chave* (1930) 30 SR (NSW) 180, where the Supreme Court of New South Wales refused an application for a grant of administration by the intestate's father, even though the intestate's widow, who was the sole intestacy beneficiary, consented to the application and was willing to file a renunciation.

³⁶⁹ See [4.185]–[4.189] above.

the Goods of Loveday.³⁷⁰ An extension of the earlier proposal so that it also applies to intestate estates will make it clear that (subject to the requirements of the provision), if all the beneficiaries agree that a grant should be made to a person other than the person, or all of the persons, who would otherwise be entitled to a grant, it is not necessary for the court to be satisfied of the matters referred to in the earlier recommendation that gives effect to the principle in *In the Goods of Loveday*.

4.208 For these reasons, the proposal made above to enable the court to pass over one or more of the named executors and to make a grant to some of the executors or to another person nominated by the beneficiaries should be extended to apply not only to the beneficiaries under a will, but also to intestacy beneficiaries. The extended provision should include the same provisions proposed earlier in relation to:

- adult beneficiaries who lack legal capacity; and
- the requirement that the court is satisfied that the applicant for the grant, or someone else with relevant knowledge, reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate.

4.209 The extended provision will also maintain consistency with the recommendations in Chapter 7 that enable the court to grant letters of administration of a deceased person's unadministered estate to a person nominated by the beneficiaries (provided all the beneficiaries are adults and agree that such a grant should be made), and thereby displace the executor or administrator by representation of the will or estate of the deceased person.³⁷¹

SPECIFIC TYPES OF LIMITED AND SPECIAL GRANTS

Introduction

4.210 In Chapter 3 of this Report, the National Committee has recommended that the model provisions dealing with the court's jurisdiction to make a grant should be based on section 6 of the *Succession Act 1981* (Qld).³⁷² As noted in that chapter, section 6 of the Queensland legislation gives the court a very broad jurisdiction to make grants. Further, section 6(3) of the *Succession Act 1981* (Qld) provides for the making of limited grants:

370 [1900] P 154.

371 See Recommendations 7-12 to 7-14 below.

372 See Recommendation 3-1 above.

6 Jurisdiction

...

- (3) A grant may be made to such person and subject to such provisions, including conditions or limitations, as the court may think fit.

4.211 In its 1978 Report, which led to the enactment of the *Succession Act 1981* (Qld), the Queensland Law Reform Commission explained that, as a result of the enactment of the proposed section 6, many provisions dealing with 'small matters of jurisdiction' could 'properly be dropped from the legislation'.³⁷³ The Commission stated:³⁷⁴

This is not because it is desired to reduce the Court's jurisdiction, but because it [section 6] seems sufficient to express all the former jurisdictions exercised by the Court and deriving from a multiplicity of sources for historical reasons in one brief, all-embracing provision. Furthermore, we are satisfied that in a number of cases these provisions would, in a modern legislative scheme, be found in subordinate legislation and not in the statute itself. We believe that the best place for most of the provisions which we recommend should be repealed, if it is desired to state them directly, is in the Rules of the Supreme Court.

4.212 In view of the National Committee's decision that the model legislation should include provisions to the effect of section 6 of the *Succession Act 1981* (Qld), the issue arises as to whether the model legislation should, in addition, include any provisions dealing with the making of particular types of limited or special grants.

4.213 In the Discussion Paper, the National Committee considered specifically whether provisions dealing with the appointment and powers of an administrator during the minority of a sole executor should be included in the model legislation.³⁷⁵ The National Committee also raised the broader question of whether the different types of letters of administration should be set out in the model legislation.³⁷⁶ These issues are considered below.

Administration during the minority of the person entitled

Background

4.214 If the executor appointed by a will is a minor, or if the person entitled to letters of administration of an estate is a minor,³⁷⁷ the court may not make a grant to the minor. Instead, the court will grant letters of administration *durante*

³⁷³ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 5.

³⁷⁴ Ibid.

³⁷⁵ *Administration of Estates Discussion Paper* (1999) QLRC 20–21; NSWLRC [3.22]–[3.25].

³⁷⁶ Ibid, QLRC 19; NSWLRC [3.17]–[3.21].

³⁷⁷ The order of priority for letters of administration is considered in Chapter 5 of this Report.

minore aetate (during minority) to an adult for the use and benefit of the minor. Such a grant is effective until the minor attains his or her majority.³⁷⁸

4.215 Historically, a distinction was drawn between the appointment of an administrator during the minority of an executor (*durante minore aetate executoris*) and the appointment of an administrator during the minority of an administrator (*durante minore aetate administratoris*). Whereas administration during the minority of an executor ceased when the executor attained the age of 17 years, administration during the minority of a person who was entitled to letters of administration on intestacy did not cease until the person attained the age of 21 years.³⁷⁹

4.216 This was the case until 1798, when legislation was passed to assimilate 'administration *durante minore aetate executoris* ... in all particulars to administration *durante minore aetate administratoris*'.³⁸⁰ The statute 38 George III c 87³⁸¹ raised the age at which a minor could obtain a grant of probate from 17 to 21 years of age and assimilated the powers of the two types of administrators. Sections 6 and 7 of that Act provided:

6. 'And whereas Inconveniences arise from granting Probate to Infants under the Age of twenty-one;' be it enacted, That where an Infant is sole Executor, Administration, with the Will annexed, shall be granted to the Guardian of such Infant, or to such other Person as the Spiritual Court shall think fit, until such Infant shall have attained the full Age of twenty-one Years, at which Period, and not before, Probate of the Will shall be granted to him.
7. And be it enacted, That the Person to whom such Administration shall be granted, shall have the same Powers vested in him as an Administrator now hath by virtue of an Administration granted to him *durante minore aetate* of the next of Kin.³⁸² (note added)

Existing legislative provisions and court rules

Australian Capital Territory, New South Wales, Northern Territory, Tasmania, Victoria, Western Australia

4.217 The legislation in the ACT, New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia includes a provision that provides for

³⁷⁸ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.250].

³⁷⁹ *Atkinson v Cornish* (1699) 1 Ld Raym 338; 91 ER 1121; *Freke v Thomas* (1702) 1 Ld Raym 667; 91 ER 1344.

³⁸⁰ R Campbell, *Ruling Cases* (1894) vol II, 118.

³⁸¹ *An Act for the Administration of Assets in Cases where the Executor to whom Probate has been granted is out of the Realm*.

³⁸² An administrator during the minority of the deceased's next of kin has the powers of an ordinary administrator (*Re Cope*; *Cope v Cope* (1880) 16 Ch D 49, 52 (Jessel MR)):

The limit to his administration is no doubt the minority of the person, but there is no other limit. He is an ordinary administrator: he is appointed for the very purpose of getting in the estate, paying the debts, and selling the estate in the usual way; and the property vests in him.

the appointment of an administrator during the minority of a sole executor.³⁸³ These provisions are based on section 6 of the 1798 legislation set out above, except that they reflect the current age of majority. The New South Wales provision, which is typical, provides:

70 Minority of sole executor

Where a minor is sole executor, administration with the will annexed may be granted to:

- (a) a guardian of the person or of the estate of the minor,³⁸⁴ or
- (b) such other person as the Court thinks fit,

until the minor attains the age of eighteen years, with full or limited powers to act in the premises until probate is granted to the executor or administration is granted to some other person. (note added)

4.218 The obvious limitation of these provisions is that they apply only where a minor is a sole executor. They do not apply where, for example, a minor has been appointed as executor, but not the sole executor, and the other executor is incapable of applying for probate³⁸⁵ or where the minor would, apart from his or her minority, be entitled to letters of administration on intestacy.

4.219 However, the rules in these jurisdictions are framed more generally and provide that the court may grant administration during minority to the guardian of a child, subject to such limitations and conditions as the court thinks fit.³⁸⁶

4.220 The legislation in the ACT, New South Wales, the Northern Territory and Western Australia includes an additional provision, based on section 7 of the 1798 legislation set out above, that assimilates the powers of an administrator during the minority of a sole executor with those of an

³⁸³ *Administration and Probate Act 1929* (ACT) s 21(1); *Probate and Administration Act 1898* (NSW) s 70; *Administration and Probate Act* (NT) s 30(1); *Administration and Probate Act 1935* (Tas) s 23(1); *Administration and Probate Act 1958* (Vic) s 26(1); *Administration Act 1903* (WA) s 33(1).

³⁸⁴ See note 386 below.

³⁸⁵ See, for example, *In the Will of Nicol* (1926) 43 WN (NSW) 146, where an application for letters of administration during minority was made by the guardian of a minor who was named in a will as one of two executors (the other executor lacking capacity by reason of mental illness). The Court granted the application, but noted that s 70 of the *Probate and Administration Act 1898* (NSW) did not apply as the minor was not the sole executor.

³⁸⁶ *Court Procedures Rules 2006* (ACT) r 3116; *Supreme Court Rules 1970* (NSW) Pt 78 r 29; *Supreme Court Rules* (NT) r 88.28; *Probate Rules 1936* (Tas) r 43; *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 5.01; *Non-contentious Probate Rules 1967* (WA) r 26(1).

With the exception of the ACT, the rules in these jurisdictions also provide for the election of a guardian by the minor and for the assignment of a guardian by the court: *Supreme Court Rules 1970* (NSW) Pt 78 rr 30, 31 (child of 16 or over may elect guardian); *Supreme Court Rules* (NT) r 88.29 (child of 16 or over may elect guardian); *Probate Rules 1936* (Tas) r 43 (child of 7 or over may elect guardian); *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 5.01 (child of 12 or over may elect guardian); *Non-contentious Probate Rules 1967* (WA) r 26(2) (child above the age of 14 may elect guardian).

administrator during the minority of the next of kin of an intestate.³⁸⁷ The New South Wales provision is in the following terms:

71 Who shall have the same power as where administration is granted durante minore aetate of the next of kin

The person to whom such administration is granted shall have the same powers vested in the person as an administrator by virtue of an administration granted to the person durante minore aetate of the next of kin.

4.221 Although section 71 of the *Probate and Administration Act 1898* (NSW) and its counterparts in the Territories assimilate the powers of an administrator during the minority of a sole executor with those of an administrator during the minority of the deceased's next of kin, they do not specify what the powers of the latter are.

4.222 In contrast, section 33(2) of the *Administration Act 1903* (WA), which deals with the powers of an administrator appointed during the minority of a sole executor, reflects the fact that an administrator during the minority of the deceased's next of kin has the powers of an ordinary administrator with the will annexed.³⁸⁸ It provides:

33 Where infant is executor, etc

...

- (2) The person to whom such administration is granted shall, unless otherwise ordered, have the same powers vested in him as any ordinary administrator with the will annexed.

4.223 When the Law Reform Commission of Western Australia reviewed that jurisdiction's administration legislation, it recommended that the current provision dealing with the appointment and powers of an administrator during the minority of a sole executor be omitted from the legislation and relocated in the rules of court.³⁸⁹ The Commission considered that 'a modern Administration Act should not exhibit the present mishmash of jurisdictional provisions, but should contain only a few broad and facilitative provisions of this kind'.³⁹⁰

³⁸⁷ *Administration and Probate Act 1929* (ACT) s 21(2); *Probate and Administration Act 1898* (NSW) s 71; *Administration and Probate Act* (NT) s 30(2); *Administration Act 1903* (WA) s 33(2).

³⁸⁸ See note 382 above.

³⁸⁹ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.35] (referring to a number of provisions, including s 33 of the *Administration Act 1903* (WA)).

³⁹⁰ *Ibid* [3.35]. The Law Reform Commission of Western Australia considered that s 6 of the *Succession Act 1981* (Qld) was a suitable model for a jurisdictional provision, and recommended the adoption of a provision to that effect: at [3.35].

Queensland

4.224 Queensland used to have statutory provisions similar to sections 70 and 71 of the *Probate and Administration Act 1898* (NSW). However, the relevant provisions were repealed when the *Succession Act 1981* (Qld) commenced.³⁹¹ The repeal of those provisions gave effect to a recommendation of the Queensland Law Reform Commission that:³⁹²

A further attraction of this provision [section 6 of the *Succession Act 1981* (Qld)] is that it eliminates some twelve or perhaps more sections from the existing legislation, some of which (eg sections 22 to 29 of the *Probate Act*), derive from as long ago as the English *Administration of Estates Act, 1798*.

4.225 The relevant provision is now contained in the *Uniform Civil Procedure Rules 1999* (Qld). However, rule 639 is not limited to the situation where a minor is the sole executor of a will. It also provides for the appointment of an administrator if the minor would be entitled to letters of administration on intestacy.³⁹³

639 Grants to young persons

- (1) This rule applies if a young person—
 - (a) is the sole executor of a will; or
 - (b) would be entitled to a grant of administration on intestacy.
- (2) The court may grant administration with the will or administration on intestacy to a young person's guardian or someone else the court considers appropriate until the young person becomes an adult.
- (3) When the young person is an adult, the court may, on the person's application, grant administration with the will or administration on intestacy to the person.

4.226 Because of the terms in which rule 639(1)(a) is expressed, the rule does not apply if a minor is one of two executors, but the co-executor, although an adult, is incapable of applying for a grant.³⁹⁴

South Australia

4.227 In South Australia, there is no statutory provision dealing with the appointment of an administrator during the minority of a sole executor. The relevant provision is found in the rules, and applies not only where a minor is a

³⁹¹ *Probate Act 1867* (Qld) ss 28–29, repealed by the *Succession Act 1981* (Qld) s 3, sch 1.

³⁹² Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 5.

³⁹³ *Court Procedures Rules 2006* (ACT) r 3116 is in similar terms. Unlike the rules in the other jurisdictions (see note 386 above and [4.227] below), the Queensland and ACT rules do not provide that a young person of a particular age may appoint a guardian.

³⁹⁴ See *In the Will of Nicol* (1926) 43 WN (NSW) 146, which is discussed at note 385 above.

sole executor, but in any circumstance where a minor would, apart from his or her minority, be entitled to a grant.³⁹⁵ Rule 42 of *The Probate Rules 2004* (SA) provides:

42 Grants of administration to guardians on behalf of minors

- 42.01 Where the person to whom a grant would otherwise be made is a minor, administration for the minor's use and benefit until the minor attains the age of eighteen years shall, subject to Rules 42.03 and 42.04 be granted—
- (a) to both parents of the minor jointly or to one parent with the consent of the other or to the statutory or testamentary guardian or any guardian appointed by a Court of competent jurisdiction, or
 - (b) if there is no such guardian able and willing to act and the minor has attained the age of sixteen years, to any next of kin elected by the minor or, where the minor is married, to any such next of kin, or to the husband or wife of the minor if elected by her or him.
- 42.02 Any person elected under Rule 42.01(b) may represent any other minor whose next of kin he or she is, being a minor below the age of sixteen years and entitled in the same degree as the minor who made the election.
- 42.03 Notwithstanding anything in Rule 42, administration for the use and benefit of the minor until the minor attains the age of eighteen years may be granted to any person assigned as guardian by order of the Registrar, in default of, or jointly with, or to the exclusion of, any such person as is mentioned in Rule 42.01 and such an order may be made on application by the intended guardian, who shall file an affidavit in support of the application and, if required by the Registrar, an affidavit of fitness sworn by a responsible person.
- 42.04 Where a minor who is sole executor has no interest in the residuary estate of the deceased, administration for the use and benefit of the minor until the minor attains the age of eighteen years, shall be granted to the person entitled to the residuary estate unless the interest of such person is adverse to that of the minor or the Registrar otherwise directs.
- 42.05 A minor's right to administration may be renounced only by a person assigned as guardian under Rule 42.03 and authorised to renounce by the Registrar.

Discussion Paper

4.228 In the Discussion Paper, the National Committee expressed the view that section 6 of the *Succession Act 1981* (Qld), which the National Committee had proposed be included in the model legislation, was wide enough to cover

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See also *The Probate Rules 2004* (SA) r 43, which applies to grants where the minor has one or more co-executors who are not under a disability.

the appointment of an administrator during the minority of a sole executor.³⁹⁶ It therefore proposed that it was not necessary for the model legislation to include provisions to the effect of sections 70 and 71 of the *Probate and Administration Act 1898* (NSW).³⁹⁷

4.229 However, the National Committee suggested that the model provision based on section 6 of the *Succession Act 1981* (Qld) should include a footnote referring to the matters dealt with by sections 70 and 71 of the *Probate and Administration Act 1898* (NSW) in order to exemplify the kinds of powers conferred on the court by the model provision.³⁹⁸ The National Committee acknowledged, however, that different jurisdictions may need to adopt the most appropriate method of achieving the same result according to the drafting style of their own Parliamentary Counsel.

Submissions

4.230 The National Committee's proposal not to include provisions to the effect of sections 70 and 71 of the *Probate and Administration Act 1898* (NSW), but to add a footnote to the model provision dealing with the court's jurisdiction, was specifically supported by the Bar Association of Queensland, the Public Trustee of New South Wales and the New South Wales Law Society.³⁹⁹

4.231 The Queensland Law Society and an academic expert in succession law were in broad agreement with the National Committee's proposal, suggesting that the matters that are dealt with in sections 70 and 71 of the *Probate and Administration Act 1898* (NSW) should be dealt with in court rules.⁴⁰⁰

4.232 Two respondents disagreed with the National Committee's proposal. The National Council of Women of Queensland argued that a footnote would have little value in clarifying the situation, and that 'the general rule should stand as it is clear in its intention'.⁴⁰¹ The ACT Law Society commented that the proposal was 'likely to impede rather than facilitate practice in the administration of estates'.⁴⁰²

The National Committee's view

4.233 In light of the broad jurisdiction conferred on the court by the inclusion in the model legislation of provisions to the effect of section 6 of the *Succession*

396 *Administration of Estates Discussion Paper* (1999) QLRC 21; NSWLRC [3.25].

397 *Ibid.*, QLRC 21; NSWLRC 31 (Proposal 5).

398 *Ibid.*

399 Submissions 1, 11, 15.

400 Submissions 8, 12.

401 Submission 3.

402 Submission 14.

Act 1981 (Qld), the National Committee is of the view that it is not necessary for the model legislation to include a provision dealing with the appointment of an administrator where a minor is the sole executor under a will. The National Committee considers it more appropriate for jurisdictions to deal with particular types of limited grants in their court rules. In this respect, it notes that all jurisdictions presently provide in their court rules for the appointment of an administrator where a minor would, apart from his or her minority, be entitled to a grant.⁴⁰³

4.234 Although it is desirable for the model legislation to provide expressly that a grant may not be made to an individual who has not attained the age of 18 years, the National Committee considers that that should be done in a provision dealing with the making of grants generally,⁴⁰⁴ rather than in a provision that applies only if the minor is named as the sole executor and that simply empowers the court to make a limited grant in those circumstances.

4.235 Accordingly, the model legislation should not include provisions to the effect of sections 70 or 71 of the *Probate and Administration Act 1898* (NSW) or any other provisions dealing the appointment of an administrator during the minority of a person who would, but for his or her minority, be entitled to a grant.

Other types of special or limited grants

4.236 In addition to grants of letters of administration during minority, there are a number of other limited grants that may be made for particular purposes.⁴⁰⁵

4.237 In Queensland, the court has jurisdiction under section 6 of the *Succession Act 1981* (Qld) to make all manner of limited and special grants, although some grants are also the subject of particular rules.

4.238 In the other Australian jurisdictions, although there are specific statutory provisions for some types of limited or special grants, some are dealt with only in the rules and for many types there is no specific statutory provision or rule. The grants are simply made under the court's general jurisdiction to grant probate of the will of a deceased person and letters of administration of the estate of a deceased person.⁴⁰⁶

403 See [4.219], [4.225], [4.227] above.

404 See the discussion of this issue at [4.272]–[4.275] below.

405 The various types of grants that may be made are discussed at [4.239]–[4.261] below.

406 'Administration' is defined in these jurisdictions to include (in South Australia, Tasmania and Victoria, to mean) all letters of administration of the real and personal estate of deceased persons whether with or without the will annexed and whether granted for general, special, or limited purposes (emphasis added): *Administration and Probate Act 1929* (ACT) s 2, dictionary; *Probate and Administration Act 1898* (NSW) s 3; *Administration and Probate Act* (NT) s 6(1); *Administration and Probate Act 1919* (SA) s 4; *Administration and Probate Act 1935* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration Act 1903* (WA) s 3.

Existing legislative provisions and court rules

4.239 In deciding whether the model legislation should refer to the different types of grants that may be made, it is useful to consider the extent to which particular limited grants are presently provided for in either the legislation or court rules of the various jurisdictions. The grants for which specific provision is made are discussed below.

Administration to attorney of person entitled

4.240 The legislation in all Australian jurisdictions except Queensland and Victoria provides expressly that the court may grant administration to the attorney of a person who is entitled to probate or administration, but who is not resident within the jurisdiction.⁴⁰⁷ The ACT provision, which is typical, provides, in part:⁴⁰⁸

22 Administration under power of attorney

- (1) If a person entitled to probate or administration of a deceased estate is out of the jurisdiction, and has appointed a person within the jurisdiction under a power of attorney to exercise that entitlement, the Supreme Court may grant administration to the attorney on behalf of the entitled person on the terms the court considers appropriate.

4.241 When the Law Reform Commission of Western Australia reviewed that jurisdiction's administration legislation, it recommended that the current provision dealing with grants of administration to the attorney of the person entitled be omitted from the legislation and relocated in the rules of court.⁴⁰⁹ That Commission was of the view that the current provision 'would fall within the ambit' of the new provision it had proposed conferring a very broad jurisdiction on the court to make grants.⁴¹⁰

4.242 In Queensland, the relevant provision is contained in the *Uniform Civil Procedure Rules 1999* (Qld). Rule 611 provides:

407

Administration and Probate Act 1929 (ACT) s 22(1); *Probate and Administration Act 1898* (NSW) s 72(1); *Administration and Probate Act* (NT) s 31(1); *Administration and Probate Act 1919* (SA) s 34; *Administration and Probate Act 1935* (Tas) s 17; *Administration Act 1903* (WA) 34. The Tasmanian provision is expressed to apply only where it is an executor who is not resident in Tasmania.

The ACT, New South Wales and Northern Territory provisions also provide that the grant continues in force notwithstanding the death of the donor of the power of attorney: *Administration and Probate Act 1929* (ACT) s 22(2); *Probate and Administration Act 1898* (NSW) s 72(2); *Administration and Probate Act* (NT) s 31(2). In the absence of a provision to this effect, such a grant lapses on the death of the donor of the power of attorney: *Re Maher* [1905] QWN 58.

408

Administration and Probate Act 1929 (ACT) s 22(1).

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Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.35] note 32 (referring to a number of provisions, including s 34 of the *Administration Act 1903* (WA)).

410

Ibid [3.35].

611 Grant to attorney of absent person or person without prior right

- (1) This rule applies if, apart from subrule (2), a person residing outside Queensland is entitled to a grant.
- (2) The court may, instead of making the grant to the person, make the grant to a person residing in Queensland who the court is satisfied may act under a power of attorney for the other person.
- (3) However, if the donor of the power later applies for a grant, the grant to the attorney ends.
- (4) The court may also make a grant to the donee of a power of attorney given by a person residing in Queensland who is entitled to a grant.

4.243 Under this rule, a grant may be made to the attorney of a person entitled to a grant not only where the person entitled is resident out of Queensland, but also where the person entitled resides in Queensland.⁴¹¹

4.244 In Victoria, there is no specific rule dealing with grants to the attorney of a person entitled. However, rule 5.02 of the *Supreme Court (Administration and Probate) Rules 2004* (Vic) provides:

5.02 Peculiar circumstances

An application for a grant of representation under peculiar circumstances not expressly referred to in these Rules shall, with any necessary modification, be made upon grounds and in circumstances and upon materials that have been previously acted upon by the Court.

Administration during absence of personal representative (in absentia)

4.245 The legislation in all Australian jurisdictions except Queensland provides expressly that, if at the end of a specified time from the deceased's death the executor to whom probate has been granted or the administrator is residing out of the jurisdiction, the court may grant special letters of administration of the estate of the deceased person.⁴¹² Section 26 of the *Administration and Probate Act 1929* (ACT), which is typical of these provisions, provides:

411

Uniform Civil Procedure Rules 1999 (Qld) r 611(1), (4). In *Re Dennis* [1993] 3 NZLR 86, the Court held that, under the relevant New Zealand rule, the Court would not grant administration to the attorney of the person entitled to the grant where the person so entitled was resident within the jurisdiction.

412

Administration and Probate Act 1929 (ACT) s 26 (6 months); *Probate and Administration Act 1898* (NSW) s 76 (6 months); *Administration and Probate Act* (NT) s 35 (6 months); *Administration and Probate Act 1919* (SA) s 37 (12 months); *Administration and Probate Act 1935* (Tas) s 21 (12 months); *Administration and Probate Act 1958* (Vic) s 24(1) (12 months); *Administration Act 1903* (WA) 38(1) (6 months).

The legislation in most of these jurisdictions also includes provisions dealing with the following: the matters about which the applicant must satisfy the court; the rescission of the grant on the application of an original executor or administrator who returns to the jurisdiction and applies to rescind the special grant of administration; the liability of the special administrator to account to the original executor or administrator; and the liability of the original executor or administrator. See *Administration and Probate Act 1929* (ACT) ss 27–30; *Probate and Administration Act 1898* (NSW) ss 77–80; *Administration and Probate Act* (NT) ss 36–39; *Administration and Probate Act 1919* (SA) ss 38–41; *Administration Act 1903* (WA) ss 38(2), 39, 40.

26 Issue of special letters of administration

If, at the end of 6 months from the death of any person, the executor to whom probate has been granted or the administrator is then residing out of the jurisdiction, the Supreme Court may, on the application of any creditor, legatee, or next of kin, grant to the creditor, legatee or next of kin so applying special letters of administration of the estate of the deceased person, nevertheless to cease on an order being made for the revocation of the grant of the special letters of administration as mentioned in section 29.

4.246 The provisions dealing with the appointment of a special administrator have no application where one only of several executors is out of the jurisdiction.⁴¹³

4.247 When the Law Reform Commission of Western Australia reviewed that jurisdiction's administration legislation, it recommended that the current provision dealing with special letters of administration where the executor or administrator remains out the jurisdiction be omitted from the legislation and relocated in the rules of court.⁴¹⁴

4.248 Queensland used to have similar statutory provisions dealing with special letters of administration where the executor or administrator remained out of the jurisdiction, but the relevant provisions were repealed when the *Succession Act 1981* (Qld) commenced.⁴¹⁵ The repeal of those provisions gave effect to a recommendation of the Queensland Law Reform Commission that the enactment of section 6 of the *Succession Act 1981* (Qld) would enable a number of provisions to be omitted from the legislation.⁴¹⁶

Administration pending litigation (pendente lite)

4.249 The legislation in all Australian jurisdictions except Queensland and South Australia includes a provision providing for the appointment of an administrator pendente lite of the personal estate of a deceased person and a receiver of the real estate of a deceased person (in Tasmania and Victoria, for an administrator of the estate of the deceased person) pending any suit touching on the validity of the deceased person's will, or for the recalling or revoking of any grant of probate or administration.⁴¹⁷ The New South Wales

413 *Re Mack* [1962] NSW 1029. In that case, one executor was out of the jurisdiction and the other executor became incapable of acting. The Court held that s 76 of the *Wills, Probate and Administration Act 1898* (NSW) had no application in these circumstances and that the proper course was to revoke the grant of probate.

414 Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.35] (referring to a number of provisions, including ss 38 and 39(1) of the *Administration Act 1903* (WA)).

415 *Probate Act 1867* (Qld) ss 22–27, repealed by the *Succession Act 1981* (Qld) s 3, sch 1.

416 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 5.

417 *Administration and Probate Act 1929* (ACT) s 23; *Probate and Administration Act 1898* (NSW) s 73; *Administration and Probate Act* (NT) s 32; *Administration and Probate Act 1935* (Tas) s 19; *Administration and Probate Act 1958* (Vic) s 22; *Administration Act 1903* (WA) s 35. The Tasmanian and Victorian provisions further provide that the administrator has the powers of a general administrator other than the right to distribute the residue of the estate.

provision, which is typical, provides:⁴¹⁸

73 Administration pendente lite and receiver

(1) The Court may:

(a) pending any suit touching the validity of the will of any deceased person, or for obtaining, recalling, or revoking any probate or any grant of administration, or

(b) during a contested right to administration,

appoint an administrator of the personal estate and the same or any other person to be receiver of the real estate of any deceased person, with such full or limited powers and with or without a bond or sureties as the Court may think right.

(2) The Court may make such orders for the remuneration of such administrator or receiver out of the personal and real estate of the deceased as it may think right.

4.250 It has been observed that the Western Australian provision (which, like the ACT, New South Wales and Northern Territory provisions, refers to an administrator of personal estate and a receiver of real estate) reflects ‘the old rule that personal estate devolved on the personal representative and real estate devolved upon the heir’.⁴¹⁹ As explained in Chapter 10 of this Report, all jurisdictions now provide that real estate vests, either on death or on grant, in the deceased’s personal representative.⁴²⁰

4.251 Queensland used to have a statutory provision dealing with the appointment, pending litigation, of an administrator of personal estate and a receiver of real estate. However, that provision was repealed when the *Succession Act 1981* (Qld) commenced.⁴²¹ The relevant Queensland provision dealing with the appointment of an administrator in these circumstances is now found in the *Uniform Civil Procedure Rules 1999* (Qld). Rule 638 provides:

638 Administration pending proceedings

(1) A person may apply to the court for the appointment of an administrator pending the outcome of proceedings under this chapter.

(2) When making any special, interim or limited grant of administration, the court may impose the conditions it considers appropriate, including conditions requiring the filing of an administration account.

⁴¹⁸ *Probate and Administration Act 1898* (NSW) s 73.

⁴¹⁹ *Public Trustee (WA) v Seow* [2003] WASC 62, [22] (EM Heenan J), noting that ‘apart from historical interest, nothing appears to turn on that distinction’.

⁴²⁰ See [10.8]–[10.33] below.

⁴²¹ *Probate Act 1867* (Qld) s 30, repealed by the *Succession Act 1981* (Qld) s 3, sch 1.

- (3) If an administration account is required to be filed, the account must be verified by affidavit.
- (4) Chapter 14, part 1 applies to the administrator and to an account under subrule (2) with necessary changes.
- (5) Unless the court fixes the remuneration of the administrator in the appointment, the registrar may on passing the account assess and provide for the remuneration of the administrator.
- (6) This rule does not limit the power of the court to make any other limited grant. (note omitted)

Administration for the purpose of litigation (ad litem)

4.252 Where a person has a cause of action against the estate of a deceased person, but the action cannot be pursued because no-one has taken out a grant, the court may appoint an administrator *ad litem*. Such a grant enables the action to be defended, and the grant will be limited to defending the particular action.⁴²² The court's power to appoint an administrator *ad litem* is limited to where the action is within the jurisdiction where the grant is sought.⁴²³

4.253 No Australian jurisdiction has a statutory provision or rule providing expressly for the appointment of an administrator *ad litem*.

Administration during the incapacity of the person entitled

4.254 Where a person who is the executor under a will⁴²⁴ or who is entitled to letters of administration⁴²⁵ is mentally incapable of applying for a grant, the court may grant administration for the use and benefit of the person concerned, during the period of the incapacity.⁴²⁶

4.255 No Australian jurisdiction has a statutory provision providing expressly for grants of administration during the incapacity of the person entitled.

4.256 However, two jurisdictions deal with grants during incapacity (both mental and physical) in their court rules.

4.257 The South Australian rule deals not only with the situation where the person entitled to the grant is incapable, by reason of mental or physical incapacity, of managing his or her affairs, but also where the person to whom a grant has been made has become incapable of so doing. Rule 44 of *The Probate Rules 2004* (SA) provides:

⁴²² See, for example, *O'Hara v Hare* [1955] QWN 44.

⁴²³ *Re Butler* [1969] QWN 48.

⁴²⁴ *In the Will of Snelling* (1899) 24 VLR 753.

⁴²⁵ *Re Shaw* [1992] 2 VR 457.

⁴²⁶ *Ibid* 458 (Tadgell J).

44 Grants in case of mental or physical incapacity

44.01 Where the Registrar is satisfied that a person entitled to a grant is by reason of mental or physical incapacity incapable of managing his or her affairs, the Registrar may order that administration for such person's use and benefit limited during such person's incapacity or in such other way as the Registrar may direct, be granted—

(a) in the case of mental incapacity—

- (i) to the committee of a lunatic so found by inquisition, or
- (ii) to the administrator of the estate of such person appointed pursuant to section 35 of the *Guardianship and Administration Act, 1993*, or
- (iii) to the manager of the property of such person appointed under the *Aged and Infirm Persons' Property Act, 1940*.

(b) Where there is no such committee, administrator or manager appointed or in the case of physical incapacity—

- (i) if the person incapable is entitled as executor and has no interest in the residuary estate of the deceased, to the person entitled to the residuary estate;
- (ii) if the person incapable is entitled otherwise than as executor, or is an executor having an interest in the residuary estate of the deceased, to the person who would be entitled to the grant in respect of his or her estate if he or she had died intestate;

or to such other person as the Registrar may by order direct.

44.02 Where after a grant has been made the sole executor or administrator, or the surviving executor or administrator, becomes by reason of mental or physical incapacity incapable of managing his or her affairs, upon the grant being impounded, an application for a grant of administration *de bonis non* for the use and benefit of the incapable grantee, limited during his or her incapacity may be made in accordance with Rule 44.01.

44.03 Where a grant of probate has been made to one executor with leave reserved to one or more executors and the proving executor becomes, by reason of mental or physical incapacity, incapable of managing his or her affairs, upon the grant being impounded, an application for double probate may be made by one or more of the non-proving executors.

44.04 Where a grant of probate has been made to two or more executors of whom one becomes by reason of mental or physical incapacity incapable of managing his or her affairs, upon the grant being revoked, a grant of probate may be made to the capable executor or executors leave being reserved to the incapable executor to apply for probate when such executor becomes capable of managing his or her affairs.

- 44.05 Where a grant of administration has been made to two or more persons pursuant to Rule 34 of whom one becomes by reason of mental or physical incapacity incapable of managing his or her affairs, upon the grant being revoked, a grant of administration may be made to the capable administrator or administrators:

Provided that if the incapable administrator had a superior title to that of the capable administrator or administrators leave must be reserved to the former to apply for administration when he or she becomes capable of managing his or her affairs.

- 44.06 Unless the Registrar otherwise directs, no grant of administration shall be made under Rule 44 unless all persons entitled in the same order of priority as the person incapable have been cleared off.
- 44.07 In the case of physical incapacity the application for the grant under Rule 44 must, unless the Registrar otherwise directs, be supported by the consent of the person alleged to be so physically incapacitated.
- 44.08 The committee of a lunatic or the administrator appointed under section 35 of the *Guardianship and Administration Act, 1993*, or the manager appointed under the *Aged and Infirm Persons' Property Act, 1940*, of a person incapable of managing his or her affairs may, on such person's behalf, renounce probate or administration except where such person is also a minor.

4.258 The Tasmanian rule is briefer. Rule 45A of the *Probate Rules 1936* (Tas) provides that, if the court is satisfied that a person entitled to a grant is by reason of mental or physical incapacity, incapable of managing his or her affairs, the court may grant administration, limited during the person's incapacity, to such other person as it may direct:

45A Administration for use and benefit of incapacitated persons entitled to grant

- (1) Subject to this rule, where a judge is satisfied upon summons supported by an affidavit that a person entitled to a grant is, by reason of mental or physical incapacity, incapable of managing his affairs, administration for the use and benefit of that person, limited during his incapacity or in such other way as the judge directs, may be granted to such other person as the judge may, by order, direct.
- (2) Where a person other than the Public Trustee makes an application under this rule, he shall give notice of the application to the Public Trustee.
- (3) A person who makes an application under this rule on the ground of the physical incapacity of a person entitled to a grant shall give notice of the application to that last-mentioned person.
- (4) No grant of administration shall be made on an application under this rule unless every person who is entitled in the same degree as the person in respect of whose incapacity the application is made has been cleared off.

Administration ad colligenda (for the collection of assets)

4.259 The court has ‘a general power to make a limited grant of administration in order to preserve assets of the deceased within the jurisdiction without waiting until those entitled to a grant have applied’.⁴²⁷ Grants of administration *ad colligenda* may be made where it is necessary to protect the assets of an estate during the time before a general grant can be made.⁴²⁸

If there should be some existing circumstance whereby a grant of probate or administration cannot be made promptly and the nature of the estate of the deceased person requires protection by a personal representative of the deceased, the court has clear power to and will authorize some person to collect and to protect the assets of the estate until a grant of probate of a will or full administration of an estate can be made.

4.260 No Australian jurisdiction has a statutory provision that provides expressly for grants of administration *ad colligenda*.

4.261 However, the South Australian and Tasmanian court rules make limited reference to grants of administration *ad colligenda*. They provide that an application for a grant of that kind may be made by summons (to the registrar in South Australia and to a judge in Tasmania) and must be supported by an affidavit setting out the grounds of the application.⁴²⁹

Discussion Paper

4.262 In the Discussion Paper, the National Committee considered whether, given the wide scope of section 6 of the *Succession Act 1981* (Qld), the model legislation should list the different types of letters of administration that may be granted.⁴³⁰ It expressed the preliminary view that section 6 of the Queensland legislation was ‘sufficiently wide to encompass the different types of general and limited grants currently recognised in the various jurisdictions’.⁴³¹ It also suggested that listing the different types of letters of administration could limit the development of the types of letters of administration,⁴³² although that would occur only if the list purported to be exhaustive.

4.263 The National Committee sought submissions on whether the different types of letters of administration should be set out in the model legislation.⁴³³

⁴²⁷ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [24–47].

⁴²⁸ *Re Cohen* [1975] VR 187, 189 (Gillard J). At 188, Gillard J observed that such grants have been made in England from the earliest times.

⁴²⁹ *The Probate Rules 2004* (SA) r 63; *Administration and Probate Act 1935* (Tas) r 38A.

⁴³⁰ *Administration of Estates Discussion Paper* (1999) QLRC 19; NSWLRC [3.18].

⁴³¹ *Ibid*, QLRC 19; NSWLRC [3.19].

⁴³² *Ibid*, QLRC 19; NSWLRC [3.20].

⁴³³ *Ibid*, QLRC 19; NSWLRC 29.

Submissions

4.264 The majority of the submissions that addressed this issue were of the view that the model legislation should set out the different types of letters of administration that may be made.⁴³⁴

4.265 The Trustee Corporations Association of Australia commented that a 'description of the various letters will assist lay persons in understanding the law'.⁴³⁵

4.266 A former ACT Registrar of Probate also expressed the view that '[p]ractitioners and lay persons would ... be assisted by having the different types of letters of administration set out in the model legislation', although she considered that a 'footnote in the legislation would ... equally achieve this result'.⁴³⁶

4.267 However, two respondents were of the view that the model legislation should not set out the different types of letters of administration that are available.

4.268 The Queensland Law Society expressed the view that:⁴³⁷

As long as there is no doubt about the court's jurisdiction to make the grant, these matters can be kept for the rules.

4.269 An academic expert in succession law commented:⁴³⁸

An applicant in person for a grant may not know whether the grant needed is ordinary or exotic. A statutory description of the different kinds of grants available would not be detailed enough to assist that applicant. ... There is no point in lumbering the statute with procedural matters.

The National Committee's view

4.270 In the National Committee's view, it is important that the court's jurisdiction to make a grant is expressed in terms that are sufficiently broad to enable the court to make the various types of grants that may be needed. However, the National Committee does not consider it useful to include in the model legislation a list of the various types of limited and special grants that may be made. It agrees with the comment made by one respondent that a list of 'exotic' grants would not, of itself, assist a person to know what type of grant was required in a particular case.

434 Submissions 2, 6, 7, 14, 15.

435 Submission 6.

436 Submission 2.

437 Submission 8.

438 Submission 12.

4.271 The model provision that is based on section 6(3) of the *Succession Act 1981* (Qld) confers on the court a jurisdiction that is sufficient to make all types of limited and special grants. In light of that provision, the National Committee considers it more appropriate for the provisions dealing with specific types of limited or special grants to be located in court rules, rather than in the model legislation.

AGE AT WHICH AN INDIVIDUAL MAY BE APPOINTED AS EXECUTOR OR ADMINISTRATOR

Background

4.272 As explained earlier, the court may not grant probate or letters of administration to a minor. Instead, the court will grant letters of administration for the use and benefit of the minor.⁴³⁹

4.273 Some jurisdictions provide in their court rules that the affidavit made by an applicant for a grant must state, if the applicant is an individual, that the applicant is an adult.⁴⁴⁰

The National Committee's view

4.274 The National Committee has recommended earlier in this chapter that the model legislation should not include provisions dealing with grants during the minority of the person named as sole executor, on the basis that grants of that kind are more appropriately the subject of court rules.⁴⁴¹

4.275 However, the model legislation should provide that the court may grant probate or letters of administration to an individual only if the individual is an adult. This provision will serve to highlight a threshold requirement for eligibility for appointment as an executor or administrator.

MAXIMUM NUMBER OF PERSONAL REPRESENTATIVES WHO MAY BE APPOINTED

4.276 It may be desirable, where the person to be appointed as executor is a natural person, to appoint more than one executor. This reduces the need to

439 See [4.214] above. See also AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.80].

440 *Court Procedures Rules 2006* (ACT) r 3010(1)(b); *Supreme Court Rules* (NT) rr 88.23(1)(b)(vii), 88.24(1)(b)(viii); *Supreme Court (Administration and Probate) Rules 2004* (Vic) rr 2.04(2)(b)(i), 3.02(1)(c), 4.04(2)(b)(i); *Non-contentious Probate Rules 1967* (WA) rr 8(i), 9(i).

441 See [4.233]–[4.235] above.

rely on the operation of the doctrine of executorship by representation where the executor dies before completing the administration of the estate.⁴⁴²

Existing legislative provisions

4.277 In most Australian jurisdictions, there is no restriction on the number of personal representatives who may be appointed when a grant is made.

4.278 However, in Queensland and Tasmania, a grant may not be made to more than four persons at any one time.⁴⁴³

4.279 Section 48 of the *Succession Act 1981* (Qld) provides:

48 Provisions as to the number of personal representatives

- (1) A grant shall not be made to more than 4 persons at any one time and where a testator appoints more than 4 persons as executors the order of their entitlement to a grant shall be the order in which they are named.
- (2) This section shall apply to grants made after the commencement of this Act whether the testator or intestate died before or after such commencement.

4.280 When recommending a provision in these terms in its 1978 Report, the Queensland Law Reform Commission suggested that the possibility of disagreement or failure of communication among personal representatives increased with the number of personal representatives who were appointed.⁴⁴⁴ It therefore considered it 'desirable to restrict the number of personal representatives to whom a grant may be made at any one time'.⁴⁴⁵

4.281 The Commission also noted that limiting the number of personal representatives who may be appointed was consistent with the *Trusts Act 1973* (Qld), which provides that no more than four trustees may be appointed in respect of a private trust.⁴⁴⁶ This is also the case under the ACT, New South Wales, Victorian and Western Australian trustee legislation.⁴⁴⁷

⁴⁴² The transmission of the office of executor is considered in Chapter 7 of this Report.

⁴⁴³ *Succession Act 1981* (Qld) s 48; *Administration and Probate Act 1935* (Tas) s 14(1). A similar provision is found in the English legislation: see *Supreme Court Act 1981* (UK) s 114(1).

⁴⁴⁴ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 31.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.* See *Trusts Act 1973* (Qld) s 11.

⁴⁴⁷ *Trustee Act 1925* (ACT) ss 6(6), 7(2), (6); *Trustee Act 1925* (NSW) ss 6(5)(b), (c), 7(5); *Trustee Act 1958* (Vic) s 40; *Trustees Act 1962* (WA) s 7(2), (5).

Discussion Paper

4.282 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the effect of section 48 of the *Succession Act 1981* (Qld).⁴⁴⁸ The National Committee noted that it had proposed elsewhere in the Discussion Paper that personal representatives be required to act jointly, and considered that such a requirement would make it even more important to limit the number of personal representatives who may be appointed at any one time.⁴⁴⁹

Submissions

4.283 All the submissions that addressed this issue agreed with the National Committee's proposal. This was the view of the Bar Association of Queensland, a former ACT Registrar of Probate, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁴⁵⁰

4.284 The former ACT Registrar of Probate, who strongly supported the proposal, suggested that restricting the number of personal representatives would make it 'less likely that the assets of an estate [would] be dissipated by any disagreement between personal representatives'.⁴⁵¹

The National Committee's view

4.285 In the National Committee's view, the model legislation should include a provision to the effect of section 48 of the *Succession Act 1981* (Qld) so that:

- the court may not make a grant of probate or letters of administration to more than four persons at any one time; and
- if more than four persons are named as executors in a deceased person's will, the order of their entitlement to a grant of probate is the order in which they are named.

448 *Administration of Estates Discussion Paper* (1999) QLRC 118; NSWLRC 167 (Proposal 57).

449 *Ibid*, QLRC 118; NSWLRC [8.190].

450 Submissions 1, 2, 8, 11, 12, 14, 15.

451 Submission 2.

THE REQUIREMENT FOR A MINIMUM NUMBER OF PERSONAL REPRESENTATIVES IN CERTAIN CASES

Existing legislative provisions

4.286 In addition to limiting the maximum number of personal representatives who may be appointed at any one time,⁴⁵² the Tasmanian legislation provides that, in certain situations, a minimum of two administrators must be appointed. It also provides that, in certain situations, the court may appoint an additional personal representative.

4.287 Section 14 of the *Administration and Probate Act 1935* (Tas) provides:

14 Provisions as to the number of personal representatives and where minority or life interest

- (1) Representation shall not be granted to more than 4 persons in respect of the same property; and administration shall, if any beneficiary is an infant, or a life interest arises under a will, be granted either to a trust corporation, with or without an individual, or to not less than two individuals. Provided that the Court in granting administration may act on such *prima facie* evidence, furnished by the applicant or any other person, as to whether or not there is a minority or life interest, as may be prescribed by the Probate Rules.
- (2) If there is only one personal representative, not being a trust corporation, then during the minority of the beneficiary or the subsistence of a life interest, and until the estate is fully administered, the Court may, on the application of any person interested or of the guardian, committee, or receiver of any such person, appoint, in accordance with the Probate Rules, one or more personal representatives in addition to the original personal representative.
- (3) This section applies to grants of representation made after the commencement of this Act, whether the deceased died before or after such commencement.

4.288 Under section 14(1) a minimum of two administrators must be appointed if any beneficiary is a minor, or if a life interest arises under a will, and the administrators are individuals. The term 'administration' is defined in the legislation to mean 'letters of administration, whether general or limited, or with the will annexed or otherwise'.⁴⁵³ Accordingly, it is clear that the requirement imposed by section 14(1) applies only to the appointment of an administrator and not to the appointment of an executor.⁴⁵⁴

452 See [4.278] above.

453 *Administration and Probate Act 1935* (Tas) s 3(1).

454 This is in contrast to the reference to 'representation' in the first clause of s 14(1). 'Representation' is defined in s 3(1) of the *Administration and Probate Act 1935* (Tas) to mean 'the probate of a will and administration'.

4.289 However, if there is a beneficiary who is a minor or there is a life interest, and the original executor is a natural person, section 14(2) of the Tasmanian legislation enables an interested person, at any time before the estate is fully administered, to apply to the court for the appointment of an additional personal representative.

4.290 Section 14 of the Tasmanian legislation is similar to section 114 of the *Supreme Court Act 1981* (UK), which also provides, in section 114(2), that a grant of administration must generally be made to a minimum of two administrators where there is a minor beneficiary or a life interest. Section 114 of the *Supreme Court Act 1981* (UK) provides in part:

114 Number of personal representatives

...

- (2) Where under a will or intestacy any beneficiary is a minor or a life interest arises, any grant of administration by the High Court shall be made either to a trust corporation (with or without an individual) or to not less than two individuals, unless it appears to the court to be expedient in all the circumstances to appoint an individual as sole administrator.
- (3) For the purpose of determining whether a minority or life interest arises in any particular case, the court may act on such evidence as may be prescribed.
- (4) If at any time during the minority of a beneficiary or the subsistence of a life interest under a will or intestacy there is only one personal representative (not being a trust corporation), the High Court may, on the application of any person interested or the guardian or receiver of any such person, and in accordance with probate rules, appoint one or more additional personal representatives to act while the minority or life interest subsists and until the estate is fully administered.
- (5) An appointment of an additional personal representative under subsection (4) to act with an executor shall not have the effect of including him in any chain of representation.⁴⁵⁵ (note added)

4.291 The purpose of section 114 of the English legislation, like section 14 of the Tasmanian legislation, is to 'protect the interest of the minor or remainderman'.⁴⁵⁶ However, section 114 of the *Supreme Court Act 1981* (UK) differs from the Tasmanian provision, in that it does not impose an absolute requirement to appoint two administrators if they are to be individuals. Although there is a presumption under section 114(2) in favour of the appointment of two administrators if they are to be individuals, the section gives the court the

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Section 14 of the *Administration and Probate Act 1935* (Tas) does not include a provision to the effect of s 114(5) of the *Supreme Court Act 1981* (UK). However, in Chapter 7 of this Report, the National Committee has recommended that the office of personal representative should be transmissible through both executors and administrators. Consequently, there would appear to be no reason to maintain a distinction between an executor and a person who was appointed as an additional personal representative.

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Halsbury's Laws of England (4th ed) vol 17(2), [167].

discretion to appoint an individual as a sole administrator if it is 'expedient in all the circumstances' to do so. It has been suggested that, where an intestate is survived by a spouse and the minority interest or interests are to terminate shortly when beneficiaries attain the age of majority, the court may consider it expedient to allow the grant to issue to the surviving spouse alone.⁴⁵⁷

4.292 Apart from Tasmania, no Australian jurisdiction has a provision that requires a minimum number of administrators, or that specifically enables the appointment of an additional personal representative, where there is a minor beneficiary or a life interest.

4.293 When the Queensland Law Reform Commission was reviewing that jurisdiction's succession laws in the late 1970s, it considered, but decided against, the adoption of provisions to the effect of section 114(2)–(5) of the *Supreme Court Act 1981* (UK).⁴⁵⁸ The Commission commented that, as two personal representatives were not required in the case of executors, there was no reason to insist on two personal representatives in the case of administrators.⁴⁵⁹ Further, the Commission was of the view that the English provision was, to some extent, misconceived:⁴⁶⁰

The existence of a minority or life interest cannot be established until the estate has been duly administered, that is, all the assets have been collected and the debts paid. At that point the personal representative becomes, or will soon become, a trustee, when the policy of the *Trusts Act 1973* will tend to bear upon him to ensure the appointment of an additional trustee — see sections 12(2)(c) and 14(1). If it is a case of a surviving spouse and infant children, it may well be desirable to let matters stand as they are, and not to insist on the appointment of an additional trustee.

4.294 The Commission considered that this comment also applied to the English provision that enables the court to appoint an additional personal representative where there is a minority or a life interest.⁴⁶¹

Discussion Paper

4.295 In the Discussion Paper, the National Committee considered whether the model legislation should include a provision requiring a minimum of two personal representatives where there is a minority interest arising under a will or on intestacy.⁴⁶²

457 JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [6.92].

458 At the time, the relevant provisions were found in s 160 of the *Supreme Court of Judicature (Consolidation) Act 1925* (UK).

459 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 31.

460 *Ibid* 32.

461 *Ibid*.

462 *Administration of Estates Discussion Paper* (1999) QLRC 119; NSWLRC [8.192].

4.296 Although the National Committee acknowledged that minority interests were vulnerable to being neglected or ignored, it was concerned about how those interests could best be protected. The National Committee noted that there would not always be two persons who could be appointed.⁴⁶³

4.297 For that reason, the National Committee did not propose a mandatory requirement for a minimum of two individual personal representatives. Instead, it proposed that the model legislation should include a provision to the effect that, where there is a minority interest, the court *may* make such order as to the protection of that interest as it considers appropriate, including the appointment of multiple personal representatives or the provision of bonds, sureties or the passing of accounts.⁴⁶⁴

Submissions

4.298 The National Committee's proposal was supported by a majority of the submissions that addressed this issue — namely, the Bar Association of Queensland, the Queensland Law Society, the New South Wales Public Trustee, and the ACT and New South Wales Law Societies.⁴⁶⁵

4.299 However, two respondents who commented on this issue did not agree with the National Committee's preliminary proposal.

4.300 A former ACT Registrar of Probate commented that, in relation to minority interests, the ACT Supreme Court required accounts to be passed and that is a sufficient protection.⁴⁶⁶

4.301 The Trustee Corporations Association of Australia,⁴⁶⁷ with whom the Queensland State Council of the Trustee Corporations Association of Australia agreed,⁴⁶⁸ considered the proposal to be ambiguous, commenting:

Is the proposal that wherever there is a minority interest in a will, the will **must** be referred to the court for it to determine who should be the personal representative?

If it is not mandatory to go to the court in these circumstances and [the proposal] is simply outlining the powers of the court in the event of an application, then doesn't the court already have this power? (emphasis in original)

⁴⁶³ Ibid, QLRC 119; NSWLRC [8.193]–[8.194].

⁴⁶⁴ Ibid, QLRC 119; NSWLRC 169 (Proposal 58). Note, after further consideration, the National Committee has recommended in this Report that the requirement for administration bonds and sureties be abolished: see Recommendation 9-1 below.

⁴⁶⁵ Submissions 1, 8, 11, 14, 15.

⁴⁶⁶ Submission 2.

⁴⁶⁷ Submission 6.

⁴⁶⁸ Submission 7.

4.302 This issue does not arise in relation to section 14(1) of the *Administration and Probate Act 1935* (Tas), as that section applies where there is a minor beneficiary and an application is made to the court for letters of administration on intestacy or with the will annexed.

The National Committee's view

4.303 The assumption underlying section 14 of the *Administration and Probate Act 1935* (Tas) is that the mere appointment of a second administrator will provide protection for minor beneficiaries and persons entitled in remainder. Yet in a non-contentious application for letters of administration, there will be no actual consideration of the suitability of the persons applying for letters of administration.

4.304 Further, if the person who would otherwise be entitled to letters of administration cannot persuade a second person to apply jointly for the grant, it will be necessary to have the public trustee or a trustee company apply for the grant, with the result that the estate will then be liable for the commission and fees charged by the administrator appointed.

4.305 For these reasons, the National Committee is of the view that there should not be a mandatory requirement that, if there is a minor beneficiary or a life interest, administration must be granted to the public trustee or a trustee company or to at least two individuals.

4.306 The next issue is whether, instead of a mandatory requirement, the court should have the express power to appoint a second personal representative, at least where there is a minority interest. In the National Committee's view, where there is a serious concern about a person's suitability to be appointed, or to continue, as a personal representative, the solution does not lie in the appointment of an additional personal representative. If the person has not yet been appointed, the appropriate course is for the court to pass over the person and to make a grant in favour of a different person. If the person has already been appointed as the personal representative, the appropriate course is for the court to revoke the grant and to appoint a new personal representative.

4.307 Accordingly, the model legislation should not include provisions to the effect of section 14(1) or (2) of the *Administration and Probate Act 1935* (Tas).

DEFINITION OF 'ADMINISTRATION'

Introduction

4.308 Section 3 of the *Probate and Administration Act 1898* (NSW) defines 'administration' in the following terms:

Administration includes all letters of administration of the real and personal estate and effects of deceased persons whether with or without the will annexed, and whether granted for general, special, or limited purposes, also exemplification of letters of administration or such other formal evidence of the letters of administration purporting to be under the seal of a Court of competent jurisdiction as is in the opinion of the Court deemed sufficient.

4.309 Similar definitions are found in the administration legislation of most other Australian jurisdictions,⁴⁶⁹ although the South Australian and Victorian provisions are briefer and do not refer to exemplifications of letters of administration or other formal evidence of letters of administration. The Victorian definition is as follows:⁴⁷⁰

administration means with reference to the estate of a deceased person letters of administration whether general special or limited or with the will annexed or otherwise;

Discussion Paper

4.310 In the Discussion Paper, the National Committee proposed that the model legislation should include a definition of 'administration' to the effect of the definition in section 3 of the *Probate and Administration Act 1898* (NSW).⁴⁷¹ In its view, the inclusion of a definition in those terms would highlight the existence of the different kinds of letters of administration.⁴⁷²

Submissions

4.311 The proposal for the model legislation to define 'administration' in the same terms as the definition found in section 3 of the *Probate and Administration Act 1898* (NSW) was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁴⁷³

The National Committee's view

4.312 The National Committee is of the view that it is desirable to define 'letters of administration' in generally similar terms to the definition of 'administration' in section 3 of the *Probate and Administration Act 1898* (NSW).

⁴⁶⁹ See *Administration and Probate Act 1929* (ACT) s 2, dictionary; *Administration and Probate Act* (NT) s 6(1); *Administration and Probate Act 1919* (SA) s 4; *Administration and Probate Act 1935* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 5(1); *Administration Act 1903* (WA) s 3.

⁴⁷⁰ *Administration and Probate Act 1958* (Vic) s 5(1).

⁴⁷¹ *Administration of Estates Discussion Paper* (1999) QLRC 13; NSWLRC 19 (Proposal 3).

⁴⁷² *Ibid.*, QLRC 12; NSWLRC [2.29].

⁴⁷³ Submissions 1, 3, 8, 11, 12, 14, 15.

4.313 However, the National Committee does not consider it necessary for the definition to refer to an exemplification or to 'such other formal evidence of the letters of administration purporting to be under the seal of a Court of competent jurisdiction as is in the opinion of the Court deemed sufficient'.

4.314 Although the broader definition is relevant in the context of the resealing of a grant, the model legislation makes express provision for the resealing of a 'foreign grant of representation', which is defined as follows:⁴⁷⁴

foreign grant of representation means—

- (a) if a single grant of probate or letters of administration has effect in an interstate jurisdiction, or in an overseas jurisdiction prescribed under a regulation—the grant of probate or letters of administration; or
- (b) if more than 1 grant of probate has been made in the same interstate jurisdiction, or in the same overseas jurisdiction prescribed under a regulation, and the grants have concurrent effect in that jurisdiction—all of the grants; or

Example for paragraph (b)—

a grant of probate and a grant of double probate

- (c) without limiting paragraph (a), an instrument (other than an instrument mentioned in paragraph (d)) made in a foreign jurisdiction and having, within that jurisdiction—
 - (i) the effect of appointing or authorising a person to collect and administer any part of the estate of a deceased person; and
 - (ii) an effect equivalent to that given, under a law of this jurisdiction, to a grant of probate or letters of administration in this jurisdiction; or
- (d) an interstate election to administer, or an overseas election to administer, certified under the seal of the court in which it is filed by, or under the authority of, the court as a correct copy of the election to administer filed in the court; or
- (e) an exemplification of an instrument mentioned in paragraph (a) or (c); or
- (f) an exemplification, as required under the rules of court, of an instrument mentioned in paragraph (b); or
- (g) other formal evidence, as required under the rules of court, of an instrument mentioned in paragraph (a), (b) or (c).

4.315 As that definition enables the resealing of an exemplification of letters of administration or another instrument having the effect of letters of administration, the model legislation should simply define 'letters of

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See Administration of Estates Bill 2009 sch 3 dictionary.

administration' to mean letters of administration with or without the will annexed, and whether made for general, special or limited purposes.

DEFINITION OF 'PERSONAL REPRESENTATIVE'

Existing legislative provisions

4.316 Section 5 of the *Succession Act 1981* (Qld) defines 'personal representative' in the following terms:

personal representative means the executor, original or by representation, or administrator of a deceased person.

4.317 Similar definitions are found in the Tasmanian and Victorian legislation.⁴⁷⁵

4.318 The other Australian jurisdictions do not contain a general definition of the term 'personal representative'.⁴⁷⁶

Discussion Paper

4.319 In the Discussion Paper, the National Committee proposed that the model legislation should include a definition of 'personal representative' based on the definition in section 5 of the *Succession Act 1981* (Qld), except that the definition in the model legislation should refer to the estate of a deceased person, rather than simply to a deceased person.⁴⁷⁷

4.320 The National Committee further proposed that it was unnecessary for the definition of 'personal representative' to include a reference to a trustee company.⁴⁷⁸ In its view, the purpose of the definition 'is to describe the types of appointment that constitute a person or entity as a personal representative, not the identity of particular entities'.⁴⁷⁹

4.321 Similarly, the National Committee proposed that the definition of 'personal representative' should not include a reference to the public trustee.⁴⁸⁰

⁴⁷⁵ *Administration and Probate Act 1935* (Tas) s 3(1); *Administration and Probate Act 1958* (Vic) s 5(1).

⁴⁷⁶ The ACT legislation defines 'personal representative, in relation to an intestate', but that definition applies only for the purpose of pt 3A (Intestacy): *Administration and Probate Act 1929* (ACT) s 44(1).

⁴⁷⁷ *Administration of Estates Discussion Paper* (1999) QLRC 11; NSWLRC 17 (Proposal 1).

⁴⁷⁸ *Ibid*, QLRC 11; NSWLRC 18 (Proposal 2).

⁴⁷⁹ *Ibid*, QLRC 11; NSWLRC [2.26].

⁴⁸⁰ *Ibid*, QLRC 123; NSWLRC 173 (Proposal 59).

Submissions

4.322 The National Committee's proposal to base the definition of 'personal representative' on the definition contained in section 5 of the *Succession Act 1981* (Qld), subject to referring to the estate of a deceased person, was supported by the Public Trustee of South Australia, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁴⁸¹

4.323 The Bar Association of Queensland supported the inclusion of a definition based on the Queensland definition, but commented that the word 'personal' in 'personal representative' was superfluous, and suggested that the model legislation should instead use the term 'representative'.⁴⁸²

4.324 The National Council of Women of Queensland also supported the Queensland definition, but was of the view that that definition should not be changed to refer to the estate of a deceased person.⁴⁸³

4.325 There was widespread support for the proposal that the definition of 'personal representative' should not refer to a trustee company or to the public trustee. This was the view of the Bar Association of Queensland, the Public Trustee of South Australia, the Public Trustee of Queensland, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁴⁸⁴

The National Committee's view

4.326 In the National Committee's view, the definition of 'personal representative' should generally be based on the definition in section 5 of the *Succession Act 1981* (Qld). That definition should, for reasons of accuracy, refer to the administrator of *the estate of a deceased person*, as proposed in the Discussion Paper. It should also refer to the executor of *the will* of a deceased person.

4.327 The National Committee notes that the Queensland definition refers to an 'executor, original or by representation'. In Chapter 7 of this Report, the National Committee has recommended that a person who is granted probate of the will, or letters of administration of the estate, of a person who was a last surviving, or sole, administrator of the estate of a deceased person becomes an administrator by representation of any estate of which the deceased person

481 Submissions 4, 8, 11, 12, 14, 15.

482 Submission 1.

483 Submission 3.

484 Submissions 1, 4, 5, 6, 7, 8, 11, 12, 14, 15.

was, at the time of his or her death, the administrator or the administrator by representation. As the model legislation makes provision for both executors, and administrators, by representation, this must be reflected in the definition of 'personal representative'.

4.328 In view of these matters, the model legislation should define 'personal representative' to mean the executor, original or by representation, of a deceased person's will or the administrator, original or by representation, of a deceased person's estate.

4.329 The National Committee remains of the view that it is unnecessary for this definition to refer to the public trustee or to a trustee company. The circumstances in which the public trustee or a trustee company may be appointed as an executor or administrator, and their power to act in that capacity, are addressed in their own substantive legislation.

4.330 The National Committee notes the comment of the Bar Association of Queensland about its preferred use of the term 'representative'. Although the term 'personal representative' originated at a time when only the deceased's personal property vested in the personal representative,⁴⁸⁵ the term is now used widely to refer to both executors and administrators and the National Committee recommends that it be retained.

DEFINITION OF 'GRANT OF REPRESENTATION'

Existing legislative provisions

4.331 Section 5 of the *Succession Act 1981* (Qld) defines 'grant' in the following terms:

grant means grant of probate of the will or letters of administration of the estate of a deceased person and includes the grant of an order to administer and the filing of an election to administer such an estate.

4.332 This definition includes not only grants of probate and letters of administration, but also an order to administer and an election to administer, which both have the same effect as a grant of probate or letters of administration.⁴⁸⁶

4.333 In the other Australian jurisdictions that include a term to mean both probate and letters of administration, a narrower definition is employed. In the ACT, the Northern Territory and Victoria, the legislation defines 'representation'

⁴⁸⁵ The vesting of property is considered in Chapter 10 of this Report.

⁴⁸⁶ See [29.3], [29.5], [31.43] in vol 3 of this Report.

to mean the probate of a will and administration.⁴⁸⁷ Similarly, the Tasmanian legislation defines ‘representation’ as follows:⁴⁸⁸

‘**representation**’ means the probate of a will and administration, and the expression ‘taking out representation’ refers to the obtaining of the probate of a will or of the grant of administration;

Discussion Paper

4.334 In the Discussion Paper, the National Committee sought submissions on whether the definition of ‘grant’ in the model legislation should be based on the definition of ‘grant’ in section 5 of the *Succession Act 1981* (Qld).⁴⁸⁹

Submissions

4.335 The four respondents who commented on this issue — the Bar Association of Queensland, the Queensland Law Society, and the ACT and New South Wales Law Societies — were all of the view that the model legislation should include a definition of ‘grant’ based on the definition in section 5 of the *Succession Act 1981* (Qld).⁴⁹⁰

The National Committee’s view

4.336 In the National Committee’s view, the model legislation should use the term ‘grant of representation’ as the term to refer generally to grants of probate and letters of administration. That term should be defined broadly, as ‘grant’ is defined in the *Succession Act 1981* (Qld), to mean:

- a grant of probate made by the Supreme Court;
- a grant of letters of administration made by the Supreme Court;
- an order to administer made by the Supreme Court; and
- an election to administer filed in the Supreme Court.

4.337 This broader definition makes it clear that these instruments are, unless otherwise stated in the model legislation, to have the same effect and be subject to the same provisions as a grant of probate or letters of administration.

⁴⁸⁷ *Administration and Probate Act 1929* (ACT) s 2, dictionary (definition of ‘representation’ (para a)); *Administration and Probate Act* (NT) s 6(1); *Administration and Probate Act 1958* (Vic) s 5(1).

⁴⁸⁸ *Administration and Probate Act 1935* (Tas) s 3(1).

⁴⁸⁹ *Administration of Estates Discussion Paper* (1999) QLRC 12; NSWLRC 18.

⁴⁹⁰ Submissions 1, 8, 14, 15.

4.338 However, as not all Australian jurisdictions make provision for orders to administer and those that do use slightly different terminology to describe these orders,⁴⁹¹ this definition may need to be adapted by individual jurisdictions.

RECOMMENDATIONS

Grant of probate to one or more executors reserving leave to others to apply

4-1 The model legislation should include a provision to the effect of section 41 of the *Probate and Administration Act 1898 (NSW)*, and provide that, if an application is made for a grant of probate by some, but not all, of the executors named in a deceased person's will, the court may:

- (a) grant probate to one or more of the executors named in the will who apply for the grant of probate; and
- (b) reserve leave to the executor or executors who have not applied for probate and have not renounced their executorship to apply for probate at a later time.⁴⁹²

See Administration of Estates Bill 2009 cl 318.

Grant of probate to an executor to whom leave to apply was reserved, following the death of the last surviving, or sole, proving executor

4-2 Given the wide jurisdiction conferred on the court by the provision that gives effect to Recommendation 3-1, it is not necessary for the model legislation to include a specific provision enabling the court to make a grant of probate, on the death of a last surviving, or sole, proving executor, to an executor to whom leave to apply for a grant of probate was reserved.⁴⁹³

Cessation of right of executor to prove will

4-3 The model legislation should include a provision, to the general effect of section 46 of the *Succession Act 1981 (Qld)*, that:⁴⁹⁴

- (a) applies if a person appointed executor by a will:

⁴⁹¹ See [31.40] in vol 3 of this Report.

⁴⁹² See [4.8]–[4.9] above.

⁴⁹³ See [4.12]–[4.14] above.

⁴⁹⁴ See [4.20]–[4.22] above.

- (i) survives the testator but dies without having taken out probate of the will; or
 - (ii) renounces his or her executorship of the will; or
 - (iii) after being required by the court, including by citation or summons, to apply for a grant of probate, fails to apply for the grant as required by the court; and
- (b) provides that:
- (i) the person's rights in relation to the executorship end;
 - (ii) the testator's personal representative is to be determined, and the administration of the testator's estate is to be dealt with, as if the person had never been appointed executor; and
 - (iii) nothing in the provision affects the person's liability for an act or omission happening before the person's rights in relation to the executorship end.

See Administration of Estates Bill 2009 cl 319.

Renunciation of the executorship of a will

4-4 The model legislation should include a provision based generally on section 54(2) of the *Succession Act 1981* (Qld), and provide that:

- (a) an executor named in the will of a deceased person may renounce his or her executorship of the deceased's will;
- (b) the executor may renounce the executorship whether or not he or she has intermeddled in the administration of the deceased's estate;
- (c) the renunciation may be made only before a grant of probate of the deceased's will is made to the executor.⁴⁹⁵

See Administration of Estates Bill 2009 cl 315.

495

See [4.50]–[4.57] above.

Effect of renunciation on any right to apply for a grant in another capacity

- 4-5 The model legislation should include a provision to the general effect of rule 28 of the *Non-contentious Probate Rules 1967 (WA)* so that a person who has renounced probate of the will or administration of the estate of a deceased person in one capacity may not be granted representation of the deceased's estate in another capacity unless the Supreme Court otherwise directs.⁴⁹⁶

See Administration of Estates Bill 2009 cl 316.

Retraction of renunciation of probate and administration

- 4-6 The model legislation should provide that, except where a grant of administration has been made to a person lower in priority, the court may permit:
- (a) an executor to retract his or her renunciation of probate; or
 - (b) a person who is entitled to letters of administration of the estate of a deceased person to retract his or her renunciation of administration;

if the court is satisfied that the retraction would be for the benefit of the estate or the persons interested in the estate.⁴⁹⁷

See Administration of Estates Bill 2009 cl 317(1), (2).

- 4-7 The model legislation should provide that, if a grant of administration has been made to a person lower in priority, the court may permit:
- (a) an executor to retract his or her renunciation of probate; or
 - (b) a person who is entitled to letters of administration of the estate of a deceased person to retract his or her renunciation of administration;

only if the court is satisfied that it would be to the detriment of the estate or the persons interested in the estate for the person appointed as administrator to continue as administrator.⁴⁹⁸

496 See [4.67]–[4.70] above.

497 See [4.110]–[4.111] above.

498 See [4.112]–[4.114] above.

See Administration of Estates Bill 2009 cl 317(1), (3).

- 4-8 The model legislation should not include a provision to the effect of section 9 of the *Administration and Probate Act 1935 (Tas)* or section 16(2) of the *Administration and Probate Act 1958 (Vic)*.⁴⁹⁹

The court's power to grant letters of administration

- 4-9 The model legislation should include a provision, based generally on section 74 of the *Probate and Administration Act 1898 (NSW)*, and provide that the court may grant letters of administration of the estate of a deceased person if the deceased dies:

- (a) intestate; or
- (b) leaving a will, but without having appointed an executor; or
- (c) leaving a will and having appointed an executor or executors, if the executor or, if more than one executor is appointed, each of the executors either:
 - (i) renounces his or her executorship of the will; or
 - (ii) lacks legal capacity to act as executor; or
 - (iii) is not willing to act.⁵⁰⁰

See Administration of Estates Bill 2009 cl 320.

The court's general discretion to pass over a person who would otherwise be entitled to a grant

- 4-10 The model legislation should include a provision that applies if the court, on application, considers it appropriate:
- (a) for the proper administration of the estate; and
 - (b) in the interests of the persons who are, or who may be, interested in the estate;

499 See [4.115]–[4.116] above.

500 See [4.180]–[4.184] above.

to pass over a person who would otherwise be entitled to a grant of probate of a deceased person's will or letters of administration of a deceased person's estate and to make a grant to a person other than the person, or all of the persons, who would otherwise be entitled to a grant.⁵⁰¹

4-11 The model legislation should provide that, in the circumstances referred to in Recommendation 4-10, the court may refuse to make a grant of probate or letters of administration to the person otherwise entitled and may instead make a grant to:

(a) without limiting paragraph (b), if there is more than one person entitled to the grant — any or all of the other persons entitled; or

(b) any person the court considers appropriate.⁵⁰²

See Administration of Estates Bill 2009 cl 347.

The court's power, in specific situations, to pass over a person who would otherwise be entitled to a grant

4-12 The model legislation should provide that, if the court considers that there are reasonable grounds for believing that a person who would otherwise be entitled to a grant of probate of the deceased's will, or letters of administration of the deceased's estate, has committed an offence relating to the deceased person's death, the court may refuse to make a grant of probate or letters of administration of the will or estate to a person otherwise entitled to the grant and may make the grant of probate or letters of administration to:

(a) without limiting paragraph (b), if there is more than one person entitled to the grant — any or all of the other persons entitled; or

(b) any person the court considers appropriate.⁵⁰³

See Administration of Estates Bill 2009 cl 348.

501 See [4.185]–[4.189] above.

502 Ibid.

503 See [4.191]–[4.192] above.

4-13 The model legislation should include a provision that:⁵⁰⁴

(a) applies if:

(i) all the beneficiaries of a deceased person's estate are adults; and

(ii) all the beneficiaries agree that a grant of probate of the deceased's will or letters of administration of the deceased's estate should be made to a person or persons, other than the person or all of the persons who would otherwise be entitled to the grant, nominated by the beneficiaries; and

(b) provides that the court may, on application, make the grant of probate or letters of administration to the person nominated by all of the beneficiaries.

See Administration of Estates Bill 2009 cl 349(1)–(2).

4-14 The model legislation should provide that, if a beneficiary of an estate lacks legal capacity to enter into the agreement mentioned in Recommendation 4-13, a reference to the beneficiary is taken to be a reference to a person, other than a person who is also a beneficiary of the estate, who has lawful authority, including under a law of another State or Territory, to make binding decisions for the beneficiary for the agreement.⁵⁰⁵

See Administration of Estates Bill 2009 cll 346, 349(4).

4-15 On an application under the provision referred to in Recommendation 4-13, the court may not make the grant of probate or letters of administration unless it is satisfied that the applicant for the grant, or someone else with relevant knowledge, reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate.⁵⁰⁶

See Administration of Estates Bill 2009 cl 349(3).

504 See [4.193]–[4.209] above.

505 See [4.196]–[4.197], [4.208] above.

506 See [4.201], [4.208] above.

Specific types of limited and special grants

4-16 The model legislation should not contain provisions to the effect of sections 70 or 71 of the *Probate and Administration Act 1898 (NSW)* or any other provisions dealing with the appointment of an administrator during the minority of a person who would, but for his or her minority, be entitled to a grant.⁵⁰⁷

4-17 The model legislation should not set out the various types of other limited or special grants that may be made.⁵⁰⁸

Age at which an individual may be appointed as an executor or administrator

4-18 The model legislation should provide that the court may make a grant of probate or letters of administration to an individual only if the individual is an adult.⁵⁰⁹

See Administration of Estates Bill 2009 cl 312(1).

Maximum number of personal representatives

4-19 The model legislation should include a provision to the effect of section 48 of the *Succession Act 1981 (Qld)* so that:

- (a) the court may not make a grant of probate or letters of administration to more than four persons at any one time; and
- (b) if more than four persons are named as executors of a deceased person's will, the order of their entitlement to a grant of probate is the order in which they are named.⁵¹⁰

See Administration of Estates Bill 2009 cl 312(2), (3).

507 See [4.233]–[4.235] above.

508 See [4.270]–[4.271] above.

509 See [4.275] above.

510 See [4.285] above.

No minimum number of personal representatives

4-20 The model legislation should not include provisions to the effect of section 14(1) or (2) of the *Administration and Probate Act 1935 (Tas)* or any modified form of that provision.⁵¹¹

Definition of 'letters of administration'

4-21 The model legislation should define 'letters of administration' to mean letters of administration with or without the will annexed, and whether made for general, special or limited purposes.⁵¹²

See Administration of Estates Bill 2009 sch 3 dictionary.

Definition of 'personal representative'

4-22 The model legislation should define 'personal representative', generally, to mean the executor, original or by representation, of a deceased person's will or the administrator, original or by representation, of a deceased person's estate.⁵¹³

See Administration of Estates Bill 2009 sch 3 dictionary.

Definition of 'grant of representation'

4-23 The model legislation should define 'grant of representation', generally, to mean:

- (a) a grant of probate made by the Supreme Court;
- (b) a grant of letters of administration made by the Supreme Court;
- (c) an order to administer made by the Supreme Court; and
- (d) an election to administer filed in the Supreme Court.⁵¹⁴

See Administration of Estates Bill 2009 sch 3 dictionary.

⁵¹¹ See [4.303]–[4.307] above.

⁵¹² See [4.312]–[4.315] above.

⁵¹³ See [4.326]–[4.330] above.

⁵¹⁴ See [4.336]–[4.338] above. This definition may need to be adapted by individual jurisdictions to reflect the different terminology used for orders to administer.

Chapter 5

Appointment of personal representatives: order of priority for letters of administration

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INTRODUCTION

5.1 Although the court has a discretion as to the person to whom administration will be granted,⁵¹⁵ the practice of the court in granting administration has been to favour the person with, or representing, the largest beneficial interest in the estate, both where the deceased died intestate⁵¹⁶ and where the deceased left a will.⁵¹⁷ The application of this principle has meant that the order of priority for letters of administration where the deceased dies intestate (where the beneficiaries' interests are determined by the intestacy rules) has differed from the order of priority for letters of administration with the will annexed (where the beneficiaries' interests are determined by the terms of the will).

5.2 In both cases, the conventional rankings that have developed through the case law are quite complex and technical in their application.⁵¹⁸ Doubts have also been expressed about the extent to which the orders apply.⁵¹⁹

EXISTING LEGISLATIVE PROVISIONS AND COURT RULES

5.3 With the exception of Victoria, all Australian jurisdictions set out in either their legislation or court rules, with varying degrees of specificity, an order of priority for letters of administration on intestacy. In each jurisdiction, the ranking of applicants for letters of administration is generally consistent with the manner of distribution under the intestacy rules of the particular jurisdiction, with the additional category, in most jurisdictions, of 'any other person' or a creditor.⁵²⁰

5.4 In addition, some jurisdictions set out in their court rules an order of priority for letters of administration with the will annexed — that is, where the deceased has left a will, but either did not appoint an executor or for some reason the executor named in the will does not apply for a grant of probate.

515 See [4.117]–[4.135] above.

516 *Re Freebairn* (1867) 1 SASR 52; *Re Slattery* (1909) 9 SR (NSW) 577. Because the general rule is that the grant should follow the interest, the court will 'not grant administration to a person not interested in the estate except under special circumstances': *Re McCormack* (1902) 2 SR (NSW) B & P 48.

517 *Re Legh* (1889) 15 VLR 816, 819 (Hodges J).

518 See RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [75.11]–[75.12]; See RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 187–9 (letters of administration with the will annexed) and 192–4 (letters of administration on intestacy).

519 *Re Hoarey* [1906] VLR 437, where Cussen J (at 445) held that, although the Court 'will no doubt have regard to the rules of preference laid down in England, it considers itself as not rigidly bound by them'.

520 *Administration and Probate Act 1929* (ACT) s 12; *Probate and Administration Act 1898* (NSW) s 63; *Administration and Probate Act* (NT) s 22; *Uniform Civil Procedure Rules 1999* (Qld) r 610; *The Probate Rules 2004* (SA) r 32; *Probate Rules 1936* (Tas) r 22; *Administration Act 1903* (WA) s 25.

Australian Capital Territory, New South Wales, Northern Territory

5.5 The legislation in the ACT, New South Wales and the Northern Territory includes a provision that sets out the persons to whom letters of administration may be granted on intestacy.⁵²¹ Section 63 of the *Probate and Administration Act 1898* (NSW), which is similar to the provisions in the Territories, provides:

63 To whom administration may be granted

The Court may grant administration of the estate of an intestate person to the following persons, not being minors, that is to say to:

- (a) the spouse of the deceased, or
- (b) one or more of the next of kin, or
- (c) the spouse conjointly with one or more of the next of kin,

or if there be no such person or no such person within the jurisdiction:

- (i) who is, of the opinion of the Court, fit to be so trusted, or
- (ii) who, upon being required in accordance with the rules, or as the Court may direct, to pray for administration, complies with the requirement or direction,

then to:

- (d) any person, whether a creditor or not of the deceased, that the Court thinks fit.

5.6 These jurisdictions do not, however, include in either their legislation or court rules an order of priority for letters of administration with the will annexed, with the result that priority in those circumstances is governed entirely by the relevant case law.

5.7 Commentators on the New South Wales legislation have observed that section 63 of the New South Wales legislation overlaps, to some extent, with section 74 of the Act, which gives the court a very wide discretion to grant administration.⁵²² They suggest, however, that section 63 does not limit the court's discretion under section 74.⁵²³

521 *Administration and Probate Act 1929* (ACT) s 12; *Probate and Administration Act 1898* (NSW) s 63; *Administration and Probate Act* (NT) s 22.

522 *Probate and Administration Act 1898* (NSW) s 74 is set out at [4.122] above.

523 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [74.02]. They suggest (at [74.06]) that 'an applicant for administration who would prefer not to cite an unsuitable person in a higher category and perhaps provoke that person into applying for a grant should use s 74 instead of s 63 and citation'.

Rather, what the section [63] does is to give an interested person the power to cite, and sets out consequences if the citee does not comply with the order or citation.

Queensland

5.8 In Queensland, the court has the power under the *Succession Act 1981* (Qld) to make a grant to 'such person ... as the court may think fit'.⁵²⁴ That provision is supplemented by the *Uniform Civil Procedure Rules 1999* (Qld), which set out the usual order of priority for letters of administration.

5.9 Rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld) provides the order of priority for letters of administration on intestacy:⁵²⁵

610 Priority for letters of administration

- (1) The descending order of priority of persons to whom the court may grant letters of administration on intestacy is as follows—
 - (a) the deceased's surviving spouse;⁵²⁶
 - (b) the deceased's children;
 - (c) the deceased's grandchildren or great-grandchildren;
 - (d) the deceased's parent or parents;
 - (e) the deceased's brothers and sisters;
 - (f) the children of deceased brothers and sisters of the deceased;
 - (g) the deceased's grandparent or grandparents;
 - (h) the deceased's uncles and aunts;
 - (i) the deceased's first cousins;
 - (j) anyone else the court may appoint.
- (2) A person who represents a person mentioned in a paragraph of subrule (1) has the same priority as the person represented.

⁵²⁴ *Succession Act 1981* (Qld) s 6(3), which is set out at [4.125] above.

⁵²⁵ Where two or more persons claim priority under r 610, the registrar may not make a grant: *Uniform Civil Procedure Rules 1999* (Qld) r 601(1)(b).

⁵²⁶ *Uniform Civil Procedure Rules 1999* (Qld) r 596 contains the following definition of 'spouse':

spouse, in relation to a deceased person and despite the *Acts Interpretation Act 1954*, section 32DA(6), means a person who, at the time of the deceased's death—

- (a) was the deceased's husband or wife; or
- (b) had been the deceased's de facto partner for a continuous period of at least 2 years ending on the deceased's death.

- (3) The court may grant letters of administration to any person, in priority to any person mentioned in subrule (1).
- (4) Also, if there is more than 1 surviving spouse, the court may make a grant to 1 or more of them, or to a person lower in the order of priority.
- (5) Each applicant must establish priority by providing evidence that each person higher in the order of priority is not entitled to priority because of death, incapacity or renunciation.
- (6) A document providing evidence for subrule (5) must be an exhibit to the application.
- (7) The applicant need not establish priority for a person equal to or lower than the applicant in the order of priority but the existence or nonexistence and beneficial interest of any spouse or a person claiming to be a spouse must be sworn. (note added)

5.10 The order of priority prescribed by rule 610 is generally consistent with the Queensland intestacy rules, which provide that, where the next of kin of an intestate are entitled to the intestate's residuary estate, the distribution of the estate can extend (if there are no closer next of kin) to the uncles and aunts of the intestate who survive the intestate and to the children of any uncle or aunt who died before the intestate (that is, to first cousins).⁵²⁷

5.11 The Queensland intestacy rules also provide for distribution of an intestate's estate in circumstances where the intestate is survived by more than one spouse.⁵²⁸ Rule 610(4) addresses the priority for letters of administration in this situation, and provides that the court may make a grant to one or more of the spouses, or to a person lower in the order of priority. This subrule recognises that the existence of multiple spouses is a special situation that may require a different rule from the other categories of relatives. In particular, there is likely to be a higher degree of antipathy among multiple surviving spouses than among members of the other prescribed categories.

5.12 Rules 603 of the *Uniform Civil Procedure Rules 1999* (Qld) provides the order of priority for letters of administration with the will annexed:

603 Priority for letters of administration with the will

- (1) The descending order of priority of persons to whom the court may grant letters of administration with the will is as follows—
 - (a) a trustee of the residuary estate;
 - (b) a life tenant of any part of the residuary estate;
 - (c) a remainderman of any part of the residuary estate;

⁵²⁷ *Succession Act 1981* (Qld) s 37(2)(b).

⁵²⁸ *Succession Act 1981* (Qld) s 36.

- (d) another residuary beneficiary;
 - (e) a person otherwise entitled to all or part of the residuary estate, by full or partial intestacy;
 - (f) a specific or pecuniary legatee;
 - (g) a creditor or person who has acquired the entire beneficial interest under the will;
 - (h) any one else the court may appoint.
- (2) The court may grant letters of administration with the will to any person, in priority to any person mentioned in subrule (1).
 - (3) If 2 or more persons have the same priority, the order of priority must be decided according to which of them has the greater interest in the estate.
 - (4) Each applicant must establish the person's priority by providing evidence that each person higher in the order of priority is not entitled to priority because of death, incapacity or renunciation.
 - (5) A document providing evidence for subrule (4) must be an exhibit to the affidavit in support of the application.
 - (6) The applicant need not establish priority for a person equal to or lower than the applicant in the order of priority.

5.13 Although both rules prescribe a descending order of priority, they nevertheless provide that the court may make a grant to any person in priority to a person mentioned in the list.⁵²⁹

South Australia

5.14 Rule 32 of *The Probate Rules 2004* (SA) provides:

Order of priority for grant in case of intestacy

32.01 Where the deceased died on or after the 29th January 1976, wholly intestate, the persons entitled in distribution under Part IIIA of the Act shall be entitled to a grant of administration in the following order of priority, namely—

- (i) Where the spouse [*or the domestic partner*] of the deceased has survived the deceased for 28 days, the surviving spouse [*or the domestic partner*];
- (ii) The children of the deceased, or the issue of any such child who died before the deceased;
- (iii) The father or mother of the deceased;

⁵²⁹

Uniform Civil Procedure Rules 1999 (Qld) rr 610(3), 603(2).

- (iv) Brothers and sisters of the deceased, or the issue of any deceased brother or sister who died before the deceased;
- (v) Grandparents of the deceased;
- (vi) Uncles and aunts of the deceased and the issue of any deceased uncle or aunt who died before the deceased.

32.02 In default of any person having a beneficial interest in the estate, administration shall be granted to the Attorney-General if the Attorney-General claims *bona vacantia* on behalf of the Crown.

32.03 If all persons entitled to a grant under Rule 32.01 have been cleared off, a grant may be made to a creditor of the deceased or to any person who, notwithstanding that he or she has no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion thereto:

Provided that the Registrar may give permission to a creditor to take a grant if the persons entitled in Rule 32.01(i) have been cleared off and if the Registrar is satisfied that in the circumstances of the case it is just or expedient to do so.

32.04 Subject to Rule 35.03, the personal representative of a person in any of the classes mentioned in Rule 32.01 or the personal representative of a creditor shall have the same right to a grant as the person whom he or she represents:

Provided that the persons mentioned in Rule 32.01(ii) shall be preferred to the personal representative of a spouse [or a domestic partner] who has died without taking a beneficial interest in the whole estate of the deceased as ascertained at the time of the application for the grant.

32.05 For the purposes of this Rule it is immaterial whether a relationship is of the whole blood or the half blood and references to “children of the deceased” include references to the deceased’s natural or adopted children and “father or mother of the deceased” shall be construed accordingly.

5.15 Rule 31 of *The Probate Rules 2004* (SA) provides:

Order of priority for grant where deceased left a will

31 The person or persons entitled to a grant of probate or administration with the will annexed shall be determined in accordance with the following order of priority, namely—

- (i) The executor;
- (ii) Any residuary devisee and/or legatee in trust for any other person;
- (iii) Any residuary devisee and/or legatee for life;
- (iv) The universal or residuary devisee and/or legatee (including one entitled on the happening of any contingency), or, where

the residue is not wholly disposed of by the will, any person entitled to share in the residue not so disposed of or, subject to Rule 35.03, the personal representative of any such person:

Provided that—

- (a) unless the Registrar otherwise directs a residuary devisee or legatee whose devise or legacy is vested in interest shall be preferred to one entitled on the happening of a contingency; and
- (b) where the residue is not in terms wholly disposed of, the Registrar may, if the Registrar is satisfied that the testator has nevertheless disposed of the whole, or substantially the whole of the estate as ascertained at the time of the application for the grant, allow a grant to be made to any devisee or legatee entitled to, or to a share in, the estate so disposed of or, subject to Rule 35.03, the personal representative of any such person without regard to the persons entitled to share in any residue not disposed of;
- (v) Any specific devisee or legatee or any creditor or, subject to Rule 35.03, the personal representative of any such person or, where the estate is not wholly disposed of by the will, any person who, notwithstanding that the value of the estate is such that he or she has no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion thereto;
- (vi) Any specific devisee or legatee entitled on the happening of any contingency, or any person having no interest under the will of the deceased who would have been entitled to a grant if the deceased had died wholly intestate.

Tasmania

5.16 In Tasmania, the administration legislation sets out the principles that are to be applied in granting letters of administration. Section 13 of the *Administration and Probate Act 1935* (Tas) provides:

13 Discretion of Court as to persons to whom administration is to be granted and limitation of grant

In granting letters of administration the Court shall have regard to the rights of all persons interested in the real and personal estate of the deceased person, or the proceeds of sale thereof and, in particular, administration with the will annexed may be granted to a devisee or legatee, and any such administration may be limited in any way the Court thinks fit. Provided that—

- (a) where the deceased died wholly intestate as to his real and personal estate, administration shall, if application is made for that purpose, be granted to some one or more of the persons interested in the residuary estate of the deceased; and

- (b) if, by reason of the insolvency of the estate of the deceased or of any other special circumstances, it appears to the Court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the Court may, in its discretion, notwithstanding anything contained in section 14, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the Court thinks fit.

5.17 This provision is supplemented by the *Probate Rules 1936* (Tas), which prescribe an order of priority for the granting of letters of administration.

5.18 Rule 22, which sets out the priority for letters of administration on intestacy, provides:

22 Priority of right to grant, where no will

Where the deceased died wholly intestate, the priority of right to a grant of administration shall be as follows:

- (a) the husband or wife, or partner for whom the whole or any part of the residuary estate of the intestate is to be held in trust;
- (b) children or other issue of deceased taking per stirpes;
- (c) father or mother;
- (d) brothers and sisters, whether of the whole blood or the half blood;
- (e) grandparents;
- (f) uncles and aunts, whether of the whole blood or the half blood;
- (g) next-of-kin according to civil law;
- (h) the Crown;
- (i) creditors.

5.19 Rule 21, which sets out the priority for letters of administration with the will annexed, provides:

21 Priority of right to grant, where will

Where the deceased died leaving a will, the priority of right to a grant of administration with the will annexed where there is no executor who proves shall be as follows:

- (a) residuary legatees or devisees in trust;
- (b) residuary legatees or devisees for life;
- (c) ultimate residuary legatees or devisees, or, where the residue is not wholly disposed of, the person entitled upon an Intestacy;

- (d) the legal personal representative of persons indicated in paragraph (c);
- (e) legatees, or devisees, or creditors;
- (f) contingent residuary legatees, or devisees, or contingent legatees or devisees, or persons having no interest in the estate who would have been entitled to a grant had the deceased died wholly intestate;
- (g) the Crown.

5.20 In addition, rule 23 provides:

23 Preference of interests

In the making of a grant, live interests will be preferred to dead interests; and, in the case of conflicting claims, the nearer interest will be preferred to the more remote, unless a judge shall otherwise direct.

Victoria

5.21 Neither the Victorian legislation nor the Victorian rules prescribes an order of priority for letters of administration, whether on intestacy or with the will annexed. Accordingly, the priority for letters of administration is governed wholly by the case law that has developed about this issue.⁵³⁰

Western Australia

5.22 The Western Australian legislation includes two provisions dealing with grants of administration on intestacy. The first provision, section 24 of the *Administration Act 1903 (WA)*, preserves the previous practice of the court in relation to granting administration of an intestate:

24 Administration in case of intestacy

The practice hitherto in force with reference to granting administration of the estate of an intestate shall, save as hereby altered and subject to the rules, be applicable to administration granted hereunder; and administration of both real and personal estate may be granted in and by the same letters.

5.23 The second provision, section 25 of the *Administration Act 1903 (WA)*, provides that administration may be granted to the persons prescribed by that section:

25 Persons entitled to administration

- (1) The Court may grant administration of the estate of a person dying intestate to the following persons (separately or conjointly) being of the full age of 18 years, that is to say—

⁵³⁰

For a discussion of priority for letters of administration, see RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 187–9 (letters of administration with the will annexed) and 192–4 (letters of administration on intestacy).

- (a) one or more of the persons entitled in distribution to the estate of the intestate;
- (b) any other person, whether a creditor or not, if there be no such person entitled as aforesaid resident within the jurisdiction and fit to be so entrusted, or if the person entitled as aforesaid fails, when duly cited, to appear and apply for administration.

5.24 As noted previously, section 36 of the Western Australian legislation sets out some of the circumstances in which the court may grant letters of administration with the will annexed.⁵³¹ However, neither the legislation nor the rules includes an order of priority for letters of administration with the will annexed.

5.25 When the Law Reform Commission of Western Australia reviewed that jurisdiction's administration legislation, it expressed the view that the 'order of priority of persons entitled to administration [under sections 25 and 36] is not altogether clear from these provisions'.⁵³² It commented:⁵³³

The practice of the Registrar in relation to entitlements to administration therefore derives partly from these provisions, partly from the general law, and partly from the exercise of discretion.

5.26 The Western Australian Commission considered, as a threshold question, whether the legislation should distinguish between cases of administration on intestacy and cases of administration where the deceased left a valid will.⁵³⁴ It noted that the general law recognised such a distinction,⁵³⁵ and concluded that 'the principle of efficient administration should continue to govern the question of priority in entitlement in cases both of administration on intestacy and of administration with the will annexed'.⁵³⁶

5.27 It recommended that, 'in cases of administration upon intestacy, the order of priority in entitlement under section 25 should directly reflect existing statutory and general law entitlements, and should therefore be':⁵³⁷

- Class 1: the surviving spouse, if any; followed by
- Class 2: other persons, either separately or conjointly, entitled (according to the facts of the particular case) to participate,

531 *Administration Act 1903* (WA) s 36 is set out at [4.133] above.

532 Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.1].

533 *Ibid.*

534 *Ibid* [3.2].

535 *Ibid.*

536 *Ibid* [3.3].

537 *Ibid.*

under the Table in section 14 of the Act, in distribution of the estate of the intestate; followed by

Class 3: any creditor of the estate, or any other person who has an interest therein (such as, for example, as the purchaser of an interest of a distributee).

5.28 In cases of administration with the will annexed, the Western Australian Commission was of the view that the order of priority under section 36 should be:⁵³⁸

Class 1: expressly appointed trustees of the residuary estate, if any; followed by

Class 2: residuary beneficiaries (either separately or conjointly) and where residue is divided between life tenant and remainderman, the life tenant being preferred; if no residuary clause in the will, then

Class 3: those entitled (either separately or conjointly) to the residue under the Table in section 14 of the Act in cases in which the Will has failed to dispose to the residue; failing application by which

Class 4: any legatee; failing which

Class 5: any creditor of the estate, or any other interested person.

5.29 The Commission considered, however, 'that situations will inevitably arise in which the statutory order or priority should, in accordance with the requirements of the due administration of justice, be departed from'.⁵³⁹ It considered, however, that the court's discretion should not be uncontrolled.⁵⁴⁰ It therefore recommended that:⁵⁴¹

the Court (or a Registrar) should have a general discretion to make a grant otherwise than in accordance with the statutory order in cases in which it is impracticable or undesirable for a person first entitled to a grant to receive it. In the latter case, the test to be applied should be whether a grant so made would be more beneficial to the estate or desirable to protect the interests of persons beneficially interested therein, and particularly of infants.

5.30 The Probate Rules Committee of Western Australia has also commented on the difficulty that results from the absence in the legislation and rules of an order of priority for letters of administration:⁵⁴²

538 Ibid.

539 Ibid [3.6].

540 Ibid.

541 Ibid.

542 Probate Rules Committee (WA), *Revision of the Non-contentious Probate Rules of 1967 of Western Australia*, Preliminary Report (2000).

The problem is particularly acute in the case of an intestacy where reliance would have to be placed on s 24 of the *Administration Act 1903* (WA) and 'The practice hitherto in force ...'⁵⁴³ (note added)

5.31 In that Committee's Final Report, it recommended that the court rules be amended to include a rule setting out the order of priority for letters of administration on intestacy, as is done in rule 22 of the *Non-Contentious Probate Rules 1987* (UK). It also recommended the inclusion of a rule setting out the order of priority for letters of administration with the will annexed, which was based, with a minor change, on rule 603 of the *Uniform Civil Procedure Rules 1999* (Qld).⁵⁴⁴

DISCUSSION PAPER

5.32 In the Discussion Paper, the National Committee commented that 'it was desirable to include a broad statement of principle in the model legislation as to the matters to which the court must have regard when granting letters of administration'.⁵⁴⁵ It therefore proposed that the model legislation should include a provision, developed from section 13 of the *Administration and Probate Act 1935* (Tas),⁵⁴⁶ to signpost the issue of the ranking of applicants for letters of administration. The proposed provision was in the following terms:⁵⁴⁷

In granting letters of administration the Court shall have regard to the rights of all persons interested in the estate of the deceased and in particular the rights of those who have the greatest interest in the due administration of the estate.

5.33 However, the National Committee considered that it would be difficult to achieve uniformity in relation to the actual ranking of applicants for letters of administration, given that the intestacy rules of the various jurisdictions are not presently uniform.⁵⁴⁸ It therefore proposed that the model legislation should not include a provision setting out the order in which people are entitled to apply for letters of administration. It suggested that those jurisdictions that have such a list could move it to, or retain it in, their court rules (depending on where the list was located).⁵⁴⁹

543 *Administration Act 1903* (WA) s 24 is set out at [5.22] above.

544 Probate Rules Committee (WA), *Revision of the Non-contentious Probate Rules of 1967 of Western Australia*, Final Report (2002). That Committee's proposed rule substituted 'a specific devisee' for 'a person otherwise entitled to all or part of the residuary estate, by full or partial intestacy', which appears in r 603(1)(e) of the *Uniform Civil Procedure Rules 1999* (Qld).

545 *Administration of Estates Discussion Paper* (1999) QLRC 33; NSWLRC [5.24].

546 *Administration and Probate Act 1935* (Tas) s 13 is set out at [5.16] above.

547 *Ibid*, QLRC 33; NSWLRC [5.24].

548 *Ibid*, QLRC 37; NSWLRC [5.32].

549 *Administration of Estates Discussion Paper* (1999) QLRC 37; NSWLRC 55 (Proposal 13).

SUBMISSIONS

Principles relevant to the exercise of the court's discretion

5.34 The National Committee's proposal to include a provision, based on section 13 of the *Administration and Probate Act 1935* (Tas), to signpost the ranking of applicants for letters of administration was supported by a former ACT Registrar of Probate, the National Council of Women of Queensland, the Trustee Corporations Association of Australia, an academic expert in succession law, the New South Wales Public Trustee and the ACT Law Society.⁵⁵⁰

5.35 The National Council of Women of Queensland commented:⁵⁵¹

It is desirable to have a provision in the proposed legislation which would highlight the most important matters to be considered and the ranking of those persons who have an interest in the estate.

5.36 The ACT Law Society expressed a similar view:⁵⁵²

[The reference to] 'the rights of those who have the greatest interest' ... facilitates the ranking of applicants and avoids unnecessary costs being incurred by competing applicants

5.37 The Bar Association of Queensland, on the other hand, suggested that the court's jurisdiction should not be fettered. In its view 'that discretion would ordinarily be exercised by reference to interest but there is sometimes good reason for ignoring quantitative interest'.⁵⁵³

Order of priority for letters of administration

5.38 The National Committee's further proposal that the model legislation should not set out the order in which people are entitled to apply for letters of administration was supported by the Bar Association of Queensland, the Public Trustee of South Australia and an academic expert in succession law.⁵⁵⁴

5.39 The Public Trustee of South Australia considered that there should be an order in which people are entitled to apply for letters of administration, which should 'correspond with the order of distribution under intestacy'. However, given that the States and Territories do not have uniform intestacy rules, she

550 Submissions 2, 3, 6, 8, 12, 14.

551 Submission 3.

552 Submission 14.

553 Submission 1.

554 Submissions 1, 4, 12.

considered that the order should be contained in the court rules of the various jurisdictions.⁵⁵⁵

5.40 The academic expert who agreed with the proposal not to set out the order of priority in the model legislation expressed the concern that attempts to codify the conventional ranking of applicants for letters of administration might run the risk of restricting the court's discretion.⁵⁵⁶

5.41 However, several respondents were strongly of the view that the model legislation should set out the order in which applicants are entitled to apply for letters of administration.⁵⁵⁷

5.42 The National Council of Women of Queensland, which disagreed with the National Committee's proposal, suggested that people who are not lawyers would benefit from a list specifying those persons who are entitled to letters of administration.⁵⁵⁸

5.43 A similar view was expressed by the Public Trustee of New South Wales.⁵⁵⁹

It would assist intended applicants and those beneficially entitled to know the general approach of the Court to appointing an administrator.

A provision which assists those persons should be in the model legislation as rules are not as readily accessible as a statute.

5.44 The ACT Law Society also opposed the proposal, commenting that the inclusion of a provision in the model legislation would 'assist practitioners and avoid unnecessary costs arising between competing applicants'.⁵⁶⁰

THE NATIONAL COMMITTEE'S VIEW

Statutory order of priority for letters of administration

5.45 In the National Committee's view, an order of priority for letters of administration, whether it is contained in the model legislation or in court rules, creates certainty in relation to the order of priority and therefore simplifies the administration of estates.

555 Submission 4.

556 Submission 12.

557 Submissions 3, 6, 11, 14.

558 Submission 3.

559 Submission 11.

560 Submission 14.

5.46 When the National Committee made its preliminary proposal that the provisions dealing with the order of priority for letters of administration not be included in the model legislation, it had not yet commenced work on reviewing the intestacy legislation of the Australian States and Territories. However, the National Committee has now finalised its work on that stage of the Uniform Succession Laws Project, and has made recommendations about the manner in which the estate of a person who dies intestate is to be distributed.⁵⁶¹ Accordingly, it is now possible to propose an order of entitlement for letters of administration on intestacy that is consistent with the recommendations made about distribution on intestacy.

5.47 In the interests of accessibility, the National Committee is of the view that the relevant orders of priority for letters of administration (both on intestacy and with the will annexed) should be included in the model administration legislation. Obviously, because the order of priority for letters of administration on intestacy is linked to the manner of distribution of an intestate's estate on intestacy, implementation in a particular jurisdiction of the National Committee's proposal for an order of priority for letters of administration on intestacy will depend on the prior implementation in that jurisdiction of the National Committee's proposals about distribution on intestacy.

5.48 The National Committee is of the view, however, that the inclusion of provisions in the model legislation will enhance the accessibility of those provisions and will greatly simplify the issue of the ranking of applicants for letters of administration, especially in those jurisdictions where the matter is still largely governed by case law.

5.49 As the model legislation is to set out the order of entitlement for letters of administration, it is not necessary for it to include a provision, based on section 13 of the *Administration and Probate Act 1935* (Tas), to 'signpost' the ranking of applicants for letters of administration, as proposed in the Discussion Paper.

Letters of administration on intestacy

5.50 The most detailed orders of priority for letters of administration on intestacy are those found in the Queensland, South Australian and Tasmanian rules.⁵⁶² Although the various orders are generally similar, they are not identical.

5.51 In its Intestacy Report, the National Committee has largely followed the distribution to next of kin that applies under the *Succession Act 1981* (Qld), which provides for distributing an intestate estate as far as first cousins (where uncles and aunts are deceased) and for distributing the estate where there is

⁵⁶¹ See *Intestacy Report* (2007).

⁵⁶² See *Uniform Civil Procedure Rules 1999* (Qld) r 610 at [5.9] above, *The Probate Rules 2004* (SA) r 32 at [5.14] above and *Probate Rules 1936* (Tas) r 22 at [5.18] above.

more than one spouse. Rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld) is generally consistent with that scheme.⁵⁶³

5.52 However, while rule 610 of the Queensland rules is generally consistent with the range of persons entitled under the National Committee's intestacy recommendations, it confers a higher priority for letters of administration on those issue or next of kin who are closer to the deceased than those who are more remote, even though those who are more remote might also share in the estate with the closer issue or next of kin. For example, the deceased's children appear in paragraph (b) of rule 610(1), whereas the deceased's grandchildren appear in paragraph (c). This means that, if an intestate had two children, one of whom predeceased the intestate, but left a grandchild who survived the intestate by 30 days, the intestate's child would have a higher priority than the intestate's grandchild, even though the child and grandchild would share the estate equally. This is in contrast to the position in South Australia and Tasmania, where, in this situation, the intestate's grandchild would rank equally with the intestate's child.⁵⁶⁴

5.53 In this respect, the National Committee considers that the Queensland order of priority is to be preferred to the order of priority that applies under the South Australian and Tasmanian rules, notwithstanding that the order of priority in South Australia and Tasmania follows the intestacy entitlements more strictly than the Queensland order of priority. Although under the National Committee's intestacy recommendations, grandchildren, for example, will take by representation the share that their parent would have taken if he or she had survived the intestate, the National Committee does not consider that this should equate to an equal priority for letters of administration. In its view, it is appropriate that the children of an intestate should be accorded a higher priority for letters of administration to their parent's estate than the intestate's grandchildren (or even more remote issue). It is also appropriate that an intestate's brothers and sisters should be accorded a higher entitlement than the issue of the intestate's deceased brothers and sisters, and that an intestate's uncles and aunts should be accorded a higher entitlement than the children of the intestate's uncles and aunts. This priority gives recognition to what will ordinarily be the closer personal relationship with the intestate. Of course, this priority does not affect the rules in relation to distribution on intestacy.

5.54 Accordingly, the order of priority for letters of administration on intestacy should, subject to the following modifications, be generally based on rule 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld).

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Note, however, that the National Committee has recommended that the issue of the intestate's deceased brothers and sisters should be entitled on intestacy, rather than merely the children of the intestate's deceased brothers and sisters: see *Intestacy Report* (2007) [9.15]–[9.21], Recommendation 34.

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The Probate Rules 2004 (SA) r 32.01(ii); *Probate Rules 1936* (Tas) r 22(b). These rules are set out at [5.14] and [5.18] above.

5.55 The modifications that should be made arise from the fact that rule 610 presently includes, within some categories in the order of priority, some individuals who may not necessarily be entitled to share in the intestate's estate. For example, under rule 610(1)(c) all grandchildren and great grandchildren rank equally in their entitlement for a grant. Suppose an intestate had two children, one of whom predeceased the intestate, as well as a grandchild by each of the two children. If the intestate's surviving child renounced the administration of the estate or was incapable of applying for a grant, the two grandchildren would rank equally in their entitlement for a grant, even though only the child whose parent had predeceased the intestate would be entitled to share in the intestate's estate. Rule 610 takes a slightly inconsistent approach in this respect as paragraph (f) of rule 610(1) consists of 'the children of *deceased* brothers and sisters of the deceased', which necessarily limits that category to persons who will share in the estate of the intestate.

5.56 Although the National Committee considers that closer issue should be entitled to a grant ahead of more remote issue and that closer next of kin should be entitled ahead of more remote next of kin, it is nevertheless of the view that the order of priority for both issue and next of kin should be confined to those persons who have an entitlement to a share of the deceased person's estate.

5.57 Accordingly, the order of priority for letters of administration on intestacy, in descending order, will be:

- a surviving spouse of the deceased person;⁵⁶⁵
- the deceased person's children;
- the issue of any child of the deceased person who died before the deceased person or who failed to survive the deceased person by 30 days, if the issue are entitled to share in the deceased person's estate;
- the deceased person's parents;
- the deceased person's brothers and sisters;
- the issue of any brother or sister of the deceased person who died before the deceased person or who failed to survive the deceased person by 30 days, if the issue are entitled to share in the deceased person's estate;
- the deceased person's grandparents;

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This first category has been framed in this way, as it is possible that the intestate may have had more than one spouse — a husband or wife and a person who was in a 'domestic partnership' with the intestate, as defined in the model legislation.

- the brothers and sisters of the deceased person's parents;⁵⁶⁶
- the children of any deceased brother or sister of the deceased person's parents who died before the deceased person or who failed to survive the deceased person by 30 days.

5.58 The final two categories should consist of:

- the public trustee of the particular jurisdiction;⁵⁶⁷ and
- anyone else the court may appoint, including a creditor of the deceased person's estate.⁵⁶⁸

5.59 Further, the model legislation should include a definition of 'spouse', so that the reference to a 'surviving spouse' of the deceased person includes a person who was a surviving de facto partner of the deceased person. The term 'spouse' is defined in the *Uniform Civil Procedure Rules 1999* (Qld) to include a person 'who had been the deceased's de facto partner for a continuous period of at least 2 years ending on the deceased's death'.⁵⁶⁹ However, for consistency with the National Committee's Draft Intestacy Bill 2007,⁵⁷⁰ the model administration legislation should include the same definitions of 'spouse' and 'domestic partnership' as are found in the Draft Intestacy Bill 2007, namely:

6 Spouse

A **spouse** of an intestate is a person—

- who was married to the intestate immediately before the intestate's death; or
- who was a party to a domestic partnership with the intestate immediately before the intestate's death.

7 Domestic partnership

A **domestic partnership** is a relationship (other than marriage) between the intestate and another person—

⁵⁶⁶ Reference is made to the 'brothers and sisters of the intestate's parents', instead of to the intestate's aunts and uncles, for consistency with the language used in the model intestacy legislation: see *Intestacy Report* (2007) Appendix A, Draft Intestacy Bill 2007 cl 32.

⁵⁶⁷ In most Australian jurisdictions, the public trustee is able to apply for an order to administer an estate where no one else has applied for a grant: see [31.40]–[31.42] in vol 3 of this Report. The National Committee therefore considers it appropriate for the public trustee to be expressly included in the order of priority for letters of administration.

⁵⁶⁸ This represents a slight extension of r 610(1)(j), which consists of 'anyone else the court may appoint'.

⁵⁶⁹ See *Uniform Civil Procedure Rules 1999* (Qld) r 596 (definition of 'spouse'), which is set out at note 526 above.

⁵⁷⁰ *Intestacy Report* (2007) Appendix A.

- (a) that is a de facto relationship/domestic partnership/civil union within the meaning of the [*here insert the name of the local legislation dealing with the recognition of de facto relationships*]; and
- (b) that—
 - (i) has been in existence for a continuous period of at least 2 years; or
 - (ii) has resulted in the birth of a child; or
 - (iii) is registered under the [*here insert the name of the local legislation dealing with registration of de facto relationships; or if there is no such legislation, omit this subparagraph*].

5.60 Subject to the following matters, the model legislation should also include provisions to the effect of the balance of rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld).

5.61 The model provision that is based on rule 610(5) should simply provide that an applicant must establish that any person higher in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation. In the National Committee's view, it is unnecessary for the model provision to provide, as rule 610(5) currently does, that the applicant must establish his or her priority 'by providing evidence' that each person higher in the order of priority is not entitled because of one of those factors.

5.62 Further, the model legislation should not include a provision to the effect of rule 610(6), which is more appropriately located in court rules.

5.63 Finally, it is not necessary for the model legislation to include a provision to the effect of the first part of rule 610(7) of the *Uniform Civil Procedure Rules 1999* (Qld), which provides that an applicant for a grant 'need not establish priority for a person equal to or lower than the applicant in the order of priority'. It is implicit in the requirement that an applicant must establish that each person '*higher* in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation' that an applicant need not 'clear off' a person who is equal to, or lower than, the applicant in the order of priority.

Letters of administration with the will annexed

5.64 In the National Committee's view, rule 603 of the *Uniform Civil Procedure Rules 1999* (Qld) is expressed in clearer and more modern terms than its counterparts in the South Australian and Tasmanian rules.⁵⁷¹ Accordingly, the Queensland rule should generally form the basis for the model provision, subject to several changes intended to simplify the order of priority set out in rule 603(1).

⁵⁷¹

Uniform Civil Procedure Rules 1999 (Qld) r 603 is set out at [5.12] above.

5.65 First, rule 603(1) distinguishes between four types of residuary beneficiary:

- (b) a life tenant of any part of the residuary estate;
- (c) a remainderman of any part of the residuary estate;
- (d) another residuary beneficiary;
- (e) a person otherwise entitled to all or part of the residuary estate, by full or partial intestacy;

5.66 In the National Committee's view, the priority for letters of administration with the will annexed can be simplified by conflating these categories into a single category — namely, a beneficiary of any part of the residuary estate, including a person entitled to all or part of the residuary estate by full or partial intestacy.

5.67 Secondly, the model order of priority should omit the reference presently found in rule 603(1)(g) to a 'person who has acquired the entire beneficial interest under the will'. As it will be rare for there to be such a person, it does not, in the National Committee's view, warrant specific mention in the order of priority.

5.68 Thirdly, for consistency with the proposal concerning the order of priority for letters of administration on intestacy, the final category should consist of 'anyone else the Supreme Court may appoint, including a creditor of the deceased person's estate'.

5.69 The result of these modifications is that the order of priority for letters of administration with the will annexed, in descending order, will be:

- a trustee of the residuary estate;
- a beneficiary entitled to any part of the residuary estate, including a person entitled to all or part of the residuary estate by full or partial intestacy;
- a beneficiary of a specific or pecuniary legacy;
- anyone else the Supreme Court may appoint, including a creditor of the deceased person's estate.

5.70 Further, the model provision that is based on rule 603(4) should be modified so that it simply provides that an applicant must establish that any person higher in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation. In the National Committee's view, it is unnecessary for the model provision to provide, as rule 603(4) currently does, that the applicant must establish his or her priority 'by providing evidence' that

each person higher in the order of priority is not entitled because of one of those factors.

5.71 In addition, the model legislation should not include a provision to the effect of rule 603(5), which is more appropriately located in court rules.

5.72 Finally, it is not necessary for the model legislation to include a provision to the effect of rule 603(6) of the *Uniform Civil Procedure Rules 1999* (Qld), which provides that an applicant for a grant ‘need not establish priority for a person equal to or lower than the applicant in the order of priority’. As explained above, it is implicit in the requirement that an applicant must establish that each person ‘higher in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation’ that an applicant need not ‘clear off’ a person who is equal to, or lower than, the applicant in the order of priority.

APPLICATION OF RECOMMENDATIONS ABOUT THE ORDER OF PRIORITY FOR LETTERS OF ADMINISTRATION WHERE THE DECEASED DIED DOMICILED OUTSIDE AUSTRALIA

Background

5.73 In Chapter 36 of this Report, the National Committee has recommended that the model legislation should include a provision dealing with entitlement to a grant where the deceased, at the time of death, was domiciled outside the jurisdiction.⁵⁷² The purpose of the recommended provision is to enable maximum effect to be given to the rules that apply in the jurisdiction in which the deceased died domiciled in relation to authority to administer an estate. As a result, a person who has been granted administration of the deceased’s estate in the jurisdiction in which the deceased died domiciled may obtain a grant in an Australian jurisdiction even though he or she may not be the person with the highest priority for a grant under the internal law of that jurisdiction.

5.74 The model provision has been based on rule 40.01 of *The Probate Rules 2004* (SA)⁵⁷³ with some minor modifications. It lists various people to whom a grant of administration may be made, without specifying any order of priority in respect of those people.

5.75 In addition, the model provision provides, similarly to the proviso to rule 40.01 of the South Australian rules, that:

- probate of a will that is admissible to proof may be granted to the executor named in the will or to the executor according to the tenor of the will; and

⁵⁷² See Recommendations 36-1 to 36-5 in vol 3 of this Report.

⁵⁷³ *The Probate Rules 2004* (SA) r 40.01 is set out at [36.25] in vol 3 of this Report.

- where the whole or substantially the whole of the estate in the jurisdiction consists of immovable property, a grant in respect of the whole of the estate may be made in accordance with the law that would have applied if the deceased had died domiciled in that jurisdiction.

5.76 The South Australian rules provide expressly that the rules that deal with the ordinary priority for letters of administration on intestacy and for letters of administration with the will annexed do not apply in these latter two situations, where the purpose of rule 40.01 is to enable a grant to be made in accordance with the law of South Australia. Rule 36.02 of *The Probate Rules 2004* (SA) provides:

Exceptions to Rules as to priority

...

- 36.02 Neither Rule 31 nor Rule 32 shall apply where the deceased died domiciled outside the State of South Australia, except in a case to which the proviso to Rule 40.01 applies.

The National Committee's view

5.77 The National Committee is of the view that the model legislation should give effect to rule 36.02 of *The Probate Rules 2004* (SA) by clarifying the relationship between the model provisions dealing with the order of priority to letters of administration and the specific model provisions that deal with applications for grants where the deceased has died domiciled outside the jurisdiction.

RECOMMENDATIONS

Statutory order of priority for letters of administration on intestacy

5-1 The model legislation should include a provision to the general effect of rule 610 of the *Uniform Civil Procedure Rules 1999* (Qld), except that:⁵⁷⁴

- (a) the model provision that is based on rule 610(5) should simply provide that each applicant must establish that each person higher in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation;**

⁵⁷⁴

See [5.47], [5.50]–[5.54], [5.60]–[5.63] above.

- (b) the model legislation should not include a provision to the effect of rule 610(6); and
- (c) it is not necessary for the model legislation to provide, as does the first part of rule 610(7), that an applicant for a grant need not establish priority for a person equal to, or lower than, the applicant in the order of priority.

See Administration of Estates Bill 2009 cl 322(2)–(6), sch 2.

5-2 The descending order of priority for letters of administration on intestacy, which is based generally on rule 610(1) of the *Uniform Civil Procedure Rules 1999* (Qld), should be:⁵⁷⁵

- (a) a surviving spouse of the deceased person;
- (b) the deceased person's children;
- (c) the issue of any child of the deceased person who died before the deceased person or who failed to survive the deceased person by 30 days, if the issue are entitled to share in the deceased person's estate;
- (d) the deceased person's parents;
- (e) the deceased person's brothers and sisters;
- (f) the issue of any brother or sister of the deceased person who died before the deceased person or who failed to survive the deceased person by 30 days, if the issue are entitled to share in the deceased person's estate;
- (g) the deceased person's grandparents;
- (h) the brothers and sisters of the deceased person's parents;
- (i) the children of any deceased brother or sister of the deceased person's parents who died before the deceased person or who failed to survive the deceased person by 30 days;
- (j) the public trustee;

575

See [5.54]–[5.58] above.

- (k) anyone else the court may appoint, including a creditor of the deceased person's estate.

See Administration of Estates Bill 2009 sch 2.

- 5-3 The model legislation should include definitions of 'spouse' and 'domestic partnership' that are consistent with the definitions contained in the National Committee's Draft Intestacy Bill 2007.⁵⁷⁶

See Administration of Estates Bill 2009 sch 3 dictionary (definitions of 'spouse' and 'domestic partnership').

Statutory order of priority for letters of administration with the will annexed

- 5-4 The model legislation should include a provision to the general effect of rule 603 of the *Uniform Civil Procedure Rules 1999 (Qld)*,⁵⁷⁷ except that:

- (a) the descending order of priority for letters of administration with the will annexed should be:⁵⁷⁸
- (i) a trustee of the residuary estate;
 - (ii) a beneficiary entitled to any part of the residuary estate, including a person entitled to all or part of the residuary estate by full or partial intestacy;
 - (iii) a beneficiary of a specific or pecuniary legacy;
 - (iv) anyone else the Supreme Court may appoint, including a creditor of the deceased person's estate;
- (b) the model provision that is based on rule 603(4) should simply provide that an applicant must establish that any person higher in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation;⁵⁷⁹

576 See [5.59] above.

577 See [5.64] above.

578 See [5.65]–[5.69] above.

579 See [5.70] above.

- (c) the model provision should not include a provision to the effect of rule 603(5) or (6).⁵⁸⁰

See Administration of Estates Bill 2009 cl 321(2)–(5), sch 1.

Application of statutory order of priority for letters of administration where the deceased died domiciled outside Australia

- 5-5 The model legislation should provide that the provisions giving effect to Recommendations 5-1, 5-2 and 5-4 do not apply if the deceased died domiciled outside the enacting jurisdiction, unless the provision giving effect to Recommendation 36-5 applies.⁵⁸¹

See Administration of Estates Bill 2009 cl 321(1), 322(1).

580 See [5.71]–[5.72] above.

581 See [5.77] above.

Chapter 6

Appointment of personal representatives: specific issues concerning public trustees and trustee companies

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AUTHORISATION AND CONSENT OF THE PERSON ENTITLED TO A GRANT TO THE APPOINTMENT OF A TRUSTEE COMPANY OR THE PUBLIC TRUSTEE

6.1 All Australian jurisdictions have provisions in their trustee company legislation under which a person who is entitled to a grant may, instead of applying personally, authorise a trustee company to apply for the grant.⁵⁸² Most Australian jurisdictions also have provisions in their public trustee legislation under which an executor or administrator appointed under a grant (and, in some jurisdictions, an executor who has not obtained a grant) may, with the consent of the court, appoint the public trustee as executor or administrator or may appoint the public trustee to perform and discharge the duties of that office.⁵⁸³

6.2 In New South Wales, in addition to the provision contained in its trustee company legislation, section 75A of the *Probate and Administration Act 1898* (NSW) deals with the power of a person entitled to a grant or appointed under a grant to appoint the public trustee or a trustee company to be the executor or administrator in his or her place.

6.3 This section of the chapter considers whether, in light of the various trustee company and public trustee provisions considered below, the model legislation should include a provision to the effect of section 75A of the *Probate and Administration Act 1898* (NSW).

Existing legislative provisions

Trustee company legislation

Authorisation by person entitled to a grant of probate or letters of administration

6.4 As mentioned above, all Australian jurisdictions have provisions in their trustee company legislation under which a person who is entitled to a grant may, instead of applying personally, authorise a trustee company to apply for the grant.

6.5 In the ACT, Queensland and Western Australia, a person who is entitled to apply for and obtain a grant of probate as sole executor⁵⁸⁴ may⁵⁸⁵

582 See [6.4]–[6.10] below. In some jurisdictions, the provisions also enable a person who is entitled to apply for and obtain a grant to join with a trustee company in an application for a joint grant.

583 See [6.12]–[6.22] below.

584 *Trustee Companies Act 1947* (ACT) s 5(1); *Trustee Companies Act 1968* (Qld) s 6(1)(a); *Trustee Companies Act 1987* (WA) s 6(1). These provisions refer to a person who is entitled to apply for and obtain probate of the will 'without reserving leave to any other person to apply for probate'. Accordingly, they will apply where the person is the sole executor named in the will or where the person is one of several executors named in the will, but all the other executors have either died or renounced their entitlement to probate.

585 *Trustee Companies Act 1947* (ACT) s 5(1); *Trustee Companies Act 1968* (Qld) s 6(1)(a), (c)(i), (d); *Trustee Companies Act 1987* (WA) s 6(1). In the ACT, a similar provision applies where a person is entitled to apply for and obtain a grant of probate jointly with any other person: *Trustee Companies Act 1947* (ACT) s 6.

- join with a trustee company in an application for a grant⁵⁸⁶ to that person and the trustee company jointly; or
- instead of applying personally, authorise a trustee company to apply for a grant of letters of administration with the will annexed.

6.6 In Victoria, there is a similar provision, except that its application is not expressed to be limited to where a person is entitled to a grant of probate as sole executor.⁵⁸⁷

6.7 In New South Wales, the Northern Territory and Tasmania, a person who is entitled to obtain a grant of probate as sole executor may also authorise a trustee company to apply for letters of administration with the will annexed.⁵⁸⁸ However, the legislation does not enable such a person to apply for a grant jointly with a trustee company.

6.8 In the ACT, New South Wales, the Northern Territory, Queensland, Victoria and Western Australia, a person who is entitled to apply for and obtain letters of administration with the will annexed,⁵⁸⁹ letters of administration on intestacy⁵⁹⁰ or simply letters of administration (whether with or without the will annexed)⁵⁹¹ may:

- join with a trustee company in applying for joint letters of administration; or;

In the ACT and Western Australia, the court may not grant the application if the testator has, by his or her will, expressed the desire that the office of executor should not be delegated or that a trustee company, or that particular trustee company, should not act in the trusts of the will: *Trustee Companies Act 1947* (ACT) s 5(2); *Trustee Companies Act 1987* (WA) s 6(2). The Queensland legislation provides that a person entitled to a grant of probate may not authorise a trustee company to apply for letters of administration with the will annexed if the testator has, by will, expressed such a desire: *Trustee Companies Act 1968* (Qld) s 6(1)(d).

586 *Trustee Companies Act 1947* (ACT) s 5(1)(a) (a grant of probate); *Trustee Companies Act 1968* (Qld) s 6(1)(c)(i) (a joint grant of probate to himself or herself and letters of administration with the will annexed to the trustee company); *Trustee Companies Act 1987* (WA) s 6(1)(a) (a grant of letters of administration with the will annexed).

587 *Trustee Companies Act 1984* (Vic) s 10(1), which applies where a person 'is entitled to obtain probate of the will of a testator'. However, the court may not grant probate under this section if the testator, by his or her will, expressed the desire that the office of executor is not to be delegated or that the trustee company applying for the grant is not to act in the trusts of the will: *Trustee Companies Act 1984* (Vic) s 10(2).

588 *Trustee Companies Act 1964* (NSW) s 5; *Companies (Trustees and Personal Representatives) Act* (NT) s 16(1); *Trustee Companies Act 1953* (Tas) s 8. Like the provisions in the other jurisdictions discussed above, a grant may not be made to a trustee company under these provisions if the testator, by will, expressed the desire that the office of executor not be delegated or that the trustee company applying for the grant is not to act in the trusts of the will: *Trustee Companies Act 1964* (NSW) s 5; *Companies (Trustees and Personal Representatives) Act* (NT) s 16(1); *Trustee Companies Act 1953* (Tas) s 8. In the Northern Territory and Tasmania, similar provisions apply where a person is entitled to obtain probate jointly with any other person: *Companies (Trustees and Personal Representatives) Act* (NT) s 16(2); *Trustee Companies Act 1953* (Tas) s 10.

589 *Trustee Companies Act 1947* (ACT) s 7(1); *Companies (Trustees and Personal Representatives) Act* (NT) s 15; *Trustee Companies Act 1968* (Qld) s 6(1)(b), (c)(ii), (d); *Trustee Companies Act 1987* (WA) s 7(1).

590 *Trustee Companies Act 1947* (ACT) s 8(1); *Companies (Trustees and Personal Representatives) Act* (NT) s 17; *Trustee Companies Act 1968* (Qld) s 7(1); *Trustee Companies Act 1987* (WA) s 8(1).

591 *Trustee Companies Act 1964* (NSW) s 6(1); *Trustee Companies Act 1984* (Vic) s 11.

- instead of applying personally, authorise a trustee company to apply for letters of administration.⁵⁹²

6.9 The equivalent Tasmanian provision enables a person who is entitled to obtain letters of administration (whether general, special or limited) to authorise a trustee company to apply for administration of the estate, but does not enable the person to apply for a grant jointly with a trustee company.⁵⁹³

6.10 In South Australia, the trustee company legislation is framed slightly differently from the provisions discussed above, although it achieves the same result. Section 4(3) of the *Trustee Companies Act 1988* (SA) enables a trustee company to apply for and obtain a grant where it has the approval of the court or the registrar and the consent of the person who would otherwise be entitled to obtain a grant:

4 Trustee company may act as executor or administrator

...

- (3) A trustee company may, with the approval of the Court or the Registrar and the consent of the person entitled to probate of the will or a grant of administration of the estate of a deceased person, apply for and obtain—
- probate of the will of the deceased person; or
 - letters of administration of the estate of the deceased person,
- (as the case requires).

Appointment of trustee company to act as executor or administrator

6.11 In Victoria, in addition to the provisions described earlier that apply before a grant has been made, the trustee company legislation provides that an executor or administrator acting under a grant may appoint a trustee company to perform and discharge all the acts and duties of the executor or administrator.⁵⁹⁴

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In the ACT and Western Australia, the court may not, under the relevant provisions, grant letters of administration with the will annexed to a trustee company if the testator, by his or her will, expressed the desire that the office of administrator should not be held by a trustee company or by that particular trustee company: *Trustee Companies Act 1947* (ACT) s 7(2); *Trustee Companies Act 1987* (WA) s 7(2). In Queensland, a similar limitation prevents a person who is entitled to letters of administration with the will annexed from authorising a trustee company to apply for such a grant: *Trustee Companies Act 1968* (Qld) s 6(1)(d). However, there is no corresponding limitation where the person applies for the grant jointly with a trustee company: *Trustee Companies Act 1968* (Qld) s 6(1)(c).

593

Trustee Companies Act 1953 (Tas) s 9.

594

Trustee Companies Act 1984 (Vic) s 17(1)(a).

Public trustee legislation

6.12 Most Australian jurisdictions also have provisions in their public trustee legislation under which an executor or administrator may, with the consent of the court, appoint the public trustee to be the executor or administrator in his or her place or may appoint the public trustee to perform the powers and duties of the office executor or administrator.⁵⁹⁵

New South Wales

6.13 In New South Wales, section 18(2) of the *Public Trustee Act 1913* (NSW) provides that an executor who has obtained probate or an administrator who has obtained letters of administration may apply to the court for an order transferring the estate to the public trustee for administration. Such an application may be made even though the executor or administrator has acted in the administration of the deceased's estate.

Northern Territory

6.14 In the Northern Territory, the legislation provides that an executor or administrator acting under a grant (or certain other specified persons) may, with the consent of the court, appoint the public trustee to exercise, perform and discharge all the powers and duties of that office. Section 33 of the *Public Trustee Act* (NT) provides:

33 An executor, &c., may appoint Public Trustee

- (1) An executor or administrator acting under any grant of probate or letters of administration, a receiver appointed by the Court, a committee or manager appointed to manage the estate of a person under any law in the Northern Territory relating to mental health or protected persons, or a guardian of the estate of any person, may, with the consent of the Court, appoint the Public Trustee to exercise, perform and discharge all the powers and duties of that executor, administrator, receiver, committee or guardian.
- (2) Notice of the intended application under this section for the consent of the Court and the date on which it is intended to be made shall be advertised once in a newspaper published in the Northern Territory at least 7 days before the making of the application.
- (3) The Court may require a person entitled to receipt of any of the income or corpus of the estate in respect of which the application is made or any other person to be served with a notice of the application.
- (4) The costs of the application and any appearances are in the discretion of the Court and may be ordered to be paid out of the estate.

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There is no similar provision in the ACT: see *Public Trustee Act 1985* (ACT).

- (5) Where the Public Trustee is appointed pursuant to this section, the person in whose place the Public Trustee is appointed is released from all liability in respect of acts done or omitted to be done by the Public Trustee acting under an appointment pursuant to this section.

6.15 The application for the court's consent to appoint the public trustee as executor or administrator must be advertised in a newspaper, and the court may require the application to be served on any person.⁵⁹⁶

Queensland

6.16 The Queensland provision is much briefer. Section 31(2) of the *Public Trustee Act 1978* (Qld) provides:

31 Appointment of public trustee in the place of existing personal representative

...

- (2) With the consent of the court, executors or administrators (with or without a will annexed) may, unless expressly prohibited, appoint the public trustee respectively executor or administrator, notwithstanding that any consent which would otherwise be requisite has not been obtained.

...

South Australia

6.17 The equivalent South Australian provision, section 15 of the *Public Trustee Act 1995* (SA), applies to executors (whether or not they have obtained a grant of probate) and to administrators. The section provides:

15 Appointment of Public Trustee by executors, administrators or trustees

- (1) With the consent of the Court—
- (a) executors may, unless expressly prohibited, appoint the Public Trustee sole executor; and
 - (b) administrators may, unless expressly prohibited, appoint the Public Trustee sole administrator; and
 - (c) trustees (whether appointed by or under a will, settlement, declaration of trust or in any other way) may, unless expressly prohibited and despite the terms of the trust as to the number of trustees, appoint the Public Trustee sole trustee in their place.

⁵⁹⁶

Public Trustee Act (NT) s 33(2), (3).

- (2) Executors whose duties continue in the nature of a trusteeship after completion of their administration will, for the purpose of subsection (1), be taken to be trustees.
- (3) An application may be made for consent under this section by less than the full number of the executors, administrators or trustees but the Court may not give its consent if there is another executor, administrator or trustee willing and, in the opinion of the Court, suitable to act.
- (4) An application may be made under this section by an executor before or after proving the will.
- (5) The Public Trustee may be appointed under this section without the need to obtain the consent of any person whose consent to the appointment would, apart from this subsection, be required.
- (6) This section is in addition to and does not derogate from section 14 of the *Trustee Act 1936*.
- (7) This section applies to executors, administrators or trustees appointed before or after the commencement of this Act.

6.18 Where the application to appoint the public trustee as sole executor or sole administrator is not made by all the executors or administrators, the court may not consent to the public trustee's appointment if there is a suitable executor or administrator who is willing to act.⁵⁹⁷

Tasmania

6.19 The Tasmanian provision also applies to executors (whether or not they have obtained a grant of probate) and to administrators. Section 15(1) of the *Public Trustee Act 1930* (Tas) provides:

15 Executors, administrators, or trustees authorized to appoint Public Trustee to act in their places

- (1) Except where he is expressly prohibited from so doing by the terms of the instrument under which he is acting—
 - (a) an executor, whenever appointed and whether he has taken out probate or not; or
 - (b) an administrator, whether the letters of administration are with the will annexed or otherwise and whenever the same were granted—

may appoint in writing the Public Trustee to act as executor or administrator respectively in his place.

597

Public Trustee Act 1995 (SA) s 15(3).

- (2) Whenever, under subsection (1) hereof, or under section 9 of the *Public Trust Office Act 1912*, any executor or administrator with the will annexed appoints, or has appointed, the Public Trustee executor or such administrator, the Public Trustee shall, by force of such appointment, be also sole trustee if such executor or administrator were sole surviving trustee, or if there were no trustee appointed by the trust instrument or in existence.
- (3) Trustees, whenever appointed, and under whatsoever trust instrument appointed, may appoint the Public Trustee sole trustee, unless expressly prohibited, notwithstanding the terms of the trust as to the number of trustees; and executors, whose duties continue in the nature of a trusteeship after their administration is closed, shall be deemed, for the purposes of this subsection, to be trustees.
- (4) Where there are more trustees, executors, or administrators than one, any one trustee, executor, or administrator, as the case may be, may apply to the Court to have the Public Trustee appointed sole trustee, executor, or administrator, and such application may be made either before or after the will, if any, has been proved.
- (5) Where the consent of any person is required for the appointment of a trustee, executor, or administrator, and such person refuses to consent to the appointment of the Public Trustee, or is an infant, or is permanently absent from this State, or is under any other disability, the Court may appoint the Public Trustee without such consent.

Victoria

6.20 In Victoria, where a person is entitled to obtain a grant of probate jointly with any other person, that person may authorise State Trustees Limited, which is the equivalent of the public trustee in the other Australian jurisdictions, to apply for the grant either alone with leave reserved to any other person or jointly with any other person entitled to apply.⁵⁹⁸ Further, because State Trustees Limited is a trustee company, the provisions described earlier in relation to trustee companies enable:

- a person who is entitled to a grant to join with State Trustees Limited in applying for a grant or, instead of applying personally, to authorise State Trustees Limited to apply for a grant; and
- an executor or administrator acting under a grant to appoint State Trustees Limited to perform and discharge all the acts and duties of that office.⁵⁹⁹

⁵⁹⁸ *State Trustees (State Owned Company) Act 1994* (Vic) s 4(1). This section does not apply if the testator specified in his or her will that the office of executor is not be delegated or that State Trustees Limited is not to act: *State Trustees (State Owned Company) Act 1994* (Vic) s 4(2).

⁵⁹⁹ See [6.6], [6.8], [6.11] above.

Western Australia

6.21 Under the Western Australian legislation, an executor or administrator who has been appointed under a grant may, in certain circumstances, apply to the court for an order transferring the estate to the public trustee for administration. In addition, where there are two or more executors or administrators, all the executors or administrators or a majority of them may apply to the court to have the public trustee appointed sole executor or administrator on the grounds that the appointment would benefit the estate. Section 12 of the *Public Trustee Act 1941 (WA)* provides in part:

12 Public Trustee may be appointed to act by executors and administrators

...

- (4) Any executor who has obtained probate, or any administrator who has obtained letters of administration, notwithstanding that he has acted in the administration of the deceased's estate may, with the consent of the Public Trustee, and after an account of all receipts and disbursements made by such executor or administrator in relation to the estate of the deceased up to the date of such application has been filed and passed by a Registrar of the Supreme Court, apply to the Court for an order transferring such estate to the Public Trustee for administration.

...

- (6) Where there are more executors or administrators than one, all, or the majority of such executors or administrators, may apply to the Court or a Judge thereof to have the Public Trustee appointed sole executor or administrator on the grounds that the interests of the estate would be benefited by such appointment.
- (7) All applications to the Court, or a Judge thereof, under this section may be brought in such manner as may be prescribed by rules made under this Act, and the Court or Judge may, and is hereby given jurisdiction to make such order as it or he thinks fit.
- (8) Where to the appointment of any executor or administrator the consent of any person is required, and any such person refuses to consent to the Public Trustee being appointed, or where the person to consent is an infant, idiot, or lunatic, or of unsound mind or absent from Western Australia, or has any other disability, then the appointment of the Public Trustee may be made without such consent, if a Judge of the Supreme Court so orders.

6.22 In addition, the legislation provides that any person or the majority of the persons entitled to obtain probate, letters of administration with the will annexed or letters of administration on intestacy may authorise the public trustee to apply to the court for an order to administer the estate.⁶⁰⁰

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Public Trustee Act 1941 (WA) s 12(1)–(3).

Administration and probate legislation: New South Wales

6.23 In New South Wales, in addition to the provision found in the trustee company legislation,⁶⁰¹ the *Probate and Administration Act 1898* (NSW) includes a provision dealing with the circumstances in which a person who is entitled to a grant of probate, or an executor or administrator appointed under a grant of probate or administration, may appoint the public trustee or a trustee company as executor or administrator.

6.24 Section 75A of the *Probate and Administration Act 1898* (NSW) provides:

75A Delegation

- (1) Any person who has been appointed executor of the will of a deceased person and has not renounced or taken probate thereof may by deed appoint the Public Trustee or a trustee company to be executor of the will in the person's place or stead or as a co-executor with the person or with the continuing executors (including the appointor), as the case may be, and upon the registration and filing by subsections (8) and (9) directed such will shall be construed and take effect in all respects as if the name of the appointee had been originally inserted in such will as the executor or one of the executors thereof in lieu of the person in whose stead it has been appointed or as an additional executor thereof, as the case may be.
- (2) Any executor who has obtained probate or any administrator who has obtained letters of administration notwithstanding that the executor or administrator has acted in the administration of the deceased's estate and notwithstanding the existence of any other executor or administrator may by deed appoint the Public Trustee or a trustee company to be executor or administrator in the executor's or administrator's place or stead or as co-executor or co-administrator with the executor or administrator or with the continuing executors or administrators (including the appointor) as the case may be and upon the registration and filing by subsections (8) and (9) directed the estate of the deceased left unadministered and all rights, powers and obligations in respect thereof shall without any conveyance or other assurance except as otherwise provided in this section vest in the appointee as executor or administrator as the case may be, either solely or jointly with the appointor as the case may be, or, when the appointor is one of several executors or administrators then in the appointee and the continuing executors or administrators or in the appointor, the appointee and the continuing executors or administrators as the case may be, as joint tenants:

Provided that where any portion of such estate is:

- (a) subject to the provisions of the *Real Property Act 1900* such portion shall not vest until either:

⁶⁰¹

See [6.7] above for a discussion of s 5 of the *Trustee Companies Act 1964* (NSW), under which a person entitled to a grant may, instead of applying personally, authorise a trustee company to make the application.

- (i) the appropriate transfer is executed and registered so that such portion is duly transferred, or
 - (ii) an entry of the vesting is made by the Registrar-General. Any such entry shall have the same effect as if the portion were duly transferred, or
- (b) subject to the provisions of the Closer Settlement Acts, the *Crown Lands Act 1989*, the *Mining Act 1992* or the *Offshore Minerals Act 1999* or any other Act relating to Crown lands such portion shall not vest until either:
 - (i) the appropriate transfer is executed and registered so that such portion is duly transferred, or
 - (ii) an entry of the vesting is made in the appropriate register kept under the provisions of the Act to which such portion is subject. Any such entry shall have the same effect as if the portion were duly transferred.

Until such transfer is so executed and registered or such entry of the vesting is made, such executor or administrator shall in any case in which the executor or administrator has appointed the appointee in the executor's or administrator's place or stead not be discharged from the trusts in respect of such portion of the estate.

An executor or administrator who has appointed the appointee in the executor's or administrator's place or stead shall not (except as mentioned in the foregoing proviso) be in any way liable in respect of any act or default in reference to such estate subsequent to the registration and filing of such deed other than the act or default of the executor or administrator or of persons other than the executor or administrator for whose conduct the executor or administrator is in law responsible.

- (3) No such appointment shall be made under subsection (1) or subsection (2) if the testator has by the testator's will directed or intimated that the office of executor should not be delegated or that the proposed appointee should not act in the trusts of the will.
- (4) Prior to making any appointment under subsection (1) or subsection (2) the person proposing to make such appointment shall give twenty-eight days' notice in writing thereof to:
 - (a) the co-executor or co-administrator (if any) of such person, and
 - (b) such of the persons entitled beneficially under the will or in consequence of the intestacy of the deceased person of whose will or estate the person proposing to make the appointment is executor or administrator, as are ordinarily resident in the Commonwealth of Australia and have attained the age of eighteen years:

Provided that the Court may, on the application of the person proposing to make the appointment, direct that service of any notice required by this paragraph be dispensed with.

- (5) Any person who is or who ought to be served or who if the person were ordinarily resident in the Commonwealth ought to be served with the notice required by subsection (4) (whether or not the Court has directed that service of notice on that person be dispensed with) may at any time prior to the expiration of the period of 28 days' notice given to that person under subsection (4), or, where the Court has directed that service of notice on that person be dispensed with, the period of 28 days after the giving of that direction, lodge with the Registrar a notice in the form prescribed by the rules that the person objects to such appointment being made and serve a copy of such notice on the person proposing to make the appointment mentioned in subsection (1) or subsection (2).
- (6) In the event of any such notice of objection being filed and a copy thereof served as aforesaid:
 - (a) the person proposing to make an appointment under subsection (1) shall not make such appointment unless the Court, on application made by the person, directs that the appointment be made; notice of such application shall be served on such persons as the Court may direct or as may be prescribed by the rules,
 - (b) the person proposing to make an appointment under subsection (2) shall not make such appointment under that subsection.
- (7) In the case of the appointment of a trustee company the capital both paid and unpaid and all other assets of the company and the manager, assistant manager and directors and their respective estates shall be liable for the due administration of the estates of which the company shall be so appointed executor or administrator.
- (8) Any such deed as is referred to in subsection (1) or in subsection (2) shall be registered in the office of the Registrar-General in the manner and on payment of the fees prescribed by regulation under the *Conveyancing Act 1919*.
- (9) A duly verified copy of any such deed as is referred to in subsection (1) or in subsection (2) shall be filed in the registry of the Court.
- (10) (Repealed)

6.25 Section 75A(1) enables a person who is named as executor in the will of a deceased person, but who has not yet renounced or taken out a grant of probate, to appoint the public trustee or a trustee company to be the executor of the will in the person's place or to be an additional executor with the person or with the continuing executors (including the person who made the appointment). The section provides that the appointment is to be made by deed.

6.26 Section 75A(2) applies where a grant of probate or administration has already been made. It enables any executor or administrator who has obtained a grant to appoint the public trustee or a trustee company to be the executor or administrator in the executor's or administrator's place or to be an additional executor or administrator with the executor or administrator or with the

continuing executors and administrators (including the executor or administrator who made the appointment). The section also provides that the appointment is to be made by deed.

6.27 An appointment may not be made under section 75A(1) or (2) if the testator 'directed or intimated that the office of executor should not be delegated or that the proposed appointee should not act in the trusts of the will'.⁶⁰²

6.28 Before making an appointment under section 75A(1) or (2), the person proposing to make the appointment must ordinarily give 28 days' notice in writing to any co-executor or co-administrator and to those beneficiaries who are ordinarily resident in the Commonwealth of Australia and who have attained the age of 18 years.⁶⁰³ Such a person may, within 28 days of receiving the notice, lodge a notice that the person objects to the appointment being made and serve a copy on the person proposing to make the appointment.⁶⁰⁴

6.29 In the event of such an objection being made:⁶⁰⁵

- the person proposing to make an appointment under section 75A(1) (that is, a person to whom a grant of probate has not yet been made) must not make the appointment unless the court, on the person's application, directs that that the appointment be made;
- the person proposing to make an appointment under section 75A(2) (that is, an executor or administrator to whom a grant has been made) must not make the appointment.

6.30 Commentators on the New South Wales legislation suggest that section 75A 'is little used because of the existence of Prescribed Form 105 [of the *Supreme Court Rules 1970* (NSW)], which provides for renunciation in favour of the Public Trustee'.⁶⁰⁶

602 *Probate and Administration Act 1898* (NSW) s 75A(3). Similar provisions are found in the trustee company legislation of the various jurisdictions: see notes 585, 587, 588 and 592 above.

603 *Probate and Administration Act 1898* (NSW) s 75A(4).

604 *Probate and Administration Act 1898* (NSW) s 75A(5).

605 *Probate and Administration Act 1898* (NSW) s 75A(6).

606 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [75A.07]. *Supreme Court Rules 1970* (NSW) Pt 78 r 26(3) provides that:

Where the executor or the executors named in the will renounces or renounce probate in favour of the Public Trustee, in the form prescribed, administration with the will annexed may be granted to the Public Trustee without the consent or citation of any person.

Discussion Paper

6.31 In the Discussion Paper, the National Committee considered whether the model legislation should include a provision to the effect of section 75A of the *Probate and Administration Act 1898* (NSW). It expressed the view that:⁶⁰⁷

it would be more appropriate for such a provision to appear, if at all, in legislation specific to the body to which the delegation is made or which would be able to administer the estate in the circumstances referred to in the New South Wales provision.

6.32 The National Committee noted that section 75A is rarely used, and considered that the requirement to serve notice on beneficiaries may be a deterrent to its use.⁶⁰⁸

6.33 The National Committee therefore proposed that the model legislation should not include a provision to the effect of section 75A of the *Probate and Administration Act 1898* (NSW).⁶⁰⁹

Submissions

6.34 The National Committee's proposal that the model legislation should not include a provision to the effect of section 75A of the *Probate and Administration Act 1898* (NSW) was supported by virtually all the respondents who addressed this issue — namely, the Bar Association of Queensland, the National Council of Women of Queensland, the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, an academic expert in succession law, the ACT and New South Wales Law Societies and the Law Institute of Victoria.⁶¹⁰

6.35 The National Council of Women of Queensland commented:⁶¹¹

It appears to be more appropriate for a provision such as Section 75A of the *Wills, Probate and Administration Act 1898* (NSW) to be contained within appropriate legislation governing the Public Trustee and trustee companies. In that case, it would not be necessary to include such a provision in the proposed legislation.

607 *Administration of Estates Discussion Paper* (1999) QLRC 79; NSWLRC [8.77].

608 *Ibid.*

609 *Ibid.*, QLRC 80; NSWLRC 116 (Proposal 35).

610 Submissions 1, 3, 4, 6, 7, 8, 12, 14, 15, 19. Of the respondents who commented on this proposal, the Public Trustee of New South Wales was the only respondent who did not expressly agree with it. He did not disagree with the proposal, but simply observed that s 18(1) and (2) of the *Public Trustee Act 1913* (NSW) also makes provision for the court to make a grant to the public trustee.

611 Submission 3.

6.36 The Trustee Corporations Association of Australia, with whose submission the Queensland State Council of the Trustee Corporations Association of Australia⁶¹² agreed, supported the proposal not to include a provision to the effect of section 75A, although the Association was of the view that such a provision should be included in either the public trustee legislation or the trustee company legislation of each jurisdiction.⁶¹³

6.37 Although the Public Trustee of South Australia supported the National Committee's proposal concerning the model legislation, she took a different view from the Trustee Corporations Association of Australia about whether an executor should be able to delegate that office:⁶¹⁴

PTSA does not support the concept of delegation of the office of executor. It is my view that the provisions of Section 15 of the South Australian *Public Trustee Act* are preferable.⁶¹⁵ Also as this is a situation where a corporate personal representative is called upon, consistent with the principle that the legislation should be in the relevant legislation it is my view that this provision should remain in the *Public Trustee Act* and not in the uniform legislation. (note added)

The National Committee's view

6.38 The model legislation should not include a provision to the effect of section 75A of the *Probate and Administration Act 1898* (NSW). The National Committee prefers the approach taken in the other Australian jurisdictions where the provisions under which a trustee company or the public trustee may be authorised to apply for a grant are located in, respectively, the trustee company legislation and the public trustee legislation of the jurisdiction.

6.39 The provisions considered above deal only with the situation where the trustee company or the public trustee is appointed by, or with the consent of, the person entitled to the grant or the person already appointed. The National Committee notes that the public trustee legislation of the Australian jurisdictions contains other provisions enabling the court to appoint a public trustee as executor or administrator in various circumstances.⁶¹⁶ In its view, it is better for all the provisions dealing with the appointment of trustee companies and the public trustee as personal representatives to be located in the trustee company legislation and the public trustee legislation of the various jurisdictions.

6.40 The National Committee notes that this view is also supported by the submissions.

612 Submission 7.

613 Submission 6.

614 Submission 4.

615 *Public Trustee Act 1995* (SA) s 15 is set out at [6.17] above.

616 See, for example, *Public Trustee Act 1913* (NSW) s 18(1A); *Public Trustee Act* (NT) ss 34, 39; *Public Trustee Act 1995* (SA) s 12; *State Trustees (State Owned Company) Act 1994* (Vic) s 5.

GRANT OF PROBATE TO THE PUBLIC TRUSTEE OF ANOTHER AUSTRALIAN JURISDICTION

6.41 This section of the chapter deals with the court's power to grant probate of a will to the public trustee of another Australian jurisdiction. This issue is likely to arise where a person makes a will appointing the local public trustee as executor, and subsequently moves to another jurisdiction. As a result, when the person dies, the estate requiring administration is in a different jurisdiction from the public trustee who is named as executor. The question then arises as to whether the court in the latter jurisdiction may grant probate to the interstate public trustee who is named as the executor of the deceased's will. The issue may also arise where a person owns property in several jurisdictions and appoints the public trustee in one jurisdiction to be the executor of his or her will.

Existing legislative provisions

Administration legislation

6.42 The administration legislation in the ACT and the Northern Territory provides expressly that, where a deceased has named the public trustee in another jurisdiction as executor of his or her will, the Supreme Court may grant probate of the will to the public trustee of that jurisdiction.

6.43 Section 10C of the *Administration and Probate Act 1929* (ACT) provides:

10C Grant of probate to public trustee

If a deceased person has named, as an executor of his or her will—

- (a) the public trustee for the Australian Capital Territory; or
- (b) the public trustee of a State; or
- (c) the public trustee for the Northern Territory;

the Supreme Court may grant probate of the will to that public trustee.

6.44 Section 20 of the *Administration and Probate Act* (NT) is in similar terms. It provides:

20 Court may grant probate to Public Trustee named as executor

Where a deceased person has named the Public Trustee of a State or Territory of the Commonwealth as an executor of his or her will, the Court may grant probate of the will to that Public Trustee.

6.45 No other Australian jurisdiction has an equivalent provision in its administration legislation.

Public trustee legislation

6.46 The public trustee legislation in most Australian jurisdictions provides generally that the public trustee of that jurisdiction may be appointed as executor of a will.⁶¹⁷ For example, section 27(1) of the *Public Trustee Act 1978* (Qld) broadly states that the public trustee may be appointed where any person or corporation could be appointed to act, including as an executor:

27 Rights and duties to which public trustee may be appointed

- (1) Where any person or corporation may be appointed or act as a trustee, executor, administrator, next friend, guardian, committee, agent, attorney, liquidator, receiver, manager or director or to or in any other office of a fiduciary nature the public trustee may be so appointed or may so act.

6.47 There does not appear to be any territorial limitation in the public trustee legislation of the various jurisdictions that would prevent the public trustee of one Australian jurisdiction from being granted probate by the court of another jurisdiction.⁶¹⁸ Of course, a grant of probate made in one jurisdiction to the public trustee of another jurisdiction would only confer authority to administer the testator's estate in the jurisdiction in which the grant was made.⁶¹⁹ It would not give the public trustee any authority to administer the estate of the deceased, if any, in the public trustee's 'home' jurisdiction or in any other Australian jurisdiction.⁶²⁰

Discussion Paper

6.48 In the Discussion Paper, the National Committee expressed the view that it was not necessary for the model legislation to include a provision to the effect of section 20 of the *Administration and Probate Act* (NT).⁶²¹ It considered that the model provision that is to be based on section 6 of the *Succession Act 1981* (Qld) would give the court wide powers to make a grant, and that the

617 *Public Trustee Act 1985* (ACT) s 13(1)(b); *Public Trustee Act 1913* (NSW) s 12(1)(ii); *Public Trustee Act* (NT) s 32(1)(a); *Public Trustee Act 1995* (SA) ss 5(2)(a), 14(1); *Public Trustee Act 1930* (Tas) s 12(1); *Public Trustee Act 1941* (WA) ss 7(1), 8. In Victoria, there is no specific provision in the *State Trustees (State Owned Company) Act 1994* (Vic). However, s 9 of the *Trustee Companies Act 1984* (Vic) provides that, if a trustee company (which includes State Trustees Limited) is named as executor in the will of a testator, the trustee may act as executor and may apply for probate of the will.

618 For an example of an analogous situation see *Re DEF* (2005) 192 FLR 92, 111–13, where Campbell J held that the *Protected Estates Act 1983* (NSW), which regulates the appointment of the New South Wales Protective Commissioner as manager of a person's estate, did not contain any inherent territorial limitation that would prevent the Supreme Court of Queensland from appointing the Protective Commissioner from managing a person's estate.

619 For a discussion of this issue, see Chapter 30 of this Report.

620 See, however, the National Committee's proposals for a scheme of automatic recognition in Chapters 37–39 of this Report.

621 *Administration of Estates Discussion Paper* (1999) QLRC 122–3; NSWLRC [8.208].

court's power would be wide enough to make a grant to the public trustee of another jurisdiction.⁶²²

6.49 It therefore proposed that the model legislation should not include a provision to the effect of section 20 of the *Administration and Probate Act* (NT).⁶²³

Submissions

6.50 The majority of submissions that considered this issue agreed with the National Committee's proposal that the model legislation should not include a provision to the effect of section 20 of the *Administration and Probate Act* (NT). This was the view of the Bar Association of Queensland, the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁶²⁴

6.51 The Public Trustee of South Australia and the Trustee Corporations Association of Australia (whose submission was supported by the Queensland State Council of the Trustee Corporations Association of Australia) suggested that it was more appropriate for a provision like section 20 of the *Administration and Probate Act* (NT) to be included in each jurisdiction's public trustee legislation.⁶²⁵

6.52 The Public Trustee of Queensland, while not supporting the inclusion of a provision to the effect of section 20 of the *Administration and Probate Act* (NT), commented.⁶²⁶

So far as Queensland is concerned, there does not appear to be any advantage to inserting the Northern Territory provision in the model legislation. However, it may be advantageous in the uniform Act to 'spell out' quite clearly that persons, trustee corporations and Public Trustees are entitled to take out a grant of probate in any State.

The current s 6 of the *Succession Act 1981* (Qld) may be argued as having a meaning different from that contemplated within the Discussion Paper.

The National Committee's view

6.53 The public trustees of the Australian jurisdictions are creatures of statute. Accordingly, the capacity of the public trustee of a particular jurisdiction

622 Ibid.

623 Ibid, QLRC 123; NSWLRC 173 (Proposal 59).

624 Submissions 1, 4, 6, 7, 8, 12, 14, 15.

625 Submissions 4, 6, 7.

626 Submission 5.

to act as executor in another jurisdiction will depend on the extent of the powers conferred on it by the legislation under which it is created.

6.54 Provisions like section 10C of the *Administration and Probate Act 1929* (ACT) and section 20 of the *Administration and Probate Act* (NT) do not address the primary issue of a public trustee's power to act as executor in another jurisdiction; that issue can only be resolved by reference, on a jurisdiction-by-jurisdiction basis, to the legislation under which an individual public trustee is created. The ACT and Northern Territory provisions do not purport to confer any particular power on an interstate public trustee to act as executor or to take a grant of probate; they simply confirm the court's power to make a grant to the public trustee of another Australian jurisdiction.

6.55 In Chapter 3 of this Report, the National Committee has recommended that the model legislation should include provisions to the effect of section 6 of the *Succession Act 1981* (Qld), which deals with the court's jurisdiction to make a grant. Section 6(2) of the *Succession Act 1981* (Qld) provides that the court may grant probate of the will or letters of administration of the estate of a deceased person even though the person to whom the grant is made is not resident or domiciled in the jurisdiction. Section 6(3) provides more generally that a grant may be made to any person that the court considers appropriate. Those provisions ensure that the court has a sufficient power to make a grant to the public trustee of another jurisdiction.

6.56 Accordingly, it is not necessary for the model legislation to include a provision to the effect of section 10C of the *Administration and Probate Act 1929* (ACT) or section 20 of the *Administration and Probate Act* (NT).

RECOMMENDATIONS

Appointment of trustee company or public trustee

6-1 The model legislation should not include a provision to the effect of section 75A of the *Probate and Administration Act 1898* (NSW).⁶²⁷

Grant of probate to the public trustee of another Australian jurisdiction

6-2 The model legislation should not include a provision to the effect of section 10C of the *Administration and Probate Act 1929* (ACT) or section 20 of the *Administration and Probate Act* (NT).⁶²⁸

⁶²⁷ See [6.38]–[6.40] above.

⁶²⁸ See [6.53]–[6.56] above.

Chapter 7

Transmission of the office of personal representative

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EXECUTORS BY REPRESENTATION

Introduction

7.1 In certain circumstances, the law provides a mechanism for the transmission of the office of executor:⁶²⁹

An executor having taken probate of his own testator's will becomes by the same act an executor, not only of that will, but also of the will of any testator of whom the other was sole, or surviving, proving executor, and so on, without limit, upwards.

7.2 The executor who obtains probate of the will of a deceased executor is known as the executor by representation of the original testator (and the estate of the original testator is sometimes referred to as the 'head estate').

7.3 Legislation providing for the transmission of the office of executor was first passed in England in 1351.⁶³⁰ That Act remained in force until its repeal by the *Administration of Estates Act 1925* (UK),⁶³¹ when it was replaced by section 7 of the 1925 Act. Section 7 of the *Administration of Estates Act 1925* (UK) has formed the basis of the provisions found in the administration legislation of the various Australian jurisdictions.

The existing law

7.4 Legislation embodying the doctrine of executorship by representation has been enacted in the ACT,⁶³² New South Wales,⁶³³ Queensland,⁶³⁴ Tasmania⁶³⁵ and Victoria.⁶³⁶

7.5 In South Australia and Western Australia, the original Imperial Act of 1351 still applies, having become part of the law of those States when they

629 JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [4.67].

630 25 Edw III st 5 c 5.

631 *Administration of Estates Act 1925* (UK) s 56, sch 2 pt 1.

632 *Administration and Probate Act 1929* (ACT) ss 43A–43C.

633 *Imperial Acts Application Act 1969* (NSW) ss 5(2), (3), 13, sch 1. See also the discussion at [7.15]–[7.20] below of s 44(2) of the *Probate and Administration Act 1898* (NSW), which applies when a grant of probate is made to the public trustee or to a trustee company.

634 *Succession Act 1981* (Qld) s 47.

635 *Administration and Probate Act 1935* (Tas) s 10.

636 *Administration and Probate Act 1958* (Vic) s 17.

were settled.⁶³⁷ It appears that the doctrine of executorship by representation also became part of the law of the Northern Territory when the Territory was annexed to South Australia.⁶³⁸

7.6 If the doctrine of executorship by representation did not apply, it would be necessary, on the death of a last surviving, or sole, executor who had not completed the administration of the particular estate, for a person to apply for a grant of letters of administration *de bonis non (dbn)*⁶³⁹ in order to complete the administration of that estate. The application of the doctrine therefore simplifies, and reduces the cost of completing, the administration of such an estate.

Queensland

7.7 Section 47 of the *Succession Act 1981* (Qld), which is the most comprehensive of the various provisions, provides:

47 Executor of executor represents original testator

- (1) Subject to this section an executor of a sole or last surviving executor of a testator is the executor by representation of that testator.
- (1A) Subsection (1) shall not apply to an executor who does not prove the will of his or her testator, and, in the case of an executor who on his or her death leaves surviving the executor some other executor of his or her testator to whom probate of the will of that testator is afterwards granted, it shall cease to apply on such probate being granted.
- (2) So long as the chain of executorial representation is unbroken, the last executor in the chain is the executor of every preceding testator.
- (3) The chain of executorial representation is broken by—
 - (a) an intestacy; or
 - (b) the failure of a testator to appoint an executor; or
 - (c) the failure to obtain probate of the will in Queensland; or

⁶³⁷ As explained at [7.3] above, the statute 25 Edw III st 5 c 5 continued to apply in England until it was repealed by the *Administration of Estates Act 1925* (UK). It therefore became part of the law of South Australia and Western Australia when those States were settled, respectively, on 28 December 1836 and 1 June 1829: see *Acts Interpretation Act 1915* (SA) s 4A; *Interpretation Act 1984* (WA) s 73. For a discussion of the application of the Imperial Act in Western Australia, see Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia*, Report, Project No 75 (1994) 29. In its 1990 Report, the Law Reform Commission of Western Australia considered that a statutory enactment of the doctrine of executorship by representation would make 'the law on the topic ... more accessible than at present': Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.11].

⁶³⁸ See *Sources of the Law Act* (NT) ss 2, 3.

⁶³⁹ This is short for '*de bonis non administratis*' meaning, literally, of the goods not administered: JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [13.01]. A grant of letters of administration *de bonis non* is a form of limited administration, and may be granted to enable a partially administered estate to be administered.

- (d) the renunciation by the executor of the executorship by representation;

but it is not broken by a temporary grant of administration if probate is subsequently granted.

- (4) Every person in the chain of executorial representation in relation to a testator—
- (a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and
- (b) is, to the extent to which the estate of the testator has come into his or her hands, answerable as if the executor were an original executor.
- (5) An executor may renounce his or her executorship by representation before intermeddling without renouncing the executorship in relation to his or her own testator.

7.8 For the most part, section 47 of the *Succession Act 1981* (Qld) is based closely on the current English provision. However, the Queensland provision makes an important departure from its English counterpart. Section 47(5) enables an executor to renounce his or her executorship by representation, while retaining the executorship of the will of the testator by whom he or she was appointed.⁶⁴⁰ In the absence of a statutory provision to this effect, partial renunciation is not possible. An executor must either accept the executorship by representation or renounce both the executorship by representation and the executorship of the will of his or her own testator.⁶⁴¹

7.9 Section 47(3)(d) is a corollary to section 47(5) and simply provides that, where an executor renounces the executorship by representation, the chain of representation is thereby broken.

Australian Capital Territory, New South Wales, Tasmania, Victoria

7.10 The provisions in New South Wales,⁶⁴² Tasmania⁶⁴³ and Victoria⁶⁴⁴ are virtually identical to the Queensland provision, except that they do not include

⁶⁴⁰ Under s 47(5) of the *Succession Act 1981* (Qld), any renunciation by the executor of the executorship by representation must be made 'before intermeddling'. Renunciation by an executor or administrator by representation is considered at [7.57]–[7.79] below.

⁶⁴¹ *In the Goods of Perry* (1840) 2 Curt 655; 163 ER 540. It has been suggested, however, that, where the executorial duties of the estate of the original testator have been completed, it may be possible to avoid the hardship of this rule by appointing new trustees to the original estate: see G Weir, 'Intermeddling by an Executor and Renunciation' (1935) 9 *Australian Law Journal* 187, 187.

⁶⁴² *Imperial Acts Application Act 1969* (NSW) ss 5(2), (3), 13, sch 1.

⁶⁴³ *Administration and Probate Act 1935* (Tas) s 10. The Tasmanian provision contains two additional subsections, s 10(3A) and (3B), that are not found in the provisions of the other Australian jurisdictions.

⁶⁴⁴ *Administration and Probate Act 1958* (Vic) s 17. Unlike the provisions in the other Australian jurisdictions, s 17(1) refers to '[a]n executor of a sole or last surviving proving executor of a testator' (emphasis added).

provisions to the effect of section 47(3)(d) and (5) of the *Succession Act 1981* (Qld).

7.11 With the exception of those subsections, the provisions in the ACT,⁶⁴⁵ although drafted in a slightly different form, are also to the same effect as the Queensland provision.

ADMINISTRATORS BY REPRESENTATION

Introduction

7.12 Except to the extent provided for by the New South Wales legislation discussed below,⁶⁴⁶ the office of administrator is not transmissible,⁶⁴⁷ with the result that there is no chain of representation in relation to administrators.⁶⁴⁸ Moreover, a person's executor, on being granted probate, does not become the administrator by representation of any estate of which the deceased person had been appointed administrator; nor does a person's administrator, on being granted letters of administration, become the executor by representation of a person of whose will the deceased person had been granted probate.

7.13 For example, in *Wimalaratna v Ellies*,⁶⁴⁹ the deceased died intestate and letters of administration were granted to her husband. When the deceased's husband subsequently died testate, probate of his will was granted to his son, who was the executor named in the will. The son, as executor of his father's will, then issued proceedings against his sister seeking the return of property that was alleged to form part of their mother's estate. However, his sister took the point that the office of administrator does not devolve, and it was therefore necessary for the son to seek a grant of administration *de bonis non*⁶⁵⁰ of his mother's estate in order to have standing to bring the proceedings.⁶⁵¹

7.14 The reason for the difference in terms of transmissibility between the office of executor and the office of administrator has been attributed to the

645 *Administration and Probate Act 1929* (ACT) ss 43A–43C.

646 See the discussion of s 44(2) of the *Probate and Administration Act 1898* (NSW) at [7.15]–[7.20] below.

647 *Re Heathcote* [1913] P 42, 45 (Bargrave Deane J).

648 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [45.05].

649 Unreported, Full Court, Supreme Court of Western Australia, Burt CJ, Wallace and Brinsden JJ, 9 October 1984.

650 See note 639 above.

651 Unreported, Full Court, Supreme Court of Western Australia, Burt CJ, Wallace and Brinsden JJ, 9 October 1984, 2–4 (Burt CJ).

confidence and trust reposed in the executor, which extends to the nomination of an executor to act on the death of the first executor.⁶⁵²

The interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A's executor is to all intents and purposes the executor and representative of A himself; but the executor of A's administrator, or the administrator of A's executor, is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary,⁶⁵³ ... in whom the deceased has reposed no trust at all: and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. (notes omitted, note added, emphasis in original)

New South Wales

Legislation

7.15 In limited circumstances, the New South Wales legislation has extended the doctrine of executorship by representation to include administrators. Section 44(2) of the *Probate and Administration Act 1898* (NSW) provides:

44 Real and personal estate to vest in executor or administrator

...

- (2) Upon the grant, to the Public Trustee or a trustee company, of probate of the will or administration of the estate of a person dying after the commencement of the *Wills, Probate and Administration (Trustee Companies) Amendment Act 1985*, the Public Trustee or the trustee company, as the case may be, shall be:
- (a) the executor, by representation, of any will of which the person had been granted probate, and
 - (b) the administrator, by representation, of any estate of which the person had been granted administration.

⁶⁵² Sir W Blackstone, *Commentaries on the Laws of England* (1809) vol II, 506.

⁶⁵³ The Ordinary was usually the Bishop of the Diocese in which the property of the intestate was situated: *Ex parte Public Trustee; Re Birch* (1951) 51 SR (NSW) 345, 347 (Street CJ); *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268, 272 (Emmett J).

7.16 This section does more than create the office of an administrator by representation. It has the effect that, regardless of whether the grant to the Public Trustee or the trustee company is one of probate or administration, the Public Trustee or the trustee company, as the case may be, will become the executor by representation of any will of which the deceased person had been granted probate, as well as the administrator by representation of any estate of which the deceased person had been granted administration. As a result, it is possible for the office of administrator to be transmitted to an administrator, for the office of executor to be transmitted to an administrator, and for the office of administrator to be transmitted to an executor.

Background

7.17 Section 44(2) of the *Probate and Administration Act 1898* (NSW) applies only when a grant is made to the Public Trustee or a trustee company, and does not apply to executors and administrators generally. It was inserted by the *Wills, Probate and Administration (Trustee Companies) Amendment Act 1985* (NSW), which was introduced as part of a package of legislation relating to the operation of trustee companies in the wake of the collapse of the Trustees, Executors and Agency Company Limited in May 1983. The then New South Wales Attorney-General, in the second reading speech, stated that the Bills were:⁶⁵⁴

designed to ensure the safety of trust funds administered by trustee companies and the continued financial stability and competitiveness of trustee companies.

7.18 The proposed section 44(2) was not specifically mentioned in the second reading speech. However, the Attorney-General referred generally to the many amendments proposed by the Bills:⁶⁵⁵

A number of other amendments are included in the bills. These are designed principally to improve the efficiency with which trustee companies transact their business. The purpose of all of the amendments contained in these bills is to ensure the continued viability and efficiency of the New South Wales trustee company industry.

Scope of the New South Wales legislation

7.19 Commentators on the New South Wales administration legislation have suggested that 'it is not clear from the wording of [section 44(2) of the *Probate and Administration Act 1898* (NSW)] whether the remaining rules governing the chain of executors remain unaltered'.⁶⁵⁶ With respect to any competition between the rights, on the one hand, of the Public Trustee or a trustee company

⁶⁵⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 April 1985, 6014 (Terence Sheahan, Attorney-General).

⁶⁵⁵ *Ibid* 6016.

⁶⁵⁶ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [45.13].

and, on the other hand, the rights of an executor to whom leave to come in and prove has been reserved,⁶⁵⁷ they suggest:⁶⁵⁸

One would assume that the remaining rules remain unaltered on the basis of ordinary principles of interpretation. Thus, one would also assume that a grant to a surviving, but up to then non-proving, executor would break the chain and end the rights of the Public Trustee [or] the trustee company.⁶⁵⁹ (note added)

7.20 The same commentators have also queried what the position would be 'where a co-administrator dies and the Public Trustee or the trustee company takes a grant in respect of the deceased co-administrator'.⁶⁶⁰ As explained previously, the provisions dealing with executorship by representation apply only to an executor of a last surviving, or sole, proving executor.⁶⁶¹ This is because, on the death of one of several executors, the surviving executors continue in that office. Section 44(2) of the *Probate and Administration Act 1898* (NSW) is not expressed, however, to be confined in its application to the situation where the Public Trustee or a trustee company is granted probate of the will, or administration of the estate, of a person who was a last surviving, or sole, executor or administrator.

ISSUES FOR CONSIDERATION

7.21 The legislative provisions outlined above raise a number of issues for consideration. These issues include:

- whether the model legislation should retain the doctrine of executorship by representation;
- if the doctrine of executorship by representation is retained, whether the doctrine should be extended so that the model legislation also provides for an administrator by representation;

657

Where a number of executors are named in a will, a grant of probate may be made to one or more of those executors, reserving leave to the other or others who have not renounced to apply for probate in the future: see, for example, *Administration and Probate Act 1929* (ACT) s 10B; *Probate and Administration Act 1898* (NSW) s 41; *Administration and Probate Act* (NT) s 19; *Administration Act 1903* (WA) s 7. See also the *Probate Rules 1936* (Tas) r 60. Where an executor to whom leave was reserved subsequently applies for a grant of probate, the grant obtained is called a grant of 'double probate': JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [13.122].

658

RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [45.13], note 86.

659

Succession Act 1981 (Qld) s 47(1A), which is set out at [7.7] above, would have this effect.

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RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [45.13], note 86.

661

Administration and Probate Act 1929 (ACT) s 43A; *Imperial Acts Application Act 1969* (NSW) ss 5(2), (3), 13(1), sch 1; *Succession Act 1981* (Qld) s 47(1); *Administration and Probate Act 1935* (Tas) s 10(1); *Administration and Probate Act 1958* (Vic) s 17(1).

- the rights and liabilities of an executor or administrator by representation;⁶⁶²
- whether an executor or administrator should be able to renounce as executor or administrator by representation, while remaining as executor of the will of his or her own testator or as administrator of the estate to which he or she has been appointed;
- what, if any, restrictions should apply in respect of the renunciation by an executor or administrator by representation;
- whether a person who is an executor by representation of a deceased person's will should cease to hold that office if the court makes a further grant of probate of the deceased's will;
- whether a person who is an executor or administrator by representation of the will or estate of a deceased person should cease to hold that office if the court grants letters of administration of the deceased's estate;
- whether a person who is an executor or administrator by representation of the will or estate of a deceased person should cease to hold that office if the person's primary grant is revoked, ends or ceases to have effect; and
- whether, in light of the National Committee's proposals, it is necessary for the model legislation to include a provision specifying the circumstances in which the chain of representation is broken.

7.22 These issues are considered in turn below.

RETENTION OF THE DOCTRINE OF EXECUTORSHIP BY REPRESENTATION

Discussion Paper

7.23 In the Discussion Paper, the National Committee considered whether the doctrine of executorship by representation should generally be retained.⁶⁶³ On the one hand, the National Committee considered that the doctrine was a simple and cost-effective means of administering an estate where the executor had died.⁶⁶⁴ On the other hand, the National Committee acknowledged that an executor by representation is not the original testator's choice and, arguably,

⁶⁶² In this Report, the expression 'executor or administrator by representation' is used to refer to an executor by representation or an administrator by representation.

⁶⁶³ *Administration of Estates Discussion Paper* (1999) QLRC 42–3; NSWLRC [6.6]–[6.10].

⁶⁶⁴ *Ibid*, QLRC 44; NSWLRC [6.15].

might very well be unsuited to the task or unacceptable to the beneficiaries of the first testator.⁶⁶⁵

7.24 The National Committee proposed generally that the doctrine of executorship by representation should be retained.⁶⁶⁶

Submissions

7.25 All the respondents who commented on this issue agreed that the doctrine of executorship by representation should be reflected in the model legislation. This was the view of the Bar Association of Queensland, the National Council of Women of Queensland, the Public Trustee of Queensland, the Trustee Corporations Association of Australia, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁶⁶⁷

7.26 The Public Trustee of Queensland commented:⁶⁶⁸

Abandonment of this principle will bring about potential inefficiencies in the administration of estates and may generally increase costs.

7.27 The Queensland Law Society also expressed the view that the doctrine of executorship by representation 'enables a more efficient approach to the management of estates'.⁶⁶⁹

The National Committee's view

7.28 When an executor dies after obtaining probate of the will of his or her testator, but before completing the administration of the estate, the doctrine of executorship by representation enables the administration of the estate to be completed without the need for the court to appoint an administrator *de bonis non*. Because of its potential to simplify, and reduce the cost of completing, the administration of an estate in this situation, the National Committee is of the view that the model legislation should generally give effect to the doctrine of executorship by representation.

665 Ibid, QLRC 43; NSWLRC [6.10].

666 Ibid, QLRC 45; NSWLRC 67 (Proposal 17).

667 Submissions 1, 3, 5, 6, 8, 11, 12, 14, 15.

668 Submission 5.

669 Submission 8.

EXTENDING THE DOCTRINE OF EXECUTORSHIP BY REPRESENTATION TO PROVIDE FOR ADMINISTRATORS BY REPRESENTATION

7.29 As explained earlier in this chapter, the office of administrator is not transmissible. As a result, there is no chain of representation in relation to administrators and a chain of executors cannot pass through an administrator.⁶⁷⁰ However, section 44(2) of the *Probate and Administration Act 1898* (NSW) contains a limited form of administratorship by representation where the public trustee or a trustee company is appointed as the executor or administrator of a person who was the administrator of another estate.⁶⁷¹

7.30 When this issue was examined by the Ontario Law Reform Commission, it came to the view that the rationale for ‘the distinction in the treatment of executors and administrators with respect to the devolution of the office on death ... is untenable’.⁶⁷² That Commission referred to the fact that the traditional rationale for the devolution of the office of executor is said to be the ‘special confidence’ reposed in the executor ‘by reason of his nomination by the testator’,⁶⁷³ but cast doubt on the continued applicability of that rationale.⁶⁷⁴

In a world where testators appoint large trust companies as their executors, and where there is a relatively high degree of mobility among the population, we doubt whether any ‘special confidence’ can be said to repose in an executor to appoint a successor to the original estate. Where the executor of an executor is unaware of the original testator or his estate, he would seem to be less capable of, or interested in, dealing with it than would a person eligible to apply for letters of administration. We believe therefore that there is no reason to distinguish between persons who are chosen [personal representatives] by a will and persons who must be appointed by the court.

Discussion Paper

7.31 In the Discussion Paper, the National Committee considered whether a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW) should be included in the model legislation.⁶⁷⁵ The National Committee considered the advantages of such a provision to be its simplicity and the saving in costs. However, the National Committee acknowledged that the provision might be regarded as giving an anti-competitive advantage to the public trustee and to trustee companies.⁶⁷⁶

670 See [7.12]–[7.13] above.

671 *Probate and Administration Act 1898* (NSW) s 44(2) is set out at [7.15] above.

672 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 33.

673 *Ibid.* See also the discussion at [7.14] above.

674 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 33–4.

675 *Administration of Estates Discussion Paper* (1999) QLRC 46; NSWLRC [6.22].

676 *Ibid.*, QLRC 47; NSWLRC [6.23].

7.32 The National Committee did not propose that a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW) should be included in the model legislation, but instead sought submissions on that issue.⁶⁷⁷

7.33 The National Committee did not address the broader questions of whether, if a provision extending the doctrine of representation were to be included in the model legislation, that provision should apply only in the situation where the public trustee or a trustee company has been granted probate or letters of administration, or what modifications might need to be made to a provision that is generally to be based on section 44(2) of the *Probate and Administration Act 1898* (NSW).

Submissions

7.34 Almost all the submissions that addressed the issue of the transmissibility of the office of personal representative supported, at least to some extent, an extension of the concept of executorship by representation.

7.35 Several submissions specifically supported the inclusion of a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW).⁶⁷⁸

7.36 A former ACT Registrar of Probate⁶⁷⁹ and the Public Trustee of Queensland⁶⁸⁰ both referred to the efficiencies that such a provision would afford. The former ACT Registrar of Probate commented:⁶⁸¹

I am of the view that there is some efficiency and cost savings in the proposal to allow some limited provision for administration by representation. The alternative is to go back to court for a further appointment and this could be both messy and expensive. Any anti competitive issues are outweighed by cost savings.

7.37 The Trustee Corporations Association of Australia also referred to the potential savings that would result from the inclusion of such a provision:⁶⁸²

The Association supports the inclusion in the model legislation of the concept of an administrator by representation, as currently applies in NSW, where the Public Trustee or a trustee company are appointed.

677 Ibid, QLRC 47; NSWLRC 70.

678 Submissions 2, 5, 6, 14, 15.

679 Submission 2.

680 Submission 5.

681 Submission 2.

682 Submission 6.

The proposed provision will save beneficiaries substantial costs. Trustee companies are regulated in all states and the NT. Their fees are regulated and they have the expertise to administer an estate efficiently. Their appointment will provide comfort for beneficiaries that the estate will be administered correctly. Unsatisfied beneficiaries will have recourse to regulators, which would not be available, if an individual administered the estate.

The Association is of the view that it always should be possible for a beneficiary of the original estate to object to the administrator by representation but only where good reason can be demonstrated.

7.38 Two submissions expressed support for a provision that was broader in its application than section 44(2) of the *Probate and Administration Act 1898* (NSW). The Bar Association of Queensland commented generally that administration, like executorship, should be transmissible,⁶⁸³ while the Public Trustee of South Australia expressly supported a provision that was not restricted in its application to public trustees and trustee companies:⁶⁸⁴

PTSA does not see why the office of administrator by representation should not be transmissible. It need not be restricted to public trustees and trustee companies. To guard against the problems cited above, beneficiaries should have the right to object to the administrator by representation. Such a change would be consistent with competition policy principles.

7.39 Only one submission, from an academic expert in succession law, opposed the inclusion of a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW). However, that opposition appears to have been based on the fact that section 44(2) applies only when a grant is made to the Public Trustee of New South Wales or a trustee company:⁶⁸⁵

I disagree with the concept of an administrator by representation especially as it seems to have had its origin in giving a preferential right to the Public Trustee. Now that Public Trustees have been corporatised or privatised there is no reason to give them a statutory preference. When a corporate administrator becomes insolvent the effect is the same, I should have thought, as if a personal administrator dies. That is, letters of administration *de bonis non* will then be sought by an appropriate person. That could be a Public Trustee or a trustee company, if requested. That is the simple law and I think it should be retained without adding to it.

The National Committee's view

Extension of the doctrine of executorship by representation

7.40 The National Committee has expressed the view earlier that the doctrine of executorship by representation should be retained because of its potential to simplify and reduce the cost of completing an estate that has been

683 Submission 1.

684 Submission 4.

685 Submission 12.

only partially administered when the executor dies.⁶⁸⁶ In the National Committee's view, the factors that justify the retention of the doctrine also justify its extension, so that it does not apply only to the executor of a deceased executor. The National Committee agrees with the view expressed by the Ontario Law Reform Commission that the distinction, with respect to the devolution of office, between executors and administrators can no longer be justified.⁶⁸⁷ However, the National Committee does not favour a provision to the effect of section 44(2) of the *Probate and Administration Act 1898* (NSW), which applies only to the Public Trustee of New South Wales and trustee companies. The National Committee considers that the model legislation should contain a provision of broader application that would potentially apply to all personal representatives who have obtained a grant.

7.41 In the National Committee's view, the office of personal representative should devolve without regard to whether any personal representative in a chain of personal representatives was, or is, an executor appointed under a grant of probate or an administrator appointed under letters of administration.

7.42 Subject to the limitation proposed below,⁶⁸⁸ the model legislation should provide that, if a personal representative is granted probate of the will, or letters of administration of the estate, of a deceased personal representative, he or she becomes:

- the executor by representation of any will of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, executor under a grant of probate;
- the administrator by representation of any estate of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, administrator under letters of administration;
- the executor by representation of any will of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, executor by representation; and
- the administrator by representation of any estate of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, administrator by representation.⁶⁸⁹

686 See [7.28] above.

687 See [7.30] above.

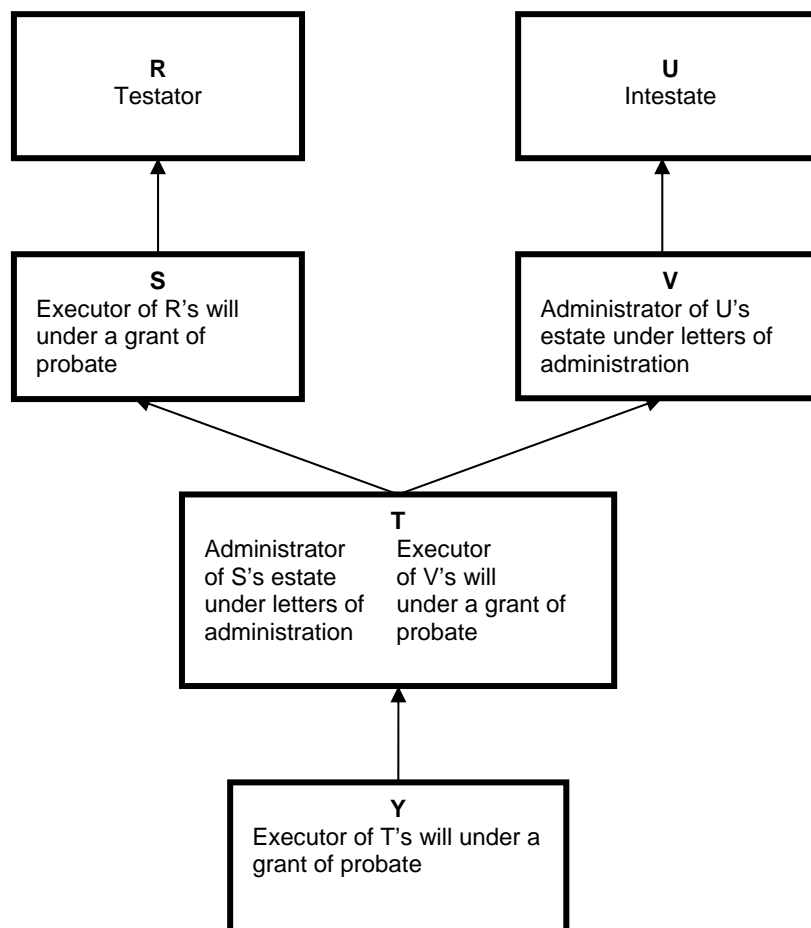
688 See [7.116]–[7.118] and Recommendation 7-19 below.

689 Under this proposal, a person who obtains probate of the will, or letters of administration of the estate, of a deceased personal representative will not become the executor or administrator by representation of any will or estate of which the deceased personal representative was once, but since ceased to be, the executor or administrator by representation.

7.43 For the purpose of the model provision, 'deceased personal representative' should be defined to mean a deceased person who, immediately before his or her death, was:

- the last surviving, or sole, executor of a deceased person's will under a grant of probate; or
- the last surviving, or sole, administrator, of a deceased person's estate under letters of administration.

7.44 If a testator was originally represented by an executor, in any chain of representation, he or she will always be represented by an executor by representation. Similarly, if a deceased person was originally represented by an administrator, in any chain of representation, he or she will always be represented by an administrator by representation. This is illustrated by considering the effect of the National Committee's proposals and clause 338 of the Administration of Estates Bill 2009 on the following scenario:



Chain of representation through R's executor

7.45 Because S was the executor of R's will, when T is granted letters of administration of S's estate, T becomes the executor by representation of R's will (clause 338(1)(a)).

7.46 Further, because T was the administrator of S's estate and the executor by representation of R's will, when Y is granted probate of T's will, Y becomes the administrator by representation of S's estate (clause 338(1)(b)) and the executor by representation of R's will (clause 338(1)(c)).

Chain of representation through U's administrator

7.47 Similarly, because V was the administrator of U's estate, when T is granted probate of V's will, T becomes the administrator by representation of U's estate (clause 338(1)(b)).

7.48 Further, because T was the executor of V's will and the administrator by representation of U's estate, when Y is granted probate of T's will, Y becomes the executor by representation of V's will (clause 338(1)(a)) and the administrator by representation of U's estate (clause 338(1)(d)).

7.49 Under the National Committee's proposal, it will be possible for the office of personal representative to be transmitted from executor to executor, from executor to administrator, from administrator to executor, and from administrator to administrator. It will therefore avoid the type of situation that arose in *Wimalaratna v Ellies*,⁶⁹⁰ where it was necessary for the executor of a deceased administrator to apply for letters of administration *de bonis non* to complete the administration of the estate that was partially administered when the administrator died.

7.50 The National Committee acknowledges that it is possible that, in a particular case, the effect of this proposal may be that a person appointed as the administrator of the estate of a deceased personal representative will become an executor or administrator by representation of the will or estate of a person with whom he or she has had no connection. However, this situation may arise under the existing doctrine of executorship by representation. Further, this effect is ameliorated by the National Committee's proposals made later in this chapter about the cessation of the office of executor or administrator by representation if the court grants letters of administration of the estate being administered through the chain of representation.⁶⁹¹

⁶⁹⁰ Unreported, Full Court, Supreme Court of Western Australia, Burt CJ, Wallace and Brinsden JJ, 9 October 1984. See [7.13] above.

⁶⁹¹ See [7.97]–[7.105] and Recommendations 7-12 to 7-14, 7-15 and 7-16 below.

Exceptions

7.51 In Chapter 5 of this Report, the National Committee has recommended that a creditor of the estate of a deceased person may apply for letters of administration, either on intestacy or where there is a will.⁶⁹² Although the National Committee is generally of the view that it should be irrelevant to the transmission of the office of personal representative whether a person is constituted as the executor of a deceased person's will or as the administrator of a deceased person's estate, it is of the view that, where a creditor, in that capacity, obtains a grant of administration of an estate, the creditor should not, as a result, become the executor or administrator by representation of any will or estate of which the deceased person had been appointed executor or administrator, or of which the deceased person was the executor or administrator by representation.

7.52 It is therefore necessary to ensure that, if a person is appointed as an administrator of a deceased person's estate only because he or she is a creditor of the estate, that fact is apparent on the face of the grant. The National Committee is therefore of the view that, in this situation, the grant must be endorsed to the effect that the administrator is appointed in the capacity of a creditor of the deceased's estate.

RIGHTS AND LIABILITIES OF AN EXECUTOR OR ADMINISTRATOR BY REPRESENTATION

Background

7.53 The legislation in most Australian jurisdictions assimilates the rights and liabilities of an executor by representation with those of an original executor, although the provisions recognise that the whole of the deceased's estate may not have come into the hands of the executor by representation.

7.54 Section 47(4) of the *Succession Act 1981* (Qld) provides:

47 Executor of executor represents original testator

...

- (4) Every person in the chain of executorial representation in relation to a testator—
- (a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and
 - (b) is, to the extent to which the estate of the testator has come into his or her hands, answerable as if the executor were an original executor.

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See Recommendations 5-2 and 5-4 above.

7.55 Similar provisions are found in the legislation in the ACT, New South Wales, Tasmania and Victoria.⁶⁹³

The National Committee's view

7.56 In the National Committee's view, the model legislation should include a provision to the general effect of section 47(4) of the *Succession Act 1981* (Qld). However, in view of the National Committee's decision that the model legislation should provide for administrators by representation, as well as executors by representation, the model provision should deal with the rights and liabilities of both executors and administrators by representation.

RENOUNCING AS AN EXECUTOR OR ADMINISTRATOR BY REPRESENTATION

Background

7.57 As explained earlier, section 47(5) of the *Succession Act 1981* (Qld) enables an executor, before intermeddling, to renounce his or her executorship by representation without renouncing the executorship of the will of the testator by whom he or she was appointed.⁶⁹⁴ Section 47(5) provides:

47 Executor of executor represents original testator

...

- (5) An executor may renounce his or her executorship by representation before intermeddling without renouncing the executorship in relation to his or her own testator.

7.58 Section 47(5) was implemented to give effect to a recommendation made by the Queensland Law Reform Commission in its 1978 Report, which considered the then existing law to be 'harsh' in its operation:⁶⁹⁵

A person may undertake the executorship of a friend without realising that it also entails undertaking the executorship of a total stranger of whom the deceased friend was executor. It may well be convenient if he does undertake both executorships but we are satisfied that he should not be forced to undertake all or none.

7.59 The Law Reform Commission of Western Australia has expressed the view that 'it is fair and reasonable that such a person should be able to renounce the executorship by representation, subject to the usual safeguards,

⁶⁹³ *Administration and Probate Act 1929* (ACT) s 43C; *Imperial Acts Application Act 1969* (NSW) s 13(4); *Administration and Probate Act 1935* (Tas) s 10(4); *Administration and Probate Act 1958* (Vic) s 17(4).

⁶⁹⁴ See [7.8] above.

⁶⁹⁵ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 31.

without also renouncing the principal executorship', and recommended a provision to that effect.⁶⁹⁶

7.60 A similar provision has been recommended by the Ontario Law Reform Commission.⁶⁹⁷ It commented:⁶⁹⁸

Under the existing law, where a surviving spouse is appointed the executor of her husband's estate, she becomes the executor of all the estates of which he was the executor. The rule preventing partial renunciation prevents her from choosing to administer her husband's estate and renouncing the administration of estates of which he was executor, and for which she does not wish to be responsible. This seems to be an inflexible and absurd result.

Discussion Paper

7.61 In the Discussion Paper, the National Committee expressed the preliminary view that, while the doctrine of executorship by representation has the advantages of simplicity and cost-effectiveness, an executor of a deceased estate should not be forced, as a result of the doctrine, to accept the executorship of an estate of which his or her testator was executor.⁶⁹⁹ It therefore proposed that it should be possible for an executor of a deceased estate to renounce the executorship of an estate of which his or her testator was executor without thereby renouncing the executorship of the estate of his or her own testator.⁷⁰⁰

Submissions

7.62 The National Committee's proposal was supported by all the respondents that addressed this issue — namely, the National Council of Women of Queensland, the Trustee Corporations Association of Australia, the Queensland Law Society, the Public Trustee of New South Wales, and the ACT and New South Wales Law Societies.⁷⁰¹

The National Committee's view

7.63 A person might be quite willing to undertake the administration of an estate in relation to which he or she is entitled to obtain a grant of probate or letters of administration, but be reluctant to undertake the administration of an estate that the deceased was administering as an executor or administrator, or

⁶⁹⁶ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.12].

⁶⁹⁷ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 30.

⁶⁹⁸ *Ibid.*

⁶⁹⁹ *Administration of Estates Discussion Paper* (1999) QLRC 44; NSWLRC [6.15].

⁷⁰⁰ *Ibid.*, QLRC 45; NSWLRC 67 (Proposal 18).

⁷⁰¹ Submissions 3, 6, 8, 11, 14, 15.

as an executor or administrator by representation. The National Committee considers it unreasonable that an executor or administrator should be faced with a choice between undertaking the administration of all these estates or none of them.

7.64 The National Committee is therefore of the view that the model legislation should include a provision, based generally on section 47(5) of the *Succession Act 1981* (Qld), but modified to reflect the fact that the model legislation also provides for administrators by representation.

7.65 The model legislation should provide that a person who is granted probate of the will, or letters of administration of the estate, of a deceased personal representative may renounce the executorship, or administratorship, by representation of any will or estate of which the deceased personal representative was:

- the executor or administrator; or
- the executor or administrator by representation;

without renouncing as executor of the will, or as administrator of the estate, of the deceased personal representative.

7.66 The effect of this proposal is that an executor or administrator is not restricted to renouncing the executorship, or administratorship, by representation of all the estates in the chain. Suppose a person (A) is appointed as administrator of his father's estate, and that his father had been the executor under a grant of probate of his wife's (that is, of A's mother's) estate. A's mother was a solicitor and had been appointed as executor under grants of probate for a number of former clients. Obviously, A can retain the administration of his father's estate, while renouncing the executorship by representation of his mother's will. However, it is also open to A to retain the administration of his father's estate and the executorship by representation of his mother's will, but to renounce the executorship, or administratorship, by representation of any will or estate of which his mother was the executor, the administrator, or the executor or administrator by representation.

7.67 However, if a person renounces the executorship, or administratorship, by representation of a will or estate of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation, the person ceases to be an executor or administrator by representation of:

- the particular deceased person's will or estate; and
- any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.

RESTRICTIONS ON RENOUNCING AS AN EXECUTOR OR ADMINISTRATOR BY REPRESENTATION

Background

7.68 Section 47(5) of the *Succession Act 1981* (Qld) enables an executor to renounce his or her executorship by representation ‘before intermeddling’. In that respect, it reflects a different approach to intermeddling from section 54(2) of the *Succession Act 1981* (Qld). Section 54(2), which deals with renunciation by executors generally, provides that an executor who has intermeddled in the administration of an estate before applying for a grant may renounce his or her executorship notwithstanding his or her intermeddling.⁷⁰²

7.69 The Queensland Law Reform Commission did not refer to this difference in its 1978 Report. However, a reason for the different approaches may be that the two provisions apply to executors with different status. Section 54 of the *Succession Act 1981* (Qld) applies to an executor who intermeddles before applying for a grant — that is, to a person who is acting informally. In contrast, section 47 applies to an executor who, as a result of taking probate of his or her own testator, is formally constituted as the executor of the will of the original testator. It is understandable then that the executor by representation may renounce the executorship of the will of the original testator only if he or she has not intermeddled in that testator’s estate. A personal representative who has been appointed under a grant requires court approval in order to retire from that office.⁷⁰³ The concession that section 47(5) affords an executor by representation is that, despite being formally constituted as the executor of the will of the original testator, he or she may, by renouncing the executorship of that estate, bring the appointment to an end without the need to obtain court approval (provided that he or she has not intermeddled in that estate).

Discussion Paper

7.70 In the Discussion Paper, the National Committee did not express a preliminary view about what restrictions, if any, should apply in respect of a person’s renunciation as executor or administrator by representation.

Submissions

7.71 Although the National Committee did not seek submissions about this issue, the Queensland Law Society suggested that it might be useful, in this context, to specify that certain acts, which are either ‘of a minor character or

⁷⁰² *Succession Act 1981* (Qld) s 54(2) and renunciation by executors generally is considered at [4.23]–[4.57] above.

⁷⁰³ See generally [25.39]–[25.59] in vol 2 of this Report. Of course, once the personal representative has completed the executorial duties, he or she becomes a trustee and may retire without court approval.

clearly for the benefit of the estate', should not constitute intermeddling of the type that would prevent renunciation of the executorship by representation.⁷⁰⁴

The National Committee's view

7.72 The National Committee has recommended in Chapter 4 of this Report that an executor may renounce at any time before probate is granted, even if he or she has intermeddled in the estate. However, the National Committee is of the view that the model legislation should generally follow the approach taken by section 47(5) of the *Succession Act 1981* (Qld), which restricts an executor's right to renounce the executorship by representation to situations where the executor has not intermeddled in the head estate. In view of the National Committee's decision earlier in this chapter that the model legislation should also provide for administrators by representation, the model provision should apply not only to the renunciation of the executorship by representation, but also to the renunciation of the administratorship by representation.

7.73 As an executor or administrator by representation is formally constituted as the executor, or administrator, of the head estate, it is appropriate that an executor or administrator by representation should not have an unrestricted right to renounce. However, the National Committee considers that the restriction should be expressed in slightly different terms from section 47(5) of the *Succession Act 1981* (Qld). In its view, the term 'intermeddling' is not appropriate to the circumstances of an executor or administrator by representation, as the term suggests someone who is acting without formal authority, and an executor or administrator by representation is in the same position in relation to the head estate as an executor or administrator appointed under an original grant.

7.74 In the National Committee's view, the restriction on renouncing the executorship, or administratorship, by representation should be framed in terms of the steps the executor or administrator by representation has taken to administer the head estate, although it should not be the case that *any* step would bar the executor or administrator by representation from renouncing, as that would be a stricter test than currently determines what acts will amount to intermeddling in the context of an ordinary executor who wishes to renounce.⁷⁰⁵

7.75 The model legislation should therefore provide that an executor or administrator by representation may renounce his or her executorship, or administratorship, by representation, provided he or she has not taken an active step in the administration of the head estate. Apart from this restriction, it should not matter whether the renunciation is made before or after the executor or administrator obtains a grant of the deceased personal representative's will or estate. The model legislation should therefore provide expressly that the

704 Submission 8.

705 See [4.30]–[4.35] above.

renunciation may be made before or after the executor or administrator obtains a grant of probate of the will, or letters of administration of the estate, of the deceased personal representative.

7.76 'An active step in the administration of the estate' should be defined to exclude:⁷⁰⁶

- an act of necessity;
- an act taken to protect or preserve the property of the estate;
- an act of a minor character that is for the benefit of the estate; and
- an act taken for the purpose of arranging the disposal of the deceased person's remains.

7.77 Although it is not possible to avoid all argument about whether, in the circumstances of an individual case, a particular act should prevent an executor or administrator by representation from renouncing the executorship, or administratorship, by representation, this approach should bring greater certainty to this issue. It also addresses the concern raised by the Queensland Law Society that the model legislation should clarify which acts would not be sufficient to prevent an executor from renouncing the executorship by representation.⁷⁰⁷

7.78 The National Committee is of the view that the reference in section 47(5) of the *Succession Act 1981* (Qld) to renouncing 'before intermeddling' is slightly ambiguous as it does not refer to the estate that is relevant for that purpose.⁷⁰⁸ The model provision should therefore be expressed in slightly different terms, so that it is clearer that it is acts taken to administer the head estate that are a bar to renouncing the executorship, or administratorship, by representation of that estate.

7.79 Finally, the model legislation should provide that the renunciation must be filed in court.⁷⁰⁹

706 See [4.36] above.

707 See [7.71] above.

708 The National Committee notes that the provision originally recommended in the Queensland Law Reform Commission's 1978 Report was in the following terms (see Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978), draft *Succession Act* cl 47(5)):

An executor may renounce his executorship by representation before intermeddling therein without renouncing the executorship in relation to his or her own testator.
(emphasis added)

709 As the doctrine of executorship or administratorship by representation will apply only where probate or letters of administration have been granted in relation to the will or estate of a deceased person, there will always be a court file in which the renunciation may itself be filed.

CEASING TO HOLD OFFICE AS EXECUTOR BY REPRESENTATION IF A FURTHER GRANT OF PROBATE IS MADE OF THE DECEASED PERSON'S WILL

Background

7.80 In Chapter 4 of this Report, the National Committee has recommended that the model legislation should include a provision to the effect of section 41 of the *Probate and Administration Act 1898* (NSW), which provides that the court may grant probate to one or more of the executors named in a will, and reserve leave to the other or others who have not renounced to come in and apply for probate at some time in the future.⁷¹⁰

7.81 This raises the issue of what happens if:

- the court made a grant of probate to only one or some of the executors named in a deceased person's will (the 'proving executors') and reserved leave to apply for a grant of probate at a later time to other executors who have not renounced their executorship (the 'non-proving executors');
- the last surviving, or sole, proving executor dies;
- a person obtains a grant of probate of the will of the last surviving, or sole, proving executor, thereby becoming the executor by representation of the deceased person's will; and
- one of the non-proving executors applies to the court for a grant of probate of the deceased person's will.

7.82 In Queensland, section 47(1) and (1A) of the *Succession Act 1981* (Qld) provides:

47 Executor of executor represents original testator

- (1) Subject to this section an executor of a sole or last surviving executor of a testator is the executor by representation of that testator.
- (1A) Subsection (1) shall not apply to an executor who does not prove the will of his or her testator, and, in the case of an executor who on his or her death leaves surviving the executor some other executor of his or her testator to whom probate of the will of that testator is afterwards granted, it shall cease to apply on such probate being granted.

7.83 Section 47(1A) applies if an executor obtains probate and then dies, but is survived by an executor named in the same will who did not originally apply for probate.⁷¹¹ If the non-proving executor subsequently obtains a grant

⁷¹⁰ See Recommendation 4-1 above.

⁷¹¹ See the discussion at [4.3]–[4.9] above of the court's power to make a grant of probate, reserving leave to one or more of the other executors to apply for probate at a future time.

of probate, section 47(1) ceases to apply to the executor of the deceased executor, with the result that that executor is no longer the executor by representation of the original testator. Subsection (1A) reflects a view that an executor chosen by the testator is to be preferred over one chosen by the executor of the testator.

7.84 Similar provisions are found in the legislation of the other Australian jurisdictions that have a provision dealing with executorship by representation.⁷¹²

The National Committee's view

7.85 The model legislation should include a provision to the general effect of section 47(1A) of the *Succession Act 1981* (Qld), although modified to reflect the fact that the model legislation provides for both executors and administrators by representation. In the National Committee's view, it is appropriate that a person who is the executor by representation of the will of a deceased person should cease to be the executor by representation if probate is subsequently granted to a previously non-proving executor of the deceased's will.

7.86 When the further grant of probate is made,⁷¹³ the person who was the executor by representation of the deceased's will should cease to be:

- the executor by representation of the deceased's will; and
- the executor or administrator by representation of any will or estate of which the deceased was the executor, the administrator, or the executor or administrator by representation.

CEASING TO HOLD OFFICE AS EXECUTOR OR ADMINISTRATOR BY REPRESENTATION IF LETTERS OF ADMINISTRATION ARE GRANTED OF THE DECEASED PERSON'S ESTATE

Discussion Paper

7.87 In the Discussion Paper, the National Committee considered, as an alternative to either retaining the doctrine of executorship by representation or abolishing it altogether, enabling the court, in certain circumstances, to appoint a person to administer the original estate so that the beneficiaries of that estate

⁷¹² *Administration and Probate Act 1929* (ACT) s 43B; *Imperial Acts Application Act 1969* (NSW) s 13(1); *Administration and Probate Act 1935* (Tas) s 10(1); *Administration and Probate Act 1958* (Vic) s 17(1).

⁷¹³ This second grant is known as a grant of double probate.

are not in the position of having the estate administered by a person to whom they object.⁷¹⁴

7.88 The National Committee proposed that it should be possible for a beneficiary of the original estate to object to the executorship by representation,⁷¹⁵ in which case the court would consider whether a grant of letters of administration should be made to another person.

7.89 The National Committee suggested that only a beneficiary who would be entitled to a grant of letters of administration should be entitled to object to the executorship by representation.⁷¹⁶

Submissions

7.90 There was limited support for the National Committee's proposal among the submissions that commented on this issue.

7.91 Only the National Council of Women of Queensland and the ACT Law Society agreed with the National Committee's proposal without adding some qualification.⁷¹⁷

7.92 The Trustee Corporations Association of Australia agreed that a beneficiary of the original estate should be able to object to the executorship by representation, 'but only where good reason can be demonstrated'.⁷¹⁸

7.93 The Public Trustee of New South Wales agreed generally with the National Committee's proposal, but suggested that it should be the beneficiaries having the majority beneficial interest in the original estate who should be able to object, rather than a beneficiary as such.⁷¹⁹

7.94 In contrast, the Queensland Law Society disagreed with the proposal, suggesting that 'the administration of the head estate is going to be disrupted while everybody gets involved in a court application'.⁷²⁰

7.95 The proposal was also opposed by an academic expert in succession law:⁷²¹

714 *Administration of Estates Discussion Paper* (1999) QLRC 43; NSWLRC [6.11].

715 *Ibid*, QLRC 45; NSWLRC 67 (Proposal 19).

716 *Ibid*, QLRC 45; NSWLRC [6.17].

717 Submissions 3, 14.

718 Submission 6.

719 Submission 11.

720 Submission 8.

721 Submission 12.

An executor by representation who does not wish to undertake the duties can renounce and the person next entitled to a grant may seek it. If an executor by representation decides to undertake the duties but another person seeks to displace him, ... we might have a fight on our hands. The only test should be the convenient administration of the estate. Perhaps it would be better to provide for a change of executorship to be approved by the court if the existing executor and the proposing executor agree and the court is satisfied that the change is in the interests of the administration of the estate.

7.96 The New South Wales Law Society queried whether, in the light of other proposals made by the National Committee in the Discussion Paper about the court's jurisdiction to revoke a grant, it was necessary to include a provision giving a beneficiary the right to object to the executorship by representation.⁷²²

The National Committee's view

Appointment made with the consent of the beneficiaries

7.97 In Chapter 4 of this Report, the National Committee has recommended that, if all the beneficiaries are adults and agree that a grant should be made to a person other than the person, or all of the persons, who would otherwise be entitled to the grant, the court may pass over the person who would otherwise be entitled to the grant and, in accordance with the wishes of the beneficiaries, make a grant to the person or persons nominated by the beneficiaries.⁷²³ That recommendation relates to the passing over of a person who has been named as executor or who is entitled to letters of administration, but who has not yet obtained a grant.

7.98 The issue of whether an application for a grant should be able to be made with the consent of the beneficiaries of the original or head estate, thereby displacing an executor or administrator by representation, is slightly different. In that case, the beneficiaries are seeking to have an administrator appointed when there is already a duly constituted personal representative in place — namely, the executor or administrator by representation.

7.99 The National Committee acknowledges that, although the doctrine of executorship, or administratorship, by representation promotes the efficient administration of estates, it can have the effect that the original estate is ultimately administered by a person with no connection to either the original testator or the beneficiaries under the original testator's will. For that reason, the National Committee is of the view that, if the estate of a deceased person is being administered by an executor or administrator by representation, the court should be able to grant letters of administration of the head estate, with the consent of the beneficiaries of that estate, in generally the same circumstances as those in which the court may, with the consent of the beneficiaries of an estate, pass over an executor named in the will or a person otherwise entitled to

722 Submission 15.

723 See Recommendations 4-13 to 4-15 above.

a grant and make a grant to someone else. These circumstances are to include the requirement that the court is satisfied that the applicant for the grant, or someone else with relevant knowledge, reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate.⁷²⁴

7.100 For consistency with the National Committee's recommendation made in Chapter 4,⁷²⁵ the model legislation should also provide that, if a beneficiary of an estate lacks legal capacity for the agreement that a grant should be made to a nominated person, a reference to the beneficiary is taken to be a reference to a person, other than a person who is also a beneficiary of the estate, who has lawful authority, including under the law of another State or Territory, to make binding decisions for the beneficiary for the agreement.

7.101 If the court grants letters of administration in accordance with this proposal, the person who was the executor or administrator by representation of the will or estate of the deceased person ceases to be the executor or administrator by representation of:

- the deceased person's will or estate; and
- any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.

7.102 Although this will result in the displacement of the executor or administrator by representation, rather than the passing over of someone who has not yet been appointed, the National Committee does not regard that fact as a sufficient reason to apply a different principle from that proposed in Chapter 4. The National Committee also notes that it is already the case that, in certain circumstances, an executorship by representation can be brought to an end by the making of another grant in relation to the original estate.⁷²⁶

Appointment of an administrator as if there were no executor or administrator by representation

7.103 There is a further situation in which it should be possible for the making of a grant in relation to the estate of a deceased person to bring about the cessation of any executorship, or administratorship, by representation of that estate.

7.104 The National Committee is of the view that, if a person who, if there were no executor or administrator by representation of the will or estate of a deceased person, would be entitled to letters of administration of the unadministered estate, applies for letters of administration, the court may grant

724 The National Committee's proposals in relation to an application to pass over a named executor or a person otherwise entitled to a grant are set out at [4.185]–[4.203] above.

725 See Recommendation 4-14 above.

726 See [7.80]–[7.86] above and Recommendations 7-10 and 7-11 below. See also Administration of Estates Bill 2009 cl 341.

letters of administration to the person.⁷²⁷ This proposal merely preserves the ordinary order of entitlement for a grant that would apply in the absence of an executor or administrator by representation.

7.105 On the granting of letters of administration of the deceased person's estate, the person who was the executor or administrator by representation ceases to be the executor or administrator by representation of:

- the deceased person's will or estate; and
- any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.

CEASING TO HOLD OFFICE AS EXECUTOR OR ADMINISTRATOR BY REPRESENTATION IF THE PRIMARY GRANT IS REVOKED, ENDS OR CEASES TO HAVE EFFECT

Background

7.106 Under the National Committee's proposals, a person who is appointed as executor of the will, or administrator of the estate, of a person who is a deceased personal representative automatically becomes the executor or administrator by representation of any will or estate of which the deceased personal representative was the last surviving, or sole, executor or administrator or executor or administrator by representation. If the person's grant in relation to the will or estate of the deceased personal representative is revoked, an issue arises as to whether or not the person is still, or should continue to be, the executor or administrator by representation of any will or estate as a result of having earlier obtained a grant of the deceased personal representative's will or estate.

7.107 In *Morgan v MacRae*,⁷²⁸ the Supreme Court of New South Wales queried whether the removal of an executor automatically had the effect of removing that person from any office that he or she might also hold as an executor by representation.⁷²⁹

there is great doubt as to whether s 13 of the *Imperial Acts Application Act 1969* permits the Court to remove a person who is an executor by representation, and it does not necessarily follow, though it might, that removing the executor also removes that person from being an executor by representation.

⁷²⁷ In this situation, the relevant grant would be a grant of letters of administration of the unadministered estate (that is, letters of administration *de bonis non*).

⁷²⁸ [2001] NSWSC 1017.

⁷²⁹ *Ibid* [19] (Young CJ in Eq).

The National Committee's view

7.108 In the National Committee's view, if a person holds a grant of probate or letters of administration of the will or estate of a deceased personal representative and the grant is revoked, ends or ceases to have effect, the very foundation for being the executor or administrator by representation of another will or estate further up the chain of representation no longer exists.

7.109 Accordingly, the model legislation should include a provision that applies if:

- a person holds a grant of probate or letters of administration of the will or estate of a deceased personal representative; and
- the grant is revoked, ends or ceases to have effect; and

provides that, on the revocation, ending or ceasing of effect, of the grant, the person ceases to be an executor or administrator by representation of any will or estate of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation.

BREAK IN THE CHAIN OF REPRESENTATION

Background

7.110 The legislation in most Australian jurisdictions specifies the circumstances in which the chain of executorial representation is broken. For example, section 47(3) of the *Succession Act 1981* (Qld) provides:

47 Executor of executor represents original testator

...

(3) The chain of executorial representation is broken by—

- (a) an intestacy; or
- (b) the failure of a testator to appoint an executor; or
- (c) the failure to obtain probate of the will in Queensland; or
- (d) the renunciation by the executor of the executorship by representation;

but it is not broken by a temporary grant of administration if probate is subsequently granted.

7.111 Similar provisions are found in the legislation in New South Wales, Tasmania and Victoria, except that the provisions in these jurisdictions do not

have an equivalent of section 47(3)(d).⁷³⁰ As noted earlier, section 47(3)(d) is a corollary to section 47(5), which does not have a counterpart in the other Australian jurisdictions.

The National Committee's view

7.112 Under the National Committee's proposal to enable the office of personal representative to devolve to, or through, an administrator, it will not matter that a deceased personal representative died intestate or made a will that failed to appoint an executor, or that the executor appointed under any will of the deceased personal representative failed to obtain probate, provided that, in any of these situations, letters of administration are granted of the estate of the deceased personal representative.

7.113 Accordingly, the model provision should not provide, as section 47(3)(a)–(c) of the *Succession Act 1981* (Qld) does, that the chain of representation is broken by:⁷³¹

- an intestacy; or
- the failure of a testator to appoint an executor; or
- the failure to obtain probate of the will in Queensland.

7.114 Earlier in this chapter, the National Committee has proposed that the model legislation should include a provision dealing with the effect of renouncing as an executor or administrator by representation. Not only does the model legislation provide that the executor or administrator by representation ceases to hold the office of executor or administrator by representation of the will or estate of the particular deceased person, it also provides that he or she also ceases to hold the office of executor or administrator by representation of the will or estate of any person of whom that deceased person was the executor, the administrator, or the executor or administrator by representation.⁷³² In view of that proposal, which provides a comprehensive statement of the effect of renunciation, it is not necessary for the model legislation to provide, as section 47(3)(d) of the *Succession Act 1981* (Qld) does, that the chain of representation is broken by the renunciation of the executorship by representation.⁷³³

⁷³⁰ *Imperial Acts Application Act 1969* (NSW) s 13(3); *Administration and Probate Act 1935* (Tas) s 10(2); *Administration and Probate Act 1958* (Vic) s 17(3).

⁷³¹ *Succession Act 1981* (Qld) s 47 is set out at [7.7] above.

⁷³² See [7.67] above.

⁷³³ The National Committee has also made other proposals in this chapter about the circumstances in which an executor or administrator by representation will cease to hold office.

7.115 Accordingly, the model legislation should not include a provision to the effect of section 47(3) of the *Succession Act 1981* (Qld).

7.116 However, there is one situation, not specified in section 47(3), that should effectively break the chain of representation.

7.117 It is possible that, after the death of a deceased personal representative and before a grant is made of the deceased personal representative's will or estate, someone obtains a grant of probate or letters of administration of a will or estate of a person (the 'other person') of whose will or estate the deceased personal representative, immediately before his or her death, was the executor, administrator or executor or administrator by representation. For example, a non-proving executor to whom leave to apply for probate was previously reserved might apply for and be granted probate of the testator's will or a person with a relevant interest in the deceased person's estate might apply for letters of administration *de bonis non*.

7.118 Obviously, if a grant is later made of the will or estate of the deceased personal representative, the person to whom that grant is made should not become the executor or administrator by representation of the will or estate of the other person or of any will or estate of which the other person was the executor, administrator, or executor or administrator by representation.

RECOMMENDATIONS

Executorship and administratorship by representation

7-1 The model legislation should provide that, subject to Recommendation 7-19, if a person is granted probate of the will, or letters of administration of the estate, of a deceased personal representative, the person is, on the granting of probate or letters of administration:

- (a)** the executor by representation of any will of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, executor under a grant of probate;
- (b)** the administrator by representation of any estate of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, administrator under letters of administration;

- (c) the executor by representation of any will of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, executor by representation; and
- (d) the administrator by representation of any estate of which the deceased personal representative was, at the time of his or her death, the last surviving, or sole, administrator by representation.⁷³⁴

See Administration of Estates Bill 2009 cl 338(1).

7-2 For the purpose of the model provisions dealing with executors and administrators by representation, 'deceased personal representative' should be defined to mean a deceased person who, immediately before his or her death, was:

- (a) the last surviving, or sole, executor of a deceased person's will under a grant of probate; or
- (b) the last surviving, or sole, administrator of a deceased person's estate under letters of administration.⁷³⁵

See Administration of Estates Bill 2009 cl 337 (definition of 'deceased personal representative').

Administrator appointed in the capacity of a creditor not to become executor or administrator by representation

7-3 If a person is appointed as administrator of a deceased person's estate only because he or she is a creditor of the deceased's estate, the person does not become the executor or administrator by representation of any will or estate of which the deceased was the executor, the administrator, or the executor or administrator by representation.⁷³⁶

See Administration of Estates Bill 2009 cl 337 (definition of 'grant of representation, of the estate of a deceased personal representative' (para (a)).

734 See [7.40]–[7.50] above.

735 See [7.43] above.

736 See [7.51] above.

7-4 If a person is appointed as administrator of a deceased person's estate only because he or she is a creditor of the deceased's estate, the grant must be endorsed to the effect that it has been made to the administrator in the capacity of a creditor of the estate.⁷³⁷

See Administration of Estates Bill 2009 cl 323.

Rights and liabilities of an executor or administrator by representation

7-5 The model legislation should include a provision to the general effect of section 47(4) of the *Succession Act 1981* (Qld), but modified so that the model provision deals with the rights and liabilities of both executors and administrators by representation.⁷³⁸

See Administration of Estates Bill 2009 cl 339.

Renunciation of executorship, or administration, by representation

7-6 The model legislation should provide that, subject to the provision that gives effect to Recommendation 7-7, a person who is granted probate of the will, or letters of administration of the estate, of a deceased personal representative may, before or after obtaining that grant, renounce the executorship, or administratorship, by representation of any will or estate (the '*other estate*') of which the deceased personal representative was:

- (a) the executor or administrator; or
- (b) the executor or administrator by representation;

without renouncing the executorship, or administratorship, of the will or estate of the deceased personal representative.⁷³⁹

See Administration of Estates Bill 2009 cl 340(1)–(4).

7-7 The model legislation should provide that an executor or administrator by representation may renounce the executorship, or administratorship, by representation only if he or she:

⁷³⁷ See [7.52] above.

⁷³⁸ See [7.56] above.

⁷³⁹ See [7.63]–[7.66] above.

- (a) renounces the executorship, or administratorship, by representation before taking an active step in the administration of the other estate;⁷⁴⁰ and
- (b) files the renunciation in court.⁷⁴¹

See Administration of Estates Bill 2009 cl 340(4)–(5).

7-8 The model legislation should define an ‘*active step*, in the administration of the other estate’ to exclude:

- (a) an act of necessity;
- (b) an act taken to protect or preserve property in the estate;
- (c) an act of a minor character that is for the benefit of the estate;
- (d) an act taken for the purpose of arranging the disposal of the deceased person’s remains.⁷⁴²

See Administration of Estates Bill 2009 cl 340(6).

Ceasing to hold office as executor or administrator by representation by renouncing the executorship, or administratorship, by representation

7-9 The model legislation should include a provision that:⁷⁴³

- (a) applies if a person:
 - (i) is granted probate of the will, or letters of administration of the estate, of a deceased personal representative; and

⁷⁴⁰ See [7.72]–[7.75], [7.78] above.

⁷⁴¹ See [7.79] above.

⁷⁴² See [7.76]–[7.77] above.

⁷⁴³ See [7.67] above.

- (ii) renounces the executorship, or administratorship, by representation of the will or estate of any deceased person of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation; and
- (b) provides that the person ceases to be an executor or administrator by representation of:
 - (i) the deceased person's will or estate; and
 - (ii) any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.

See Administration of Estates Bill 2009 cl 344.

Ceasing to hold office as executor or administrator by representation if a further grant of probate is made of the deceased person's will

7-10 The model legislation should include a provision to the effect of section 47(1A) of the *Succession Act 1981* (Qld), but modified to take account of the proposals about administrators by representation.⁷⁴⁴

7-11 The provision that gives effect to Recommendation 7-10 should:⁷⁴⁵

- (a) apply if:
 - (i) the Supreme Court made a grant of probate to only one or some of the executors named in a deceased person's will (the '*proving executors*');
 - (ii) the Supreme Court reserved leave to apply for a grant of probate at a later time to other executors who have not renounced their executorship (the '*non-proving executors*');
 - (iii) the last surviving, or sole, proving executor dies; and

⁷⁴⁴ See [7.85] above.

⁷⁴⁵ See [7.85]–[7.86] above.

- (iv) a person becomes the executor by representation of the deceased person's will under the provision that gives effect to Recommendation 7-1; and
- (b) provide that, on the making of a grant of probate to one or more of the non-proving executors, the executor by representation of the deceased person's will ceases to be:
 - (i) an executor by representation of the deceased's will; and
 - (ii) an executor or administrator by representation of any will or estate of which the deceased was the executor, the administrator, or the executor or administrator by representation.

See Administration of Estates Bill 2009 cl 341.

Ceasing to hold office as executor or administrator by representation if a further grant of letters of administration is made of the deceased person's estate

7-12 The model legislation should include a provision that:⁷⁴⁶

- (a) applies if:
 - (i) there is an executor or administrator by representation of the will or estate of a deceased person; and
 - (ii) all the beneficiaries under the deceased person's will or under the intestacy rules that apply to the deceased person's estate are adults; and
 - (iii) all the beneficiaries agree that letters of administration should be granted to:
 - (A) without limiting subparagraph (B), if there is more than one executor or administrator by representation — one or more of the executors or administrators by representation nominated by the beneficiaries; or

⁷⁴⁶

See [7.97]–[7.102] above.

**(B) another person nominated by the beneficiaries;
and**

(b) provides that the court may, on application, grant letters of administration of the estate to the person or persons nominated by all the beneficiaries.

See Administration of Estates Bill 2009 cl 350(1)–(2).

7-13 The model legislation should provide that, if a beneficiary of an estate lacks legal capacity to enter into the agreement mentioned in Recommendation 7-12, a reference to the beneficiary is taken to be a reference to a person, other than a person who is also a beneficiary of the estate, who has lawful authority, including under the law of another State or Territory,⁷⁴⁷ to make binding decisions for the beneficiary for the agreement.

See Administration of Estates Bill 2009 cl 350(4).

7-14 The model legislation should provide that, on an application for a grant under the provision that gives effect to Recommendation 7-12, the court may not grant letters of administration under that provision unless it is satisfied that the applicant for the grant, or someone else with relevant knowledge, reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate.⁷⁴⁸

See Administration of Estates Bill 2009 cl 350(3).

7-15 The model legislation should include a provision that:⁷⁴⁹

(a) applies if:

(i) there is an executor or administrator by representation of the will or estate of a deceased person; and

(ii) a person who, if there were no executor or administrator by representation, would be entitled to letters of administration of that estate, applies for a grant of letters of administration; and

⁷⁴⁷ See [7.100] above.

⁷⁴⁸ See [7.99], [4.193]–[4.201] above.

⁷⁴⁹ See [7.104] above.

- (b) provides that the court may grant letters of administration to the person mentioned in paragraph (a)(ii).

See Administration of Estates Bill 2009 cl 351.

7-16 The model legislation should provide that, if the court makes a grant under the provisions that give effect to Recommendations 7-12 or 7-15, the person who was an executor or administrator by representation of the deceased person's will or estate ceases to be:

- (a) an executor or administrator by representation of the deceased person's will or estate; and
- (b) an executor or administrator by representation of any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.⁷⁵⁰

See Administration of Estates Bill 2009 cl 342.

Ceasing to hold office as executor or administrator by representation if the primary grant is revoked, ends or ceases to have effect

7-17 The model legislation should include a provision that:

- (a) applies if a person:
- (i) holds a grant of probate of the will, or letters of administration of the estate, of a deceased personal representative; and
- (ii) the grant is revoked, ends or ceases to have effect; and
- (b) provides that the person ceases to be an executor or administrator by representation of any will or estate of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation.⁷⁵¹

See Administration of Estates Bill 2009 cl 343.

⁷⁵⁰ See [7.101], [7.105] above.

⁷⁵¹ See [7.108]–[7.109] above.

Break in chain of representation

7-18 The model legislation should not include a provision to the effect of section 47(3) of the *Succession Act 1981 (Qld)*.⁷⁵²

7-19 The model legislation should include a provision that:⁷⁵³

(a) applies if:

- (i)** after the death of the deceased personal representative; and
- (ii)** before a grant of probate or letters of administration is made of the will or estate of the deceased personal representative;

a grant of probate or letters of administration is made of the will or estate of any person (the '*other person*') of whose will or estate the deceased personal representative was the executor, the administrator, or the executor or administrator by representation; and

(b) provides that the person appointed as the executor or administrator of the deceased personal representative does not, on the making of the grant, become the executor or administrator by representation of:

- (i)** the will or estate of the other person; or
- (ii)** any will or estate of which the other person was the executor, the administrator, or the executor or administrator by representation.

See Administration of Estates Bill 2009 cl 338(2)–(3).

⁷⁵² See [7.112]–[7.115] above.

⁷⁵³ See [7.116]–[7.118] above.

Chapter 8

Notice provisions and caveats

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NOTICE PROVISIONS: ORIGINAL GRANTS

8.1 In all Australian jurisdictions except South Australia and Western Australia, a person who intends to apply for a grant must give notice of his or her intention to do so by publishing a notice in accordance with the requirements of the particular jurisdiction.⁷⁵⁴

Existing statutory provisions and court rules

Australian Capital Territory

8.2 In the ACT, the rules provide that a person intending to apply for a grant must publish notice of the person's intention to apply in a daily newspaper circulating generally in the ACT.⁷⁵⁵ The notice must be published not less than 14 days, and not more than three months, before the day the application is made.⁷⁵⁶

New South Wales

8.3 In New South Wales, the legislation provides that notice of an intended application for a grant must be published 'in such newspaper or newspapers as may be prescribed by the rules at least fourteen days before such application is made'.⁷⁵⁷ Under the rules, notice of an intended application for a grant must be published, in the prescribed form:⁷⁵⁸

- if the deceased was resident in New South Wales at the date of his or her death — in a newspaper circulating in the district where the deceased resided; or
- in any other case — in a Sydney daily newspaper.

8.4 New South Wales is the only jurisdiction where the primary obligation to give notice of an intended application is found in the legislation, rather than in the rules.

⁷⁵⁴ As explained below, additional requirements apply in some jurisdictions.

⁷⁵⁵ *Court Procedures Rules 2006* (ACT) r 3006(1).

⁷⁵⁶ *Court Procedures Rules 2006* (ACT) r 3006(2).

⁷⁵⁷ *Probate and Administration Act 1898* (NSW) s 42(2). See also s 42(4), which provides that a failure to comply with this requirement 'shall not bar the granting of probate or letters of administration'. It has been held that, in cases of urgency, and where it is for the benefit of the estate, the court may make a limited grant even though there has not been compliance with the requirement to give notice of intended application: *In the Estate of Pickles* (1922) 22 SR (NSW) 227. See also *Greenway v McKay* (1911) 12 CLR 310, where the High Court considered a similar requirement in the Victorian rules.

⁷⁵⁸ *Supreme Court Rules 1970* (NSW) Pt 78 r 10(1).

Northern Territory

8.5 In the Northern Territory, the rules provide that notice of an intended application for a grant must be published in one Darwin daily newspaper. If, at the date of death, the deceased was resident in the Territory at a place more than 200 kilometres from the General Post Office, Darwin, notice must also be published in a newspaper published and circulating in the district where the deceased resided.⁷⁵⁹

Queensland

8.6 In Queensland, the rules provide that a person, other than the public trustee, proposing to apply for a grant must, at least 14 days before filing the application, give notice in the approved form of intention to apply for the grant.⁷⁶⁰ The notice must be published:⁷⁶¹

- if the deceased's last known address is more than 150 kilometres from Brisbane — in a local newspaper circulated and sold at least once each week in the area of the deceased's last known address; or
- in any other case — in a newspaper circulating throughout the State or a newspaper approved for the area of the deceased's last known address by the Chief Justice under a practice direction.⁷⁶²

8.7 In addition, the notice must be published in a publication approved by the Chief Justice under a practice direction.⁷⁶³

Tasmania

8.8 In Tasmania, the rules provide that an applicant for letters of administration must advertise notice of his or her intention to apply for the grant at least once in the *Gazette* and at least once in a newspaper.⁷⁶⁴ There is no similar requirement in relation to an application for a grant of probate.

759 *Supreme Court Rules (NT)* r 88.09.

760 *Uniform Civil Procedure Rules 1999 (Qld)* r 598(1).

761 *Uniform Civil Procedure Rules 1999 (Qld)* r 599(3)(a).

762 See Supreme Court of Queensland Practice Direction No 25 of 1999 and Supreme Court of Queensland Practice Direction No 32 of 1999. Under these Practice Directions four regional newspapers have been approved as an alternative to publication in a newspaper circulating throughout the State.

763 *Uniform Civil Procedure Rules 1999 (Qld)* r 599(4). See Supreme Court of Queensland Practice Direction No 19 of 1999, under which publication in the *Queensland Law Reporter* has been approved for the purposes of r 599(4).

764 *Probate Rules 1936 (Tas)* r 26.

Victoria

8.9 In Victoria, an application for a grant may not be made unless, not less than 14 days before the date of the application, the applicant has advertised his or her intention in accordance with the rules.⁷⁶⁵

8.10 As a result of significant amendments to the *Supreme Court (Administration and Probate) Rules 2004* (Vic), which commenced on 2 March 2009, there is now a dual advertising system.

8.11 Notice of intention to apply for a grant may be advertised:⁷⁶⁶

- where the deceased resided in Victoria more than 50 kilometres from the south-east corner of William Street and Lonsdale Street in Melbourne — in a newspaper published at least weekly and circulating in the district in which the deceased resided;
- in any other case — in a Melbourne daily newspaper.

8.12 Alternatively, notice of intention to apply for a grant may be posted on the Supreme Court of Victoria's website.⁷⁶⁷ The posted notices may be searched by reference to the deceased's name or address.⁷⁶⁸

8.13 Information provided on the Court website states that:⁷⁶⁹

- There is currently a fee of \$35.75 for each advertisement posted.
- Advertisements published on the website will not expire or become stale. The advertisement will be available permanently on the website and accessible to anyone at anytime.

8.14 The Court website refers to the following advantages of online advertising:⁷⁷⁰

Online advertisements: provide a single comprehensive point of publication for all advertisements; provide universal accessibility to interested persons including regional and overseas persons; improve the visibility of advertisements for all persons; are located on a single authoritative site that can be searched at anytime; and provide instant confirmation that the advertisement has been published.

⁷⁶⁵ *Supreme Court (Administration and Probate) Rules 2004* (Vic) rr 2.03(1), 2A.03(1), 3.02(1)(c), 4.03, 4A.03(1).

⁷⁶⁶ *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 2.03(2)(b), (c), 3.02(1)(c), 4.03.

⁷⁶⁷ *Supreme Court (Administration and Probate) Rules 2004* (Vic) rr 2A.03(1), 3.02(1)(c), 4A.03(1).

⁷⁶⁸ See <<https://online.justice.vic.gov.au/poas/CommonNoticeSearchAction.do>> at 21 March 2009.

⁷⁶⁹ See <https://online.justice.vic.gov.au/CA2572EB008107EE/page/Guidance+Notes+and+FAQs?OpenDocument&1=95-Guidance+Notes+and+FAQs-&2=-&3=-> at 21 March 2009.

⁷⁷⁰ Ibid.

8.15 There is no fee for searching the published notices.⁷⁷¹

8.16 From 2 September 2009 all advertisements, except those in relation to applications for resealing and the filing of elections to administer by trustee companies, must be advertised on the website.⁷⁷²

South Australia, Western Australia

8.17 In South Australia and Western Australia, there is no requirement for an applicant for a grant to publish a notice of his or her intention to apply for the grant.

The effectiveness of publishing notice of intention to apply

8.18 Understandably, the requirements as to the particular newspapers in which notice must be published are jurisdiction-specific. However, the requirements in some jurisdictions to publish multiple notices, and the choice that is given to applicants in relation to the newspapers in which notice may be given, raise issues about the cost involved in complying with the various requirements. They also raise an issue about how effective such notice requirements are as a means of informing persons having an interest in an estate of the fact that an application is to be made for a grant.

8.19 The issue of giving public notice of intention to apply was considered by the Law Reform Commission of Western Australia in its Report on the recognition of interstate and foreign grants. In the view of that Commission, advertising was probably ineffective, and caused expense and delay.⁷⁷³ It attributed part of the ineffectiveness of advertising to the method of advertising:⁷⁷⁴

Advertisements may appear in any place on any date in any one of several newspapers. Although Public Trustees and trustee companies would no doubt monitor the daily press for notices of application, it is most unlikely that the average beneficiary or creditor would do so, and some interested parties would be resident outside the State or Territory in which it was sought to reseal the grant. It thus seems to be merely a matter of chance whether an advertisement comes to the attention of interested persons.

771 See <<https://online.justice.vic.gov.au/poas/PoasServicesAction.do?sessionId=EE8D82A15CADBF10613103F7ED56FB81>> at 21 March 2009.

772 Ibid.

773 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.37].

774 Ibid [3.38].

Discussion Paper

8.20 The Discussion Paper did not specifically consider whether the model legislation should require an applicant for a grant to publish a notice of his or her intention to apply for the grant, as the substantive issues of succession law were its main concern.

8.21 However, in considering whether the model legislation should include a provision requiring applications for probate or letters of administration to be made in accordance with the relevant rules, the National Committee referred to section 42 of the *Probate and Administration Act 1898* (NSW),⁷⁷⁵ subsection (2) of which creates a legislative requirement to give notice of an intended application for a grant. Section 42 provides:

42 Application for probate or administration

- (1) All applications for probate or letters of administration may be made to the Court in such manner as may be prescribed by the rules.
- (2) Notice of such intended application shall be published in such newspaper or newspapers as may be prescribed by the rules at least fourteen days before such application is made.
- (3) Application for probate of a will not deposited as in section 32 provided or for letters of administration shall be supported by an affidavit that a search has been made in the proper office for a will of the deceased, and stating whether any such will remains deposited with the officer for the time being authorised to have the custody of deposited wills, or by a certificate from the Registrar to the like effect.
- (4) The Court may by order direct that any partial or total failure to comply with the requirements of subsections (2) and (3) shall not bar the granting of probate or letters of administration.
- (5) The Court may refuse to revoke a grant of probate or letters of administration notwithstanding that in respect of the application for the grant there was any partial or total failure to comply with the requirements of subsections (2) and (3).

8.22 In the Discussion Paper, the National Committee considered whether:⁷⁷⁶

- the model legislation should include a provision dealing with the manner in which applications for probate and letters of administration are to be made;⁷⁷⁷ and

⁷⁷⁵ *Administration of Estates Discussion Paper* (1999) QLRC 257; NSWLRC [18.1]–[18.2].

⁷⁷⁶ *Ibid*, QLRC 257; NSWLRC [18.3].

⁷⁷⁷ This issue is considered in Chapter 40 of this Report.

- if so, it would be more appropriate for provisions to the general effect of section 42(2)–(5) of the *Probate and Administration Act 1898* (NSW) to be located in court rules, rather than in the model legislation.

Submissions

8.23 The Trustee Corporations Association of Australia disagreed with the requirement in section 42 of the *Probate and Administration Act 1898* (NSW) for a person applying for a grant to publish a notice of his or her intention to make the application:⁷⁷⁸

The Association does not agree that rules of court covering procedural matters should include a requirement to publish a notice of intention to make application for probate (section 42(2) *Wills, Probate and Administration Act 1898* (NSW)). Such an obligation does not apply in other jurisdictions such as South Australia. This requirement to advertise adds unnecessary cost, slows down the estate administration, adds extra complexity to the process, and provides little in the way of protection, either for the executors or the beneficiaries named in the will.

8.24 Trust Company of Australia Limited expressed a similar view:⁷⁷⁹

We submit that it will result in further costs, delays and added procedural complexity without any real benefit to beneficiaries or executors by way of increased protection or otherwise.

The National Committee's view

8.25 The requirements in relation to publishing a notice of a person's intention to apply for a grant are, by their very nature, specific to the individual jurisdiction concerned. The National Committee is therefore of the view that the specific requirements should be a matter for individual jurisdictions, and should be contained in court rules. Requirements of this nature are not appropriate for inclusion in the model legislation.

8.26 The National Committee is conscious of the concerns that have been expressed in relation to the utility of the current provisions that require notice to be given in a newspaper. It considers that it would be a significant advance if the Supreme Courts of all Australian jurisdictions made available on their websites an electronic facility on which such notices could be published, as has recently occurred in Victoria.⁷⁸⁰ This would provide a central, reliable means for the searching of a notice of intention to apply for a grant.

⁷⁷⁸ Submission 6.

⁷⁷⁹ Submission 10.

⁷⁸⁰ See [8.12]–[8.16] above.

NOTICE PROVISIONS: RESEALING OF GRANTS

Existing legislative provisions and court rules

Australian Capital Territory

8.27 In the ACT, the rules provide that a person intending to apply for the resealing of a grant must publish a notice of the person's intention in a daily newspaper circulating generally in the ACT. The notice must be published not less than 14 days, and not more than three months, before the date on which the application for resealing is made.⁷⁸¹

New South Wales, Northern Territory, Tasmania, Victoria

8.28 The legislation in New South Wales, the Northern Territory, Tasmania and Victoria provides that a grant may not be resealed except on an affidavit that notice of intention to apply has been given, in the manner prescribed, at least 14 days before the making of the affidavit, and that no caveat has been lodged in respect of the application.⁷⁸² Except in New South Wales, the detail regarding the manner in which the notice is to be published is set out in the legislation.⁷⁸³

8.29 The New South Wales provision is slightly briefer, as the detail regarding the manner in which the notice is to be published is set out in the rules,⁷⁸⁴ rather than in the legislation itself. Section 109 of the *Probate and Administration Act 1898* (NSW) provides:

The seal of the Court shall not be affixed as aforesaid except upon an affidavit that notice of the intention to apply in that behalf has been published as prescribed by rules of Court fourteen days before the making of such affidavit, and that no caveat has been lodged in respect thereof.

Queensland

8.30 In Queensland, although notice of intention to apply must be published when an application is made for an original grant, the rules provide that it is not necessary to publish or serve a notice of intention to apply for the resealing of a

⁷⁸¹ *Court Procedures Rules 2006* (ACT) r 3021(1), (2). This requirement is the same as for an application for an original grant: see [8.2] above.

⁷⁸² *Probate and Administration Act 1898* (NSW) s 109; *Administration and Probate Act* (NT) s 113(3); *Administration and Probate Act 1935* (Tas) s 49(1); *Administration and Probate Act 1958* (Vic) s 83. There used to be a similar provision in the ACT, but that provision has since been repealed: see *Administration and Probate Act 1929* (ACT) s 82(3), repealed by the *Justice and Community Safety Legislation Amendment Act 2006* (ACT) s 3, sch 2 pt 2.1 amdt [2.32].

⁷⁸³ *Administration and Probate Act* (NT) s 113(3) (once in a newspaper printed and published in Darwin and once in a newspaper printed and published in Alice Springs); *Administration and Probate Act 1935* (Tas) s 49(1) (once in the *Gazette* and in two newspapers published in different parts of Tasmania); *Administration and Probate Act 1958* (Vic) s 83 (once in one of the Melbourne daily newspapers). These requirements differ from those that apply when an application is made for an original grant: see [8.5], [8.8], [8.9]–[8.11] above.

⁷⁸⁴ *Supreme Court Rules 1970* (NSW) Pt 78 r 10. These requirements are set out at [8.3] above.

grant unless 'there are debts owing at the date of the application in Queensland or the court or registrar requires it for another reason'.⁷⁸⁵

South Australia

8.31 In South Australia, the rules provide that, if the registrar so requires, notice of an application for the resealing of a grant must be advertised in such manner as the registrar may direct.⁷⁸⁶

Western Australia

8.32 In Western Australia there is no requirement that an applicant advertise his or her intention to apply for the resealing of a grant.

Discussion Paper

8.33 In the Discussion Paper on the recognition of interstate and foreign grants, the National Committee noted that the Commonwealth Secretariat, in its Draft Model Bill, had included a provision to the effect that a person intending to apply for the resealing of a grant must cause to be published an advertisement giving notice of that intention and requiring any person wishing to oppose the resealing to lodge a caveat by a specified date.⁷⁸⁷

8.34 The National Committee also noted that the Law Reform Commission of Western Australia, when reviewing the law in relation to resealing, had recommended 'that the uniform code of procedure for resealing should not incorporate a requirement of advertising'.⁷⁸⁸

8.35 The National Committee therefore sought submissions on whether:⁷⁸⁹

- there should be a uniform, mandatory provision in relation to giving notice of intention to apply for the resealing of a grant;
- as an alternative to a mandatory requirement, all jurisdictions should adopt a provision that, if the registrar so requires, notice of the application for resealing should be advertised in such manner as the registrar may direct and, if so, what matters would be relevant to the exercise of the registrar's discretion;

⁷⁸⁵ *Uniform Civil Procedure Rules 1999* (Qld) r 617(1).

⁷⁸⁶ *The Probate Rules 2004* (SA) r 50.03.

⁷⁸⁷ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 136, referring to Commonwealth Secretariat Draft Model Bill cl 3(3). The Commonwealth Secretariat Draft Model Bill is set out in full in Appendix 4 to this Report.

⁷⁸⁸ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 137, referring to Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.42].

⁷⁸⁹ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 138. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 73.

- any provision in relation to giving notice of intention to apply for the resealing of a grant should be located in the court rules of the various jurisdictions, rather than in the model legislation; and
- there are any procedures, other than advertising, that could be used to bring to the attention of interested parties the fact that an application was being made for the resealing of a grant.

Submissions

8.36 Several respondents to the Discussion Paper on the recognition of interstate and foreign grants addressed the issue of whether an applicant for the resealing of a grant should be required to publish a notice of his or her intention to make the application.

8.37 The Public Trustee of New South Wales and the New South Wales Bar Association were of the view that an applicant for the resealing of a grant should be required to publish such a notice only if required to do so by the registrar.⁷⁹⁰

8.38 The former Principal Registrar of the Supreme Court of Queensland was opposed to a mandatory provision in relation to the publication of a notice of intention to apply for the resealing of a grant, and suggested that the Queensland rule should be adopted.⁷⁹¹ As explained earlier, under those rules, notice of intention to apply need not be published or served unless there are debts owing at the date of the application in Queensland or the court or the registrar requires it for another reason.⁷⁹² The former Principal Registrar of the Supreme Court of Queensland was also of the view that the relevant provision should be located in court rules, rather than in the model legislation.⁷⁹³

8.39 The Victorian Bar commented on the issue of an alternative to the current requirements for publishing notice of intention to apply for the resealing of a grant. It noted that:⁷⁹⁴

The question of advertising is one that is being separately considered in Victoria in the context of whether facilities will be made available through the Court for advertisements to be published on a Court Web site. Presumably this will in due course be introduced in all jurisdictions. Once that has occurred, the advertising requirements for re-seals ought to be similar to those for the principal applications for a grant.

790 Submissions R2, R5.

791 Submission R1.

792 See [8.30] above.

793 Submission R1.

794 Submission R4.

8.40 As explained earlier in this chapter, the website facility referred to in this submission commenced operation in Victoria on 2 March 2009.⁷⁹⁵

The National Committee's view

8.41 Consistent with the view expressed earlier in relation to original grants,⁷⁹⁶ the National Committee is of the view that the requirements in relation to publishing a notice of a person's intention to apply for the resealing of a grant should be a matter for individual jurisdictions, and should be contained in their court rules.

8.42 If the courts develop the facility to publish on their websites notices of intention to apply for an original grant, as has now occurred in Victoria, the mechanism should also extend to notices of intention to apply for the resealing of a grant.

CAVEATS: ORIGINAL GRANTS

8.43 A caveat is a procedure by which a person who has an interest in an estate and who wishes to object to, or to be heard on, the making or resealing of a grant may ensure that the grant is not made or resealed except after notice has been given to the caveator. The function of a caveat has been described in the following terms:⁷⁹⁷

A caveat is not a notice to any opponent in particular. It is a notice to the registrar or officer of the Court not to let anything be done by anybody in the matter of the will, or the goods of the deceased, without notice to the person who lodges the caveat. ... it merely requests the registrar to tell the caveator if anybody stirs in this matter.

8.44 A caveat is likely to be lodged where the caveator:⁷⁹⁸

1. disputes the validity of a will which a person wishes to prove or propound;
2. wants to prevent a person entitled in the same degree from obtaining a grant of representation;
3. wishes to prove that an applicant for a grant is unfit to hold office as a personal representative; or

795 See [8.12]–[8.16] above.

796 See [8.25] above.

797 *Moran v Place* [1896] P 214, 216 (Lindley LJ).

798 DM Haines, *Succession Law in South Australia* (2003) [20.2].

4. wishes to be notified of a grant so that he or she may take proceedings under the [family provision legislation] against the estate.⁷⁹⁹ (note added)

Existing legislative provisions and court rules

8.45 All Australian jurisdictions have provisions enabling a person with an interest in an estate to lodge a caveat against the making of a grant. Although there is variation between the jurisdictions, the lodging of a caveat will usually trigger the institution of some form of proceedings. Depending on the nature of the caveat, the applicant for the grant may choose to institute contested proceedings to have the court pronounce for the validity of the will. Another possibility is that the applicant will apply to have the caveat set aside. These matters, and the various requirements for a caveator to state the grounds on which he or she objects to the grant being made, are for the most part governed by the court rules in the various jurisdictions.⁸⁰⁰

8.46 The various provisions are considered below.

New South Wales, Western Australia

8.47 In New South Wales and Western Australia, the administration legislation in the particular jurisdiction, although supplemented by the court rules, contains provisions dealing with the lodgment of caveats, the requirements for setting out the name and address for service of the caveator, and the removal or withdrawal of caveats.⁸⁰¹

8.48 Sections 144 to 146 and 148 of the *Probate and Administration Act 1898* (NSW) provide:

144 Caveat may be lodged

- (1) Any person may lodge in the registry of the Court a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under Division 5, at any time previous to such probate or administration being granted, or to the sealing of any such probate or letters of administration.
- (2) Every such caveat shall set forth the name of the person lodging the same, and an address for service in accordance with the rules.

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This would be more likely to occur in those jurisdictions where the time for making an application for provision runs from the date of the grant, rather than from the date of death of the deceased.

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See *Court Procedures Rules 2006* (ACT) rr 3065–3072; *Supreme Court Rules 1970* (NSW) Pt 78 rr 61–70; *Supreme Court Rules* (NT) rr 88.62–88.71; *Uniform Civil Procedure Rules 1999* (Qld) rr 623–628; *The Probate Rules 2004* (SA) rr 52.01–52.13; *Probate Rules 1936* (Tas) rr 77–82; *Supreme Court (Administration and Probate) Rules 2004* (Vic) rr 8.01–8.08; *Non-contentious Probate Rules 1967* (WA) r 33.

801

Probate and Administration Act 1898 (NSW) ss 144–146, 148; *Administration Act 1903* (WA) ss 63, 64.

145 Application may proceed on notice

In every case where a caveat is lodged against an application the applicant may, subject to the giving of such notice to the caveator as the rules may require or the Court may direct, proceed, in accordance with the rules or as the Court may direct, with the application.

146 Court may order application to proceed

The Court, on the application of the caveator, may order that the application for grant or sealing, as the case may be, proceed and may give directions relating thereto.

148 Caveats may be withdrawn

A caveat may be withdrawn at any time with the leave of the Court, subject to such order as to costs or otherwise as it may direct.

8.49 Sections 63 and 64 of the *Administration Act 1903* (WA) provide:

63 Caveat

- (1) Any person may lodge with the Principal Registrar a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under this Act, at any time previous to such probate or administration being granted or sealed.
- (2) Every such caveat shall set forth the name of the person lodging the same, and an address in accordance with the rules at which notices may be served on him.

64 Court may remove caveat

- (1) In every case in which a caveat is lodged the Court may, upon application by the person applying for probate or administration, or for the sealing of any probate or letters of administration, as the case may be remove the same.
- (2) Every such application shall be served on the caveator by delivering a copy of the same at the address mentioned in his caveat.
- (3) Such application may be heard and order made upon affidavit or oral evidence, or as the Court may direct.

Northern Territory, South Australia, Victoria

8.50 In the Northern Territory, South Australia and Victoria, the administration legislation contains a provision that simply states the fact that a caveat may be lodged, while the detailed provisions in relation to caveats are located in the court rules. The legislative provisions are in fairly similar terms.

8.51 Section 44 of the *Administration and Probate Act* (NT) provides:

44 Caveat may be lodged

Subject to and in accordance with the Rules, a person may, at any time before the granting of representation, lodge with the Registrar a caveat against an application for representation.

8.52 Section 26(1) of the *Administration and Probate Act 1919* (SA) provides:

26 Caveats

- (1) Caveats against the grant of probates or administrations may be lodged in the Probate Registry of the Court.

8.53 Section 58 of the *Administration and Probate Act 1958* (Vic) provides:

58 Caveat may be lodged?

Any person may lodge with the registrar in accordance with the Rules of the Supreme Court a caveat against the making of a grant.

Australian Capital Territory, Queensland, Tasmania

8.54 In the ACT,⁸⁰² Queensland⁸⁰³ and Tasmania,⁸⁰⁴ the relevant provisions are located entirely in the court rules.

Discussion Paper

8.55 In the Discussion Paper on the administration of estates, the National Committee queried whether it was necessary or appropriate to include a provision relating to caveats in the model legislation, or whether such a provision would be better placed in court rules.⁸⁰⁵

8.56 The National Committee noted that rule 52.01 of *The Probate Rules 1998* (SA), which is in the same terms as rule 52.01 of *The Probate Rules 2004* (SA), provided that:⁸⁰⁶

Any person who wishes to ensure that no grant is sealed without notice to such person may enter a caveat in the Registry.

⁸⁰² *Court Procedures Rules 2006* (ACT) rr 3065–3072. The *Administration and Probate Act 1929* (ACT) used to contain detailed provisions about caveats: ss 33–38. Those provisions, which were repealed by the *Justice and Community Safety Legislation Amendment Act 2006* (ACT) s 3, sch 2 item [2.20], dealt with the Supreme Court's power to make an order nisi for a grant and to appoint a time for the caveator to show cause against the order, service of the order nisi, the making absolute of the order nisi, and evidentiary and procedural matters in relation to the hearing of the order nisi.

⁸⁰³ *Uniform Civil Procedure Rules 1999* (Qld) rr 623–628.

⁸⁰⁴ *Probate Rules 1936* (Tas) rr 77–82.

⁸⁰⁵ *Administration of Estates Discussion Paper* (1999) QLRC 39; NSWLRC [5.37].

⁸⁰⁶ *Ibid*, QLRC 39; NSWLRC [5.38].

8.57 The National Committee's preliminary proposal was that a provision to the effect of rule 52.01 of the South Australian rules should be included in the model legislation.⁸⁰⁷

8.58 The National Committee also proposed on a preliminary basis that, when the jurisdictions review their rules in relation to caveats, consideration should be given to the possible inclusion of the following provisions.⁸⁰⁸

- rules 52.02–52.13 of what are now *The Probate Rules 2004* (SA);
- sections 144–146 and 148 of the *Probate and Administration Act 1898* (NSW); and
- the Victorian rules in relation to caveats, which are now set out in Order 8 of the *Supreme Court (Administration and Probate) Rules 2004* (Vic).

Submissions

8.59 The preliminary proposal that the model legislation should include a provision to the effect of rule 52.01 of the South Australian rules was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Public Trustee of New South Wales, and the New South Wales Law Society.⁸⁰⁹

8.60 The New South Wales Law Society suggested that, in addition, the model legislation should include a provision to the effect of section 144(2) of the *Probate and Administration Act 1898* (NSW), which requires the caveat to set out the name of the person lodging it and an address for service,⁸¹⁰ and that the interest of the caveator should be stated.⁸¹¹

8.61 The further preliminary proposal that the jurisdictions should give consideration to the possible inclusion in their rules of provisions based on the South Australian and Victorian rules in relation to caveats and the New South Wales legislative provisions in relation to caveats was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Public Trustee of New South Wales, and the New South Wales Law Society.⁸¹²

807 Ibid, QLRC 39; NSWLRC 58 (Proposal 14).

808 Ibid, QLRC 39; NSWLRC 58 (Proposals 15, 16).

809 Submissions 1, 3, 11, 15.

810 *Probate and Administration Act 1898* (NSW) s 144 is set out at [8.48] above.

811 Submission 15.

812 Submissions 1, 3, 11, 15.

8.62 Although the Public Trustee of New South Wales supported both preliminary proposals, his preference was to adopt uniform rules dealing with caveats.⁸¹³

8.63 A former ACT Registrar of Probate also expressed a preference for uniform rules.⁸¹⁴

There may also be value in following the lead in some other areas (eg. Cross-Vesting) in having model rules, or at least basic model rules, since the desirability of uniformity could be significantly eroded given the very wide scope of the matters to be left to the rules.

8.64 Although the Queensland Law Society did not address the specific preliminary proposals, it commented that, when the National Committee considered rule 52 of the South Australian probate rules, those rules were the most recently drafted probate rules. The Queensland Law Society noted that, since that time, new rules in relation to caveats had been adopted in Queensland.⁸¹⁵

8.65 The ACT Law Society was opposed to both preliminary proposals. In its view, the model legislation 'should include consistent substantive and procedural provisions dealing with caveats':⁸¹⁶

This will avoid inconsistent rules being adopted in various jurisdictions and will facilitate practice in that practitioners will be able to refer to one source rather than have to relate legislative provisions to Rules of Court.

8.66 The National Committee notes, however, that, since this submission was made, the ACT legislative provisions dealing with caveats have been repealed,⁸¹⁷ and the provisions dealing with caveats are now located in the *Court Procedures Rules 2006 (ACT)*.⁸¹⁸

The National Committee's view

8.67 In the National Committee's view, it is desirable that the model legislation should include a provision that signals that it is possible for a person to lodge a caveat against the making of a grant. The National Committee favours the Northern Territory provision, which is set out above.⁸¹⁹ That

813 Submission 11.

814 Submission 2.

815 Submission 8.

816 Submission 14.

817 See note 802 above.

818 See *Court Procedures Rules 2006 (ACT)* rr 3065–3072.

819 See [8.51] above.

provision makes it clear that a person may, at any time before a grant is made, lodge a caveat against an application for a grant.

8.68 However, the National Committee considers it appropriate that the detail of the provisions in relation to caveats, dealing with matters such as the different types of caveats, the matters to be set out in caveats, and the procedures to be followed once a caveat has been lodged, should be located in the court rules of the jurisdictions.

CAVEATS: RESEALING OF GRANTS

Existing legislative provisions and court rules

8.69 The provisions dealing with lodging a caveat against the resealing of a grant also differ between the jurisdictions.

Northern Territory, Tasmania, Victoria

8.70 The Northern Territory, Tasmania and Victoria have essentially the same legislative provision.⁸²⁰ The Northern Territory provision is typical:⁸²¹

112 Caveat

Any person may lodge with the Registrar a caveat against the sealing of any such probate or administration, and any such caveat shall have the same effect, and shall be dealt with in the same manner, as if it were a caveat against the granting of probate or administration.

8.71 The legislation in the Northern Territory further provides that the registrar must not, without an order of the court, reseal a grant if a caveat has been lodged with the registrar.⁸²²

New South Wales, Western Australia

8.72 In New South Wales⁸²³ and Western Australia,⁸²⁴ the legislative provisions and rules about caveats are expressed to apply not only in respect of a caveat lodged against the making of an original grant, but also in respect of a caveat lodged against the resealing of a grant.

820 *Administration and Probate Act* (NT) s 112; *Administration and Probate Act 1935* (Tas) s 49(2); *Administration and Probate Act 1958* (Vic) s 82.

821 *Administration and Probate Act* (NT) s 112.

822 *Administration and Probate Act* (NT) s 111(3)(a).

823 *Probate and Administration Act 1898* (NSW) ss 144–146, 148; *Supreme Court Rules 1970* (NSW) Pt 78 rr 61–70. Sections 144–146 and 148 are set out at [8.48] above.

824 *Administration Act 1903* (WA) ss 63, 64; *Non-contentious Probate Rules 1967* (WA) r 33. Sections 63 and 64 are set out at [8.49] above.

Australian Capital Territory, Queensland

8.73 In the ACT and Queensland, the rules that apply to a caveat lodged against the making of an original grant also apply to a caveat lodged against the resealing of a grant.⁸²⁵

8.74 The Queensland rules also provide that the registrar may not reseal a grant if a caveat against resealing has been filed.⁸²⁶

South Australia

8.75 In South Australia, although the legislative provision in relation to caveats applies only in respect of the making of an original grant,⁸²⁷ the rules dealing with caveats apply in respect of the making of an original grant and the resealing of a grant.⁸²⁸

Commonwealth Secretariat Draft Model Bill

8.76 Clause 4 of the Commonwealth Secretariat Draft Model Bill provided:

4 Caveats

- (1) Any person who wishes to oppose the resealing of a grant of administration shall, by the date specified in the advertisement published pursuant to section 3(3), lodge a caveat against the sealing.
- (2) A caveat under subsection (1) shall have the same effect and shall be dealt with in the same manner as if it were a caveat against the making of a grant of probate or letters of administration by the Supreme Court.
- (3) The Registrar shall not, without an order of the Supreme Court, proceed with an application under section 3 if a caveat has been lodged under this section.

Recommendation of the Law Reform Commission of Western Australia

8.77 In its Report on the recognition of interstate and foreign grants, the Law Reform Commission of Western Australia recommended that there should be a uniform provision in relation to the lodgment of caveats against resealing, and that the 'consequences of lodgment should be the same as under the present

⁸²⁵ For the purposes of div 3.1.7 of ch 3 of the *Court Procedures Rules 2006* (ACT) (Caveats), the term 'grant of representation' includes 'a resealing ... of a grant of probate or administration': *Court Procedures Rules 2006* (ACT) r 3065. Similarly, for the purposes of ch 15, pt 7 of the *Uniform Civil Procedure Rules 1999* (Qld) (Caveats), the term 'grant' includes 'a resealing of a foreign grant': *Uniform Civil Procedure Rules 1999* (Qld) r 623.

⁸²⁶ *Uniform Civil Procedure Rules 1999* (Qld) rr 601(1)(a), 617(2).

⁸²⁷ *Administration and Probate Act 1919* (SA) s 26.

⁸²⁸ *The Probate Rules 2004* (SA) rr 52.01–52.13. Note that r 52.13 provides that, in that rule, "grant" includes a grant made by any Court outside this State which is produced for re-sealing by the Court.

law⁸²⁹ — that is, they should be the same as for a caveat against an original grant.

Discussion Paper

8.78 The preliminary view expressed in the Discussion Paper on the recognition of interstate and foreign grants was that there should be a uniform provision enabling the lodgment of a caveat against the resealing of a grant. It was proposed that a provision to the effect of clause 4 of the Commonwealth Secretariat Draft Model Bill should be incorporated in the model legislation, and that any additional provisions should be set out in court rules.⁸³⁰

Submissions

8.79 With the exception of one aspect of clause 4 of the Commonwealth Secretariat Draft Model Bill, the respondents who commented on the issue of caveats supported the adoption of a provision to the effect of that clause.⁸³¹

8.80 Although the former Principal Registrar of the Supreme Court of Queensland supported the adoption of subclauses (2) and (3) of that provision, he did not agree that a provision to the effect of subclause (1) should be adopted.⁸³² Under that subclause, any caveat must be lodged by the date specified in the advertisement published by the applicant giving notice of his or her intention to apply for resealing. In Queensland, however, there is no general requirement for an applicant for resealing to publish such a notice.⁸³³ Such a requirement would also seem to be inappropriate in South Australia and Western Australia.⁸³⁴

8.81 The Public Trustee of New South Wales and the Trustee Corporations Association of Australia both agreed with the preliminary proposal that the relevant provision should be located in the model legislation.⁸³⁵

829 Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [11.1] Recommendation (15). See also Law Reform Commission of Western Australia, *Recognition of Interstate and Foreign Grants of Probate and Administration*, Report, Project No 34 Pt IV (1984) [3.45] note 2, where the Commission observed that similar provisions appeared in the Commonwealth Secretariat Draft Model Bill.

830 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 135. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.88]. It was observed that rr 52.02–52.13 of *The Probate Rules 1998* (SA), which supplemented s 26 of the *Administration and Probate Act 1919* (SA), would provide a suitable model for any rules dealing with caveats: *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 135; *Recognition of Interstate and Foreign Grants Issues Paper* (2002) [5.89].

831 Submissions R1, R2, R4, R5, R6.

832 Submission R1.

833 See [8.30] above.

834 See [8.31], [8.32] above.

835 Submissions R2, R6.

The National Committee's view

8.82 In the National Committee's view, the provision dealing with the lodgment of a caveat against the resealing of a grant should be consistent with the provision proposed earlier in relation to the lodgment of a caveat against an original grant.

RECOMMENDATIONS

Notice provisions

- 8-1 The model legislation should not include specific requirements for publishing a notice of a person's intention to apply for an original grant or for the resealing of a grant.⁸³⁶
- 8-2 Any specific requirements about such notices should be contained in the court rules of the individual jurisdictions.⁸³⁷

Caveats

- 8-3 The model legislation should include a provision, similar to section 44 of the *Administration and Probate Act* (NT), that a person may, at any time before a grant is made, lodge a caveat against the making of a grant.⁸³⁸

See Administration of Estates Bill 2009 cl 313(1)–(3).

- 8-4 The model legislation should include a provision, similar to that recommended in Recommendation 8-3, providing that a person may, at any time before the resealing of a grant, lodge a caveat against the resealing of a grant.⁸³⁹

See Administration of Estates Bill 2009 cl 313.

836 See [8.25], [8.41] above.

837 Ibid.

838 See [8.67]–[8.68] above.

839 See [8.82] above.

Chapter 9

Administration bonds and sureties

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9.1 This chapter examines the present legislative requirements for the furnishing of an administration bond (with or without sureties), or for the provision by a surety of an administration guarantee.

9.2 These requirements are considered initially in the context of an application for an original grant and, subsequently, in the context of an application for the resealing of a grant made in another jurisdiction.

BACKGROUND

9.3 The requirement for an administration bond 'was introduced by the ecclesiastical courts in England at a time when the law relating to intestacy and the administration of an intestate estate was in chaos'.⁸⁴⁰ The purpose of requiring a bond was to ensure 'that the estate was distributed to those entitled to it'.⁸⁴¹

9.4 Historically, an administrator was required to furnish an administration bond, usually supported by two sureties, in which the administrator undertook to administer the estate according to law and to render an account of the estate when required to do so by law.⁸⁴² If the administrator committed a serious breach of the bond, the court could assign the bond to such person as it thought fit, so that the assignee could sue on the bond. If the administrator could not make good the loss, the sureties would be liable.

9.5 The amount secured by an administration bond is commonly referred to as the 'penalty' of the bond.

9.6 The requirement to provide an administration bond has never applied to an executor. The rationale for imposing the requirement only on an administrator is said to be that 'the testator ... has chosen the executors and must be taken to be satisfied as to their honesty and competence'.⁸⁴³ Because an administrator is appointed by the court, the argument for requiring a bond or sureties is that:⁸⁴⁴

the State should protect those interested in the estate from the consequences of the State's appointment of an incompetent or dishonest administrator.

840 *Re Sopru* (1992) 165 LSJS 132, 136 (Legoe J).

841 *Ibid.*

842 Law Commission (England and Wales), *Administration Bonds, Personal Representative's Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [1], [10].

843 *Ibid* [13].

844 New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978) [19].

9.7 An administration bond is said to serve four purposes:⁸⁴⁵

- (a) It repeats, albeit in vague and general terms, the duties of the administrator.
- (b) It affords an aggrieved creditor or beneficiary an additional remedy against a defaulting administrator.
- (c) Where there are sureties it affords an aggrieved creditor or beneficiary a remedy against the sureties in the event of default by the administrator.
- (d) In the case of a grant to a creditor as such it is used as a device to exclude the administrator's rights of retainer and preference.⁸⁴⁶ (note added)

9.8 In England, administration bonds were abolished by the *Administration of Estates Act 1971* (UK), and replaced with a requirement for a guarantee to be given by a surety.⁸⁴⁷ The *Supreme Court Act 1981* (UK) still provides that, as a condition of granting administration to any person, the court may require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss which any person interested in the administration of the estate in that jurisdiction may suffer in consequence of a breach by the administrator of his or her duties.⁸⁴⁸ However, the *Non-Contentious Probate Rules 1987* (UK), unlike the previous rules, do not contain any provisions in relation to guarantees. Consequently, in relation to grants sought after the commencement of the 1987 rules, a guarantee is not required as a condition of granting administration.⁸⁴⁹

EXISTING LEGISLATIVE PROVISIONS: ORIGINAL GRANTS

9.9 Over the last thirty years, there has been a trend in Australia away from requiring the provision of an administration bond, with the more common requirement now being for a surety to provide an administration guarantee. Further, the circumstances in which the court may dispense with the requirements for an administration bond (where applicable) and a guarantee

⁸⁴⁵ Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [6]. See also Law Reform Committee of South Australia, *Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Administration Bonds and to the Rights of Retainer and Preference of Personal Representatives of Deceased Persons*, Report No 22 (1972) 4; Law Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34 Pt II (1976) 14; Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 34.

⁸⁴⁶ Rights of retainer and preference are considered at [16.145]–[16.152] in vol 2 of this Report.

⁸⁴⁷ See *Supreme Court of Judicature (Consolidation) Act 1925* (UK) s 167, which was substituted by s 8 of the *Administration of Estates Act 1971* (UK). The *Supreme Court of Judicature (Consolidation) Act 1925* (UK) was subsequently repealed by the *Supreme Court Act 1981* (UK) s 152(4), sch 7.

⁸⁴⁸ *Supreme Court Act 1981* (UK) s 120(1).

⁸⁴⁹ JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [6.392].

have gradually been extended. The different approaches taken by the various Australian jurisdictions are discussed below.

Administration bonds and sureties

9.10 The legislation in New South Wales, the Northern Territory and Tasmania still provides for an administrator to enter into an administration bond, supported by one or more sureties, for duly collecting, getting in, and administering the estate of a deceased person, although the court has a discretion, to varying degrees, to dispense with either the bond or with the sureties or both.

New South Wales

9.11 In New South Wales, there is a general requirement for a person to whom a grant of administration is made, before the grant is made, to execute a bond with one or more sureties.⁸⁵⁰ Ordinarily, the penalty of the bond must be equal to the amount at which the property of the estate is sworn.⁸⁵¹ However, the court may dispense with the bond or with one or both of the sureties, or direct that the penalty of the bond be reduced.⁸⁵²

9.12 In 2001, the Supreme Court of New South Wales issued a Practice Direction in relation to the circumstances in which the Court will dispense with a bond or sureties.⁸⁵³ The Practice Direction records that:⁸⁵⁴

consideration has been directed to looking for ways of reducing the costs and difficulties caused to applicants by the requirement of bonds and sureties, while at the same time continuing to provide suitable protection for the interests of disabled beneficiaries and in other appropriate cases.

9.13 It also notes that the previous practice was 'to require a bond to cover the share of any non-consenting beneficiary together with any unpaid unsecured debt'.⁸⁵⁵ Although the registrar retains the discretion to require a bond with sureties in any estate where it seems appropriate, the effect of the Practice Direction is to reduce the number of estates in which administration

850 *Probate and Administration Act 1898* (NSW) s 64(1). This requirement does not apply where the administrator is the Public Trustee or a person obtaining administration for the benefit of the Crown (*Probate and Administration Act 1898* (NSW) s 64(2)), where the administrator is a trustee company and the value of the estate is \$50 000 or less, or where the court otherwise orders (*Probate and Administration Act 1898* (NSW) s 64(3)).

851 *Probate and Administration Act 1898* (NSW) s 65.

852 *Probate and Administration Act 1898* (NSW) s 65.

853 Supreme Court of New South Wales, Practice Direction, *Probate Office Change of Practice*, 3 December 2001. See now *Probate Fact Sheet: Who can be a surety to an administration bond and what does the court require?* <http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_probatefs#surety> at 21 February 2009.

854 Supreme Court of New South Wales, Practice Direction, *Probate Office Change of Practice*, 3 December 2001.

855 *Ibid.*

bonds and sureties will be required, as well as the value that any bond is required to cover. This is the result of several changes. First, where an adult beneficiary who has legal capacity is served with a notice of the intended application that includes a recital that the administration bond is to be dispensed with, that beneficiary must oppose the application if he or she seeks to have the bond cover his or her share. Secondly, it is now possible for the manager of an adult who lacks capacity and for the guardian of a beneficiary who is a minor to consent to the bond being dispensed with.⁸⁵⁶ Thirdly, a bond is no longer required in respect of unpaid unsecured debts.

Northern Territory

9.14 In the Northern Territory, the legislation provides more generally that the registrar may order a person to whom a grant of administration is made to enter into, and file with the registrar, a bond with a surety, and that the person must do so before the grant is made.⁸⁵⁷

9.15 Court rules provide that the court may dispense with a bond or with one or both of the sureties, or may reduce the penalty of the bond.⁸⁵⁸

Tasmania

9.16 The Tasmanian legislation provides that a person to whom a grant of administration is made must give an administration bond and, if the registrar so requires, with one or more sureties.⁸⁵⁹ The bond must be given in the amount of the property that is to be dealt with by the administrator.⁸⁶⁰

856 Where the guardian of a minor beneficiary is the proposed administrator, the guardian may not consent on behalf of the minor.

857 *Administration and Probate Act* (NT) s 23.

858 *Supreme Court Rules* (NT) r 88.24(4). An application to dispense with a bond or sureties, or to reduce the penalty of the bond, must be supported by an affidavit: *Supreme Court Rules* (NT) r 88.24(5).

859 *Administration and Probate Act 1935* (Tas) s 25(1). The requirement to give a bond does not apply where the administrator is the Public Trustee or a person obtaining administration to the use or for the benefit of the Crown (*Administration and Probate Act 1935* (Tas) s 25(6)). Further, sureties to an administration bond are not required where the grant is made to a trustee company or to two or more individuals (unless the registrar otherwise directs) or where, owing to the smallness of the estate, or the fact that the person to whom administration is to be granted is the sole beneficiary, the registrar considers it unnecessary to require sureties (*Administration and Probate Act 1935* (Tas) s 25(7), *Probate Rules 1936* (Tas) r 35).

860 *Probate Rules 1936* (Tas) r 32(1).

Sureties only

9.17 In the ACT,⁸⁶¹ Victoria⁸⁶² and Western Australia,⁸⁶³ an administrator is no longer required to enter into an administration bond. However, as a condition of granting administration, the court may require one or more sureties to enter into an administration guarantee (in the ACT, an administration bond) to the effect that they will make good any loss that any person interested in the administration of the estate may suffer as a consequence of a breach by the administrator of his or her duties as an administrator.

9.18 The courts may, in a variety of circumstances, dispense with the requirement for a surety.

Australian Capital Territory

9.19 In the ACT, the court may, on application or of its own initiative, dispense with the administration bond in relation to the estate or part of the estate if:⁸⁶⁴

- all or part of the estate passes to the person to whom administration is granted; or
- all or part of the estate passes to beneficiaries who are of full legal capacity and the beneficiaries consent, in writing, to the administration bond for the estate being dispensed with.

9.20 Until the ACT legislation was amended in 2003, a person to whom administration was granted was required to enter into a bond supported by a surety that was an insurance company.⁸⁶⁵ As a result of that amendment, where an administration bond is required, it may now be given by a private individual.

861 *Court Procedures Rules 2006* (ACT) r 3045. An administration bond must not be required if administration is granted to a person on behalf of the Territory, the Commonwealth, a State or another Territory, to the public trustee of the Territory, a State or another Territory, or to a trustee company: *Court Procedures Rules 2006* (ACT) r 3045(3).

862 *Administration and Probate Act 1958* (Vic) s 57, which was substituted by s 4 of the *Administration and Probate (Amendment) Act 1977* (Vic). The requirement to provide one or more sureties does not apply where administration is granted to a person for the use or benefit of the Crown, to State Trustees Limited, or to any person, body corporate or holder of an office specially exempted by any Act: *Administration and Probate Act 1958* (Vic) s 57(4).

863 *Administration Act 1903* (WA) s 26, which was substituted by s 5 of the *Administration Act Amendment Act 1976* (WA). However, a guarantee must not be required from the Public Trustee or from a person obtaining administration for the benefit of the Crown: *Non-contentious Probate Rules 1967* (WA) r 27(3).

864 *Court Procedures Rules 2006* (ACT) r 3046(1), (2).

865 *Administration and Probate Act 1929* (ACT) s 14 was repealed by s 5 of the *Justice and Community Safety Legislation Amendment Act 2003* (ACT).

Victoria

9.21 In Victoria, court rules provide that the court or the registrar may require a guarantee where an application is made for a grant of administration:⁸⁶⁶

- (a) to a creditor of the deceased or the legal personal representative of a creditor applying in that capacity;
- (b) to a person having no immediate beneficial interest in the estate of the deceased;
- (c) to an attorney of a person entitled to a grant of administration;
- (d) to the use and benefit of a minor or of some person incapable of managing his own affairs;
- (e) to any person who appears to the Court or the Registrar to be resident outside the State of Victoria;
- (f) to collect and preserve the assets of the deceased (being a grant formerly described as a grant *ad colligenda bona*);
- (g) to bring or defend a proceeding (being a grant formerly described as a grant *ad litem*);
- (h) under section 20, 22 or 24 of the Act;⁸⁶⁷ or
- (i) in any other case where the Court or the Registrar considers that there are special circumstances making it desirable to act under paragraph (2). (note added)

9.22 The other options available to the court or the registrar when an application for administration is made in these circumstances are to require the application to be made jointly by two or more persons or to require the application to be made by an authorised trustee company.⁸⁶⁸

Western Australia

9.23 In Western Australia, the registrar must not require a guarantee as a condition of granting administration except where it is proposed to grant administration.⁸⁶⁹

⁸⁶⁶ *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 7.01(1), (2)(a).

⁸⁶⁷ These provisions of the *Administration and Probate Act 1958* (Vic) refer to the situations where a grant is made in respect of the real estate only of a deceased person or where a limited grant is made in respect of real or personal estate (s 20), where letters of administration are granted pending litigation touching the validity of the will of a deceased person (s 22), and where letters of administration are granted to a creditor because, at the expiration of twelve months from the deceased's death, the personal representative to whom a grant was made is residing out of the jurisdiction (s 24).

⁸⁶⁸ *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 7.01(1), (2)(b), (c).

⁸⁶⁹ *Non-contentious Probate Rules 1967* (WA) r 27(1).

- for the use and benefit of another person or where the grant is otherwise limited;
- to an applicant who appears to the registrar to be resident outside Western Australia;
- where a beneficiary is not of full age or capacity;
- where a beneficiary is not resident in Western Australia and has no agent or attorney in that State;

or except where the registrar considers that there are special circumstances making it desirable to require a guarantee.

9.24 However, even though it may be proposed to grant administration in one of these four situations, a guarantee must not be required, except in special circumstances, where the applicant or one of the applicants is a corporation authorised under Western Australian law to obtain a grant or a person holding a current practice certificate under the *Legal Practice Act 2003* (WA).⁸⁷⁰

Sureties, but with a general power to dispense altogether

South Australia

9.25 In South Australia, administration bonds have been abolished. The legislation now provides that a person to whom administration is granted must provide a surety if:⁸⁷¹

- the administrator is not resident in South Australia; or
- the administrator has any claim against, or interest in, the estate of the deceased person arising from a liability incurred by the deceased before his or her death;⁸⁷² or
- any person who is not *sui juris* is entitled to participate in the distribution of the estate;⁸⁷³ or
- the court is of the opinion that, in the circumstances of the case, a surety is required.

870 *Non-contentious Probate Rules 1967* (WA) r 27(2).

871 *Administration and Probate Act 1919* (SA) s 31. This provision was inserted by s 6 of the *Administration and Probate (Administration Guarantees) Amendment Act 2003* (SA), which commenced on 1 March 2005. As in the other Australian jurisdictions, a surety is not required where the administrator is the Public Trustee, any other agency or instrumentality of the Crown, or a trustee company: *Administration and Probate Act 1919* (SA) s 31(9).

872 This would apply to the situation where a creditor of the deceased person was granted letters of administration.

873 This would apply to the situation where a beneficiary of the estate was a minor or otherwise lacked legal capacity.

9.26 The legislation requires a surety to enter into a guarantee to make good any loss that a person interested in the estate may suffer as a result of a breach by the administrator of his or her duties in administering the South Australian estate.⁸⁷⁴

9.27 However, the court is given a very broad power to dispense with the requirement for a surety. Section 31(10) of the *Administration and Probate Act 1919 (SA)* provides:⁸⁷⁵

The Court may, if satisfied that it is beneficial or expedient to do so, dispense with the requirement to provide a surety.

9.28 In addition, the Act provides:⁸⁷⁶

Without limiting the effect of subsection (10), the Court may, if administration is granted to two or more persons and the Court is satisfied that it is beneficial or expedient to do so, dispense with the requirement to provide a surety.

9.29 These amendments recognise the difficulty in finding sureties (especially corporate sureties), and endeavour to provide an alternative means of providing protection for persons interested in the estate of a deceased person. In the second reading speech for the Administration and Probate (Administration Guarantees) Amendment Bill 2003, the South Australian Attorney-General stated:⁸⁷⁷

It has proven difficult ... in recent times, for administrators to find sureties willing to guarantee the estate. The usual practice has been to arrange for an insurance company to act as surety at commercial rates. However, owing to changes in the insurance market, there is now no insurer trading in South Australia that is willing to act as surety for administration bonds. Sureties will only be available from private persons or entities willing to risk their own funds. Understandably, these are difficult to find.

The bill therefore also provides that the Court can dispense with the requirement for a surety guarantee and, if needed, appoint joint administrators as an alternative safeguard against maladministration of the estate. The Court might, for example, appoint two family members to administer the estate together, or it might appoint a family member together with a professional person such as a lawyer or accountant.

874 *Administration and Probate Act 1919 (SA)* s 31(2).

875 See *Re Freebairn* (2005) 93 SASR 415, where the Court dispensed with the requirement for the administrator to give an administration guarantee. The Court noted (at 422) that the applicant had sworn that he understood that no company offers administration guarantees and that he knew of no person, other than his wife, who was willing to provide a surety for the amount of the South Australian estate of the deceased or for a lesser amount.

876 *Administration and Probate Act 1919 (SA)* s 31(12).

877 South Australia, *Parliamentary Debates*, House of Assembly, 26 June 2003 (MJ Atkinson, Attorney-General) 3556 <<http://hansard.parliament.sa.gov.au/pages/historic/default.aspx>> at 14 January 2009.

The joint administration provides a practical solution to the problem of administrators being unable to find a third party willing to act as a surety. Retaining the requirement for surety guarantees in the first instance maintains protection for estates vulnerable to maladministration, as potential administrators will need to satisfy the Court that it should exercise its discretion and dispense with the surety guarantee and, if needed, appoint additional administrators.

No administration bonds or sureties

Queensland

9.30 Queensland is the only Australian jurisdiction to have abolished the requirement for an administration bond and sureties in the case of a grant of letters of administration. Section 51 of the *Succession Act 1981* (Qld) provides:

51 Abolition of administration bond and sureties

As from the commencement of this Act neither an administration bond nor sureties in support of an administration bond shall be required of any administrator.

ISSUES FOR CONSIDERATION

9.31 It is apparent from the discussion of the existing legislative provisions that there has been a narrowing of the circumstances in which administration bonds and sureties will be required.

9.32 The primary issue for consideration is whether the model legislation should require an administrator and sureties to execute an administration bond (or a surety to execute an administration guarantee) or whether administration bonds and sureties should be abolished altogether.

9.33 If administration bonds or sureties are to be retained, a further issue arises as to whether bonds or sureties should also be a requirement for obtaining a grant of probate. As noted elsewhere in this Report, there has been a general trend towards assimilating the office of an administrator with that of an executor.⁸⁷⁸

Administration bonds

9.34 Earlier in this chapter, the National Committee outlined the various purposes that administration bonds are said to serve.⁸⁷⁹ However, there has been much criticism of administration bonds on the basis that, with one exception, the supposed purposes are of little utility.

878 See [4.54] above.

879 See [9.7] above.

9.35 Although an administration bond repeats the duties of an administrator, those duties can be set out in the legislation itself,⁸⁸⁰ as they are now in a number of jurisdictions.⁸⁸¹ It has been suggested that any advantage a bond might be thought to have in terms of impressing on an administrator the duties of office 'is illusory because in this respect the bond duplicates the separate oath of office which must be given by an applicant for administration'.⁸⁸²

9.36 Further, it is not necessary to retain administration bonds to give a creditor or beneficiary of an estate a remedy against a defaulting administrator. As the Law Commission of England and Wales commented:⁸⁸³

It is clear that an administrator can never be liable on the bond unless he has committed a breach of duty for which he would be liable whether or not there was a bond.

9.37 Although, in the past, administration bonds may have served the subsidiary purpose of excluding an administrator's rights of retainer and preference,⁸⁸⁴ that purpose no longer provides a reason to retain administration bonds, as the National Committee has recommended in this Report that a personal representative's rights of retainer and preference should generally be abolished.⁸⁸⁵

9.38 The majority of bodies that have reviewed the desirability of retaining administration bonds have recommended their abolition.⁸⁸⁶

880 Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [10]; Law Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34 Pt II (1976) 6–7; Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 34.

881 See, for example, s 52 of the *Succession Act 1981* (Qld).

882 New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978) [17].

883 Law Commission (England and Wales), *Administration Bonds, Personal Representative' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [12].

884 *Ibid* [5].

885 See [16.161], [16.168], [16.180]–[16.182] in vol 2 of this Report.

886 See Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970); Law Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34 Pt II (1976); Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978); New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978). The Law Reform Committee of South Australia, on the other hand, recommended that the court should have a discretionary power to require a bond and sureties in a proper case: Law Reform Committee of South Australia, *Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Administration Bonds and to the Rights of Retainer and Preference of Personal Representatives of Deceased Persons*, Report No 22 (1972) 6.

Sureties

9.39 It is generally agreed that ‘the main purpose of the bond is to provide a remedy against the surety’.⁸⁸⁷ Not surprisingly, a number of Australian jurisdictions have abolished bonds, but have retained a separate requirement for a surety to guarantee to make good any loss caused by a breach of the administrator’s duties.⁸⁸⁸ However, the courts have increasingly been given a power to dispense with this requirement.⁸⁸⁹

9.40 As explained above, in Queensland, the requirement for bonds and sureties has been abolished altogether.⁸⁹⁰ That change to the law was made as a result of a recommendation made by the Queensland Law Reform Commission in its 1978 Report.⁸⁹¹ The abolition of bonds and sureties has also been proposed, on a preliminary basis, by the New South Wales Law Reform Commission.⁸⁹² In Western Australia, where administration bonds have been abolished, but sureties have been retained,⁸⁹³ the Law Reform Commission of Western Australia has since recommended that the system of administration sureties should be entirely abolished.⁸⁹⁴

9.41 The arguments in favour of the abolition of sureties are:

- the fact that they are required only when an administrator is appointed;
- the cost involved;
- the difficulty in obtaining a surety;
- the fact that there is only infrequent recourse to sureties; and
- the degree of protection afforded.

⁸⁸⁷ Law Commission (England and Wales), *Administration Bonds, Personal Representatives’ Rights of Retainer and Preference and Related Matters*, Report No 31, (1970) [5]. See also Law Reform Committee of South Australia, *Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Administration Bonds and to the Rights of Retainer and Preference of Personal Representatives of Deceased Persons* (1972) 5; Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 34.

⁸⁸⁸ See the discussion at [9.19]–[9.29] above of the law in the ACT, South Australia, Victoria and Western Australia.

⁸⁸⁹ See [9.11]–[9.13], [9.15] above.

⁸⁹⁰ See *Succession Act 1981* (Qld) s 51, which is set out at [9.30] above.

⁸⁹¹ See Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 33–6.

⁸⁹² See New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978). This paper did not proceed to a final report.

⁸⁹³ See [9.17], [9.23]–[9.24] above. These changes implemented recommendations made by the Law Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34 Pt II (1976).

⁸⁹⁴ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.10]–[3.13].

Only administrators affected

9.42 Earlier in this chapter, the National Committee noted that the historical explanation for imposing security requirements on an administrator but not on an executor is that an executor is chosen by a testator, whereas an administrator is appointed by the court.⁸⁹⁵

9.43 This explanation has been rejected by the Law Commission of England and Wales.⁸⁹⁶

This explanation is not very convincing. The possibility of error is in most respects just as great whether the personal representative be an executor or administrator ...

9.44 In fact, it has been suggested that, at least in relation to beneficiaries, it is arguable that the need for protection is less in the case of an intestacy.⁸⁹⁷

As regards protection of beneficiaries the need for sureties would appear to be rather less in the case of an intestacy than if there is a will since the administrators will normally be some of the principal beneficiaries, whereas an executor appointed by will may not be.

9.45 In recommending the abolition of bonds and sureties, the Queensland Law Reform Commission considered it compelling that.⁸⁹⁸

bonds and sureties are never required of executors or trustees as such and we do not see that administrators are the less to be trusted ...

9.46 The New South Wales Law Reform Commission also drew the distinction between the requirements that apply to trustees and administrators:⁸⁹⁹

the law relating to trustees has the merit of simplicity and cheapness. Of course sometimes beneficiaries suffer through the insolvency of a defaulting trustee, but so far as we know no one has seen in this a case for a general rule requiring trustees to give security.

895 See [9.6] above.

896 Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [13].

897 *Ibid.* This point was also made by the Law Reform Commission of Western Australia in its Report, *The Administration Act 1903*, Report, Project No 88 (1990) [3.11].

898 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 36.

899 New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978) [20].

Infrequency of recourse to the surety

9.47 It appears to be rare for sureties to be required to pay out in respect of the breach of an administrator's duties.⁹⁰⁰ The Queensland Law Reform Commission noted, in its 1978 Report, that:⁹⁰¹

An enquiry of the State Government Insurance Office as to the number of occasions on which they had been obliged to pay out a surety bond elicited a response that that company had never, in fact, been obliged to meet any claim. We have never heard of any private insurance company having to meet any claim and the Registrar of the Supreme Court cannot recollect a bond ever having been assigned by the court which is the first step taken where a bond is to be enforced.

9.48 A similar view has been expressed by the Law Reform Commission of Western Australia. In its 1990 Report in which it recommended the abolition of sureties, the Law Reform Commission of Western Australia commented that it was 'not aware that any litigation ha[d] been brought against an administration surety in Western Australia since its previous report' fourteen years earlier.⁹⁰²

9.49 Several respondents to the Discussion Paper also commented on the infrequency with which sureties are sued.

9.50 A former ACT Registrar of Probate stated that she could not cite an instance in the previous twelve years where an action had been brought pursuant to an administration bond.⁹⁰³ The ACT Law Society also commented that it was not aware of an instance where this had occurred.⁹⁰⁴

9.51 The Queensland Law Society stated that it was not aware of a surety having been sued in Queensland,⁹⁰⁵ although, as noted previously, administration bonds and sureties were abolished on the commencement of the *Succession Act 1981* (Qld). The Bar Association of Queensland suggested that sureties were sued 'very infrequently'.⁹⁰⁶

Difficulty in obtaining a surety

9.52 As mentioned previously, one of the reasons for the amendments to the South Australian legislation was the fact that not one insurer operating in

900 Note, however, the reference in *Richardson v Pedler* [2001] NSWSC 221, [11], [12] (Master Macready) to proceedings in which an insurance company that had given an administration bond was required to pay out on the bond.

901 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 35.

902 Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.13].

903 Submission 2.

904 Submission 14.

905 Submission 8.

906 Submission 1.

South Australia was willing to act as an insurer for an administration bond.⁹⁰⁷ This is also the position in Victoria. In its submission in response to the Discussion Paper on the recognition of foreign grants, the Victorian Bar observed that, in that State, security guarantees are no longer provided by any insurance company.⁹⁰⁸ The New South Wales practice direction in relation to administration bonds and sureties records that, in New South Wales, there is presently only one guarantee company operating in the field.⁹⁰⁹

9.53 If a corporate surety cannot be secured, it will be necessary for the bond to be supported by, or for an administration guarantee to be obtained from, a private surety. Although this does not involve the expense of an insurance premium, not all administrators have family members or friends who are willing or, perhaps more importantly, have the financial resources, to be able to act as a surety.⁹¹⁰

The degree of protection afforded

9.54 It has been suggested that, in some cases, the protection of a surety is ‘an illusory protection to a beneficiary’.⁹¹¹ The Law Reform Commission of Western Australia noted in its 1976 Report that:⁹¹²

some companies which act as surety require an immediate release from adult beneficiaries, thus collecting a premium without being at risk of action by those beneficiaries. At least one company required an indemnity from each adult beneficiary, thus making each such beneficiary liable to recompense the company in the event of it being obliged to meet a claim by any other beneficiary or creditor of the estate.

Cost

9.55 Where an insurance company acts as a surety, it will charge a premium, which varies according to the value of the estate and the complexity of the administration. The premium is paid from the estate as an administration expense.⁹¹³

907 See [9.29] above.

908 Submission R4.

909 Supreme Court of New South Wales, Practice Direction, *Probate Office Change of Practice*, 3 December 2001.

910 All jurisdictions that make provision for sureties require an individual who is acting as a surety to swear an affidavit of justification — that is, to state on oath his or her assets. The surety must generally have assets at least to the value of the estate assets: *Court Procedures Rules 2006* (ACT) r 3047(3); *Supreme Court Rules 1970* (NSW) Pt 78 r 24A(8), Form 103; *Supreme Court Rules* (NT) r 8.24(7), Form 88P; *The Probate Rules 2004* (SA) r 49.02(d), Form 5; *Probate Rules 1936* (Tas) r 32(2) (in Tasmania the surety must provide an affidavit of justification only if required to do so by the registrar); *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 7.03, Form 3-7B; *Non-contentious Probate Rules 1967* (WA) r 27(6), (7).

911 Law Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34 Pt II (1976) [17].

912 Ibid.

913 See *Blake v Bayne* (1908) 6 CLR 179, 189–9 (PC); *Estate of J* [1999] SASC 364, [17] (Williams J).

9.56 In *Estate of J*,⁹¹⁴ the administrator, who was the deceased's husband, applied to the court for a reduction of the penalty⁹¹⁵ on the administration bond. The deceased had left a very large estate, of which the intestacy share of her minor children was valued at \$6 788 617. Administration had been granted on an administration bond of \$6 800 000 and a surety in a penalty for that amount. The Court referred to the costs associated with the surety:⁹¹⁶

In the present case a Bank is acting as surety upon existing bond at an annual fee of \$34,000. The Bank has also required a company in a group associated with the estate to maintain minimum cash deposits with the Bank in the sum of \$6,800,000. Therefore, not only is there the direct annual cost of the bond but there is an indirect cost in lost opportunities for investment by reason of cash funds being tied up. The administrator has made numerous enquiries within Australia and overseas but has been unable to secure a surety upon better terms. The premium apparently reflects a 'going rate'.

9.57 The Court considered that '[t]here [was] nothing in the circumstances of the estate to suggest that the risk is in any way out of the ordinary'.⁹¹⁷ Although the minors' interest was very large, the bulk of the estate was comprised of shares in family companies that were controlled by the deceased's mother, father and brothers. Accordingly, the administrator was not in a position to influence the control of the companies. In the circumstances, the Court dispensed with the surety, but only on an undertaking being given by the administrator to engage independent accountants to provide periodic reports to the Court and to the Public Trustee and on an undertaking in similar terms being given by the accountant.⁹¹⁸

9.58 Although an insurance premium will not be incurred when a private individual acts as a surety, there is still a cost to the estate, as it is necessary for the bond or guarantee to be prepared and for the surety's affidavit of justification to be prepared.⁹¹⁹

9.59 In those jurisdictions where an application can be made for the court to dispense with sureties or to reduce the amount of the bond, there is a cost involved in preparing the necessary documentation.⁹²⁰ There is also a public cost in having the court supervise the giving of bonds and sureties and deal with applications to dispense or to reduce the amount of the bond.⁹²¹

914 [1999] SASC 364.

915 See [9.5] above.

916 [1999] SASC 364, [17] (Williams J).

917 Ibid.

918 Ibid [29]–[30].

919 See note 910 above.

920 Law Reform Commission of Western Australia, *Administration Bonds and Sureties*, Report, Project No 34 Pt II (1976) 7.

921 New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978) [18].

9.60 In recommending the abolition of bonds and sureties in its 1978 Report, the Queensland Law Reform Commission commented:⁹²²

we are satisfied that the very considerable cost to the community, estate by estate, of the retention of this system simply does not justify the protection which it may extraordinarily provide for persons who have been defrauded.

9.61 A similar view has been expressed by the New South Wales Law Reform Commission:⁹²³

It is probably fair to say that over the years the expense of giving bonds incurred by applicants for administration is hundreds of times greater than the money recovered under bonds.

Alternative means of protection

9.62 It has been suggested that the imposition of liability on a surety can be unfair, and that there might be alternative means of protecting those interested in the administration of an estate:⁹²⁴

it is unsatisfactory, and perhaps unfair, that the Court should absolve its conscience by casting a liability on innocent and helpless sureties, at a possibly remote date, if the Court has any other means of ensuring a proper administration.

9.63 In proposing the abolition of administration bonds and sureties, the New South Wales Law Reform Commission also considered the issue of alternative means of protection. It suggested that, on an application for letters of administration, evidence should be given of the fitness of the applicant.⁹²⁵ In its view:⁹²⁶

If the applicant for administration is fit for the office that should be the end of the matter. If he is not fit he should not be given a grant.

9.64 It also raised the possibility of granting administration, in certain cases, to two or more administrators as a means of providing protection to beneficiaries.⁹²⁷

922 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 36.

923 New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978) [18].

924 *Re Egen* [1951] NZLR 323, 324 (Adams J). Adams J referred (at 325) to the options available under English legislation where the estate involves a minority or a life interest.

925 New South Wales Law Reform Commission, *Administration Bonds*, Working Paper No 18 (1978) [23].

926 *Ibid* [37].

927 *Ibid* [24].

9.65 The New South Wales Commission cautioned against giving the court a power to require security in special circumstances, suggesting that a 'discretion to require security may harden into a practice to require security'.⁹²⁸

Discussion Paper

9.66 In the Discussion Paper, the National Committee's preliminary proposal was that the provision of bonds and sureties should not be mandatory, but should be among the options that may be ordered by the court in an appropriate case.⁹²⁹

9.67 In addition, the National Committee sought submissions on whether:⁹³⁰

- there should be provision for private sureties; and
- the provision of bonds and sureties should be required only where an estate is being administered by an administrator, or whether the court should also be able to require the provision of bonds and sureties where an estate is being administered by an executor.

SUBMISSIONS

9.68 The National Committee's preliminary proposal that the court should be able to order bonds and sureties in an appropriate case was supported by the majority of the submissions.⁹³¹

9.69 A former ACT Registrar of Probate was of the view that it was important for the court to retain a discretion in this respect. In her view, some protection was still required where, for example, there was a minor beneficiary, and the total abolition of sureties would be unwise.⁹³²

9.70 The Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia qualified their support for the National Committee's preliminary proposal by stating that the court should not have a discretion to require bonds or sureties where the personal representative was a public trustee or a trustee corporation.

928 Ibid [37].

929 *Administration of Estates Discussion Paper* (1999) QLRC 135; NSWLRC 191 (Proposal 61).

930 Ibid, QLRC 135; NSWLRC 192.

931 Submissions 1, 2, 6, 7, 11, 14, 15.

932 Submission 2.

9.71 However, the National Committee's preliminary proposal was opposed by an academic expert in succession law.⁹³³

The infrequency with which bonds have been successfully pursued is in itself a sufficient argument for their complete abolition: *they don't work*. If bonds were being successfully pursued in Australia several times a year, or even decade, there might be some argument for them. The other problem is that, like mortgage guarantors, a private bond may be oppressive of an innocent relative of a defrauding personal representative. I would just get rid of them. The Court, if apprised of legitimate fears that a personal representative may act improperly, has ample jurisdiction to act.

9.72 All respondents who addressed the issue agreed that there should be provision for private sureties.⁹³⁴

9.73 Several submissions also commented on whether the provisions dealing with bonds and sureties should also apply to executors. These submissions were divided on the issue.

9.74 The ACT and New South Wales Law Societies were of the view that these security requirements should not be extended so as to apply to executors.⁹³⁵

9.75 However, the Bar Association of Queensland and a former ACT Registrar of Probate considered that the court should also be able to order the provision of bonds and sureties where an estate is being administered by an executor.⁹³⁶ The former ACT Registrar of Probate commented:⁹³⁷

it is appropriate for the provision of bonds and sureties to be extended to administration by an executor as dissipation of estate assets would be less likely. It would be both cheaper and quicker for a beneficiary to be compensated in this manner.

9.76 An academic expert in succession law who favoured the abolition of administration bonds⁹³⁸ was of the view that, *if* bonds were to continue to be a matter for the court's discretion, the court should be able to require a bond from an executor, as well as from an administrator.⁹³⁹

933 Submission 12.

934 Submissions 1, 12, 14, 15.

935 Submissions 14, 15.

936 Submissions 1, 2.

937 Submission 2.

938 See [9.71] above.

939 Submission 12.

THE NATIONAL COMMITTEE'S VIEW

9.77 In the National Committee's view, administration bonds do not of themselves serve any real purpose. They simply repeat the duties of office, which are better set out in the legislation,⁹⁴⁰ and the administrator's oath. Moreover, in the absence of an administration bond, a creditor or beneficiary of an estate will still have a remedy against an administrator who neglects to perform his or her duties.⁹⁴¹ The real issue is whether the requirement for a surety should be retained in the model legislation.

9.78 As noted earlier in this chapter, there has been an increasing trend in recent years to extend the circumstances in which an administration bond (where still applicable) or an administration guarantee will not be required when an application is made for letters of administration.

9.79 In part, this trend has been driven by the difficulty in obtaining corporate sureties, with many insurance companies no longer being willing to act as a surety.⁹⁴²

9.80 However, well before the practical problem of obtaining a corporate surety became quite so acute, arguments had been advanced for the abolition of sureties on the grounds of the cost involved, the infrequency of recourse to sureties, the lack of protection afforded, and the fact that sureties have been required only when an administrator is appointed.⁹⁴³

9.81 Bonds and sureties have never been required of executors, and, with the exception of arguments based on the general desirability of assimilating the roles of executors and administrators, there has never been any real movement to subject executors to such a requirement.

9.82 The National Committee considers that there is no reason to suppose that an estate that is being administered by an administrator is at any greater risk of maladministration than an estate that is being administered by an executor. On the contrary, given the order of priority for letters of administration,⁹⁴⁴ which largely follows the order of the intestacy beneficiaries' interest in the estate, an administrator will have at least the same, and possibly a greater, interest in the proper administration of an estate than an executor, who will not necessarily be a beneficiary under the deceased's will. Further, at least in a contentious case, the court is able to scrutinise the applicant's suitability at the time a grant is being sought.

940 See Chapter 11 of this Report.

941 Ibid.

942 See [9.52] above.

943 These factors are discussed at [9.40]–[9.61] above.

944 See Chapter 5 of this Report.

9.83 In the National Committee's view, the limited protection afforded by sureties does not justify the expense and inconvenience of obtaining a corporate surety, where that is still possible.

9.84 Moreover, the National Committee does not consider it appropriate that a person who would otherwise be entitled to letters of administration should be disentitled by reason of the fact that he or she is unable to produce a private surety, with assets sufficient to cover the value of the estate, who is prepared to guarantee the due performance of the administration. In fact, with the recent increase in the value of real estate Australia-wide, it is likely that many adult children, who would otherwise be entitled to letters of administration of their parent's estate, would find it difficult to provide a private surety who had assets of at least the value of an estate that included the family home.

9.85 Finally, the National Committee considers that the requirement of a surety has the potential to raise the issue of the unconscionability of protecting the interests of beneficiaries at the expense of those of a private surety, who may agree to be a surety merely to save the estate the expense of being administered by a professional administrator, which may become necessary if a private surety cannot be found.⁹⁴⁵

9.86 The National Committee is therefore of the view that the model legislation should abolish the requirement for administration bonds and sureties, as has occurred under the Queensland legislation.⁹⁴⁶

9.87 If there is a serious question about a person's suitability to act as an administrator, the more appropriate course is for the court to appoint another person as administrator.

REQUIREMENTS FOR ADMINISTRATION BONDS AND SURETIES ON AN APPLICATION FOR RESEALING

Existing legislative provisions

9.88 With the exception of Queensland, the legislative requirements in relation to the provision of bonds and sureties when an application is made for the resealing of a grant are generally consistent with the requirements that apply when an application is made for an original grant.

9.89 In the ACT, the court rules that apply to the resealing of letters of administration without the will annexed apply, with any necessary changes, to the resealing of letters of administration and an order to collect and administer

945

A similar issue arises in the context of third party guarantees: see J Lovric and J Millbank, *Darling, please sign this form: A report on the practice of third party guarantees in New South Wales* (NSWLRC RR 11, 2003). See also New South Wales Law Reform Commission, *Guaranteeing someone else's debts*, Report No 107 (2006).

946

Succession Act 1981 (Qld) s 51 is set out at [9.30] above.

an estate.⁹⁴⁷ Accordingly, as a condition of resealing, the court may require one or more sureties to guarantee, by an administration bond, that they will make good any loss that anyone interested in the administration of the estate may have because of a breach by the administrator of the administrator's duties.⁹⁴⁸

9.90 In New South Wales, the Northern Territory and Tasmania, the legislation provides that letters of administration must not be resealed until such bond has been entered into as would have been required if administration had been originally granted by the court.⁹⁴⁹

9.91 In South Australia, where administration bonds have been abolished and replaced with a requirement for the provision of a surety,⁹⁵⁰ the requirements for resealing are also consistent with the requirements for an original grant. A surety must be provided before a grant of administration is resealed 'if a surety would be required under section 31 on the granting of such administration'.⁹⁵¹ However, the court may, if satisfied that it is beneficial or expedient to do so, dispense with the requirement to provide a surety.⁹⁵²

9.92 In Victoria⁹⁵³ and Western Australia,⁹⁵⁴ the legislation provides that, as a condition of resealing letters of administration, the court may require one or more sureties to guarantee that they will make good, within any limit imposed by the court on the total liability of the surety or sureties, any loss that any person interested in the administration of the estate in that jurisdiction may suffer in consequence of a breach by the administrator of his or her duties in administering the estate in that jurisdiction. These requirements are consistent with the requirements that apply in relation to original grants.⁹⁵⁵

947 *Court Procedures Rules 2006* (ACT) r 3053.

948 *Court Procedures Rules 2006* (ACT) r 3045(2). See also [9.19]–[9.20] above.

949 *Probate and Administration Act 1898* (NSW) s 108(2); *Administration and Probate Act* (NT) s 113(2); *Administration and Probate Act 1935* (Tas) s 50(2). See also [9.10]–[9.16] above.

950 See [9.25] above.

951 *Administration and Probate Act 1919* (SA) s 18(1). The situations in which a surety will generally be required under s 31 of the Act are set out at [9.25] above.

952 *Administration and Probate Act 1919* (SA) s 18(10). This provision mirrors s 31(10), which applies in relation to original grants.

953 *Administration and Probate Act 1958* (Vic) s 84(1).

954 *Administration Act 1903* (WA) s 62(1). The *Non-contentious Probate Rules 1967* (WA) r 27A(a) provides that the registrar shall not require a guarantee under s 62 of the Act as a condition of resealing the grant except where it appears to the registrar that the grant is made to a person or in any of the circumstances mentioned in paragraphs (a) to (d) inclusive of r 27(1) (which are set out at [9.23] above), or except where the registrar considers that there are special circumstances making it desirable to require a guarantee.

955 The requirements in relation to original grants are discussed at [9.17] above.

9.93 In Queensland, although administration bonds and sureties have been abolished in relation to original grants,⁹⁵⁶ the resealing legislation in that State still contains a requirement in relation to the provision of security:⁹⁵⁷

4 Sealing in Queensland of British probates and letters of administration

...

- (3) The Supreme Court may, if it thinks fit, upon the application of any creditor, require, before sealing, that adequate security be given for the payment of debts due from the estate to creditors residing in Queensland, and also, if it thinks fit, upon the application of any beneficiary or next of kin, require that adequate security be given for the protection of the interests of such beneficiary or next of kin.

...

9.94 This provision does not distinguish between an application for the resealing of probate and an application for the resealing of letters of administration. Officers within the registry of the Supreme Court of Queensland are not aware of an application for security ever having been made under this section.⁹⁵⁸

9.95 The legislation in several other jurisdictions also contains a provision (in addition to their specific provisions dealing with bonds and sureties) giving the court a general power to require security, but without specifying the form that the security would take. Like the Queensland provision, these other provisions apply to grants of probate as well as to letters of administration:

- The ACT and Northern Territory legislation provides that, before or after resealing a grant of probate, letters of administration or an order to collect and administer, the court may require the applicant to give security for the proper administration of the estate to which it relates.⁹⁵⁹
- The New South Wales legislation provides that the court may require an executor or administrator who applies for the resealing of a grant 'to give such security for the due administration of the estate in respect of matters or claims in New South Wales'.⁹⁶⁰
- The Tasmanian legislation provides that, before resealing any grant of probate or letters of administration, the court may, on the application of any creditor of the estate of a deceased person, require adequate

956 *Succession Act 1981* (Qld) s 51, which is set out at [9.30] above.

957 *British Probates Act 1898* (Qld) s 4(3).

958 Information provided to the Queensland Law Reform Commission 7 July 2005.

959 *Administration and Probate Act 1929* (ACT) s 80B; *Administration and Probate Act* (NT) s 111(6).

960 *Probate and Administration Act 1898* (NSW) s 107(3).

security to be given for the payment of debts due from the estate to creditors residing in Tasmania.⁹⁶¹

Discussion Paper

9.96 The Discussion Paper on the recognition of foreign grants noted that, in the Discussion Paper on the administration of estates, the National Committee had proposed, in the context of original grants, that the provision of bonds and sureties should not be mandatory, but should be among the options that may be ordered by the court in an appropriate case.⁹⁶²

9.97 Given the view expressed in relation to original grants, the preliminary view expressed in relation to resealing was that the model legislation should contain a provision to the effect that:

- the registrar may require security for the due administration of the estate in that jurisdiction; and
- if security is required, the grant may not be resealed unless the registrar is satisfied that adequate security has been given.⁹⁶³

Submissions

9.98 The preliminary proposal in relation to the requirements for security on the resealing of a grant was supported by the Public Trustee of New South Wales, the Victorian Bar, the New South Wales Bar Association, and the Trustee Corporations Association of Australia.⁹⁶⁴

9.99 Although the Victorian Bar supported the proposal that the registrar should be able to require 'some sort of security, by way of personal surety or otherwise', it acknowledged the practical difficulties in obtaining a surety, observing that, in Victoria, security guarantees are no longer provided by any insurance company.⁹⁶⁵

9.100 The former Principal Registrar of the Supreme Court of Queensland was opposed to the inclusion in the model legislation of provisions that give the registrar the power to require security, or that provide that a grant may not be

961 *Administration and Probate Act 1935 (Tas)* s 51.

962 *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 140.

963 *Ibid* 141.

964 Submissions R2, R4, R5, R6. The Trustee Corporations Association of Australia stated, however, that trustee corporations should continue to be exempt from this requirement: Submission R6.

965 Submission R4. The difficulty in obtaining a surety is discussed generally at [9.52]–[9.53] above.

resealed unless the registrar is satisfied that adequate security has been given.⁹⁶⁶

The National Committee's view

9.101 Earlier in this chapter, the National Committee expressed the view, in the context of original grants, that administration bonds and sureties should not be required of any administrator.⁹⁶⁷

9.102 The National Committee has given consideration to whether there is any feature of the resealing process that would justify taking a different approach on resealing from that proposed in relation to original grants. The National Committee is conscious that an applicant for the resealing of a grant might well be a person who does not have assets within the resealing jurisdiction.⁹⁶⁸ However, the National Committee considers that, if there is a serious question about a person's suitability to act as a personal representative, the better course is for the court to decline the application for resealing, in which case someone else would need to apply for an original grant. This highlights the importance, which the National Committee has discussed in Chapter 8, of having a reliable means by which people with an interest in an estate should be able to become aware that an application has been made for a grant or for the resealing of a grant.

9.103 The National Committee is of the view that administration bonds and sureties, or indeed any other form of security, should not be required of a person who applies for the resealing of a grant.⁹⁶⁹

RECOMMENDATIONS

9-1 The model legislation should provide that neither an administration bond nor sureties may be required of an administrator or a person who applies for letters of administration.⁹⁷⁰

See Administration of Estates Bill 2009 cl 617(1).

⁹⁶⁶ Submission R1.

⁹⁶⁷ See [9.86] above.

⁹⁶⁸ Of course, it would be open to an applicant for the resealing of a grant to apply instead for an original grant, where, under the National Committee's proposals, no administration bond or surety would be required. The National Committee has not proposed that entitlement to apply for a grant should depend on the sufficiency of the applicant's assets within the jurisdiction.

⁹⁶⁹ The National Committee notes that, in England, the *Non-Contentious Probate Rules 1987* (UK) do not require the provision of a guarantee on an application for the resealing of a grant: see JI Winegarten, R D'Costa and T Synak, *Tristram and Coote's Probate Practice* (30th ed, 2006) [18.44].

⁹⁷⁰ See [9.77]–[9.87] above.

9-2 The model legislation should provide that neither an administration bond nor sureties, nor any other form of security, may be required of a person who applies for the resealing of a grant.⁹⁷¹

See Administration of Estates Bill 2009 cl 617(2).

971

See [9.101]–[9.103] above.

Chapter 10

Vesting of property

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INTRODUCTION

10.1 It is ‘part of the concept of English and Australian property law that property must always have an existing owner’.⁹⁷² As a deceased person does not continue to possess a legal personality,⁹⁷³ the law provides that, on the death of a person, his or her estate vests immediately in another person. This ensures that there is no time at which the estate of a deceased person is left without an owner.

HISTORICAL BACKGROUND

10.2 Historically, different rules applied in relation to the vesting of the real and personal estate of a deceased person.

10.3 The real estate of a deceased person did not vest in the person’s personal representative. On the deceased’s death, it vested immediately in the devisee or trustee if there was a will, or in the heir if there was no will.⁹⁷⁴

10.4 The vesting of the personal estate of a deceased person ‘depended on whether the deceased appointed an executor by a valid will’.⁹⁷⁵ Where an executor was so appointed:⁹⁷⁶

[The] executor took his title to the personal estate from the will of his testator, not from the probate of the will. The personal estate including all rights of action vested in the executor immediately on the death of the testator.

10.5 As a result, an executor could institute an action ‘in the character of executor’ before obtaining a grant of probate.⁹⁷⁷ Although it was necessary for the executor to obtain probate before judgment could be given in the action, that was not because the executor’s title was dependent on the grant of probate, but because the production of probate was the only way in which the executor was allowed to prove his or her title.⁹⁷⁸

10.6 On the other hand, where an administrator was appointed under letters of administration, the administrator’s title to the personal estate was derived

972 AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [1.50].

973 See O Wood and NC Hutley, *Hutley, Woodman and Wood: Cases and Materials on Succession* (3rd ed, 1984) 1.

974 *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268, 271 (Emmett J).

975 *Ibid.*

976 *Ibid.* See also *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603, 608 (Earl Loreburn, Lord Atkinson, Lord Parker and Lord Sumner).

977 *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603, 608 (Earl Loreburn, Lord Atkinson, Lord Parker and Lord Sumner).

978 *Ibid* 608–9.

wholly from the grant.⁹⁷⁹ Accordingly, no cause of action could vest in an administrator until letters of administration were granted.⁹⁸⁰

10.7 Between the death of a deceased person and the granting of letters of administration, the deceased's personal property vested in the Ordinary,⁹⁸¹ who was usually the Bishop of the Diocese in which the property of the intestate was situated.⁹⁸² When an administrator was appointed, the personal estate was treated as having vested in the administrator as from the death of the deceased.⁹⁸³ This is known as the doctrine of 'relation back'. The effect of this doctrine was that an administrator was able 'to sue in respect of matters happening between the date of the death and the grant of administration'.⁹⁸⁴

EXISTING LEGISLATIVE PROVISIONS

10.8 The vesting provisions of the Australian jurisdictions fall broadly into two types:

- those where the property of a deceased person vests initially in the public trustee, regardless of whether the person has died testate or intestate (as is the case in the ACT, New South Wales, the Northern Territory and Western Australia);⁹⁸⁵ and
- those where the property of a deceased person ordinarily vests in the executor named in the deceased's will, and property vests in the public trustee (or the statutory equivalent⁹⁸⁶) or other public official⁹⁸⁷ only in limited circumstances — primarily, where the deceased has died intestate (as is the case in Queensland, South Australia, Tasmania and Victoria).⁹⁸⁸

979 *Ingall v Moran* [1944] KB 160, 164 (Scott LJ), 168 (Luxmoore LJ), 170 (Goddard LJ).

980 *Ibid* 164–5 (Scott LJ), 168 (Luxmoore LJ), 172 (Goddard LJ).

981 Sir W Holdsworth, *A History of English Law* (5th ed, 1942) vol III, 567–8.

982 *Ex parte Public Trustee; Re Birch* (1951) 51 SR (NSW) 345, 347 (Street CJ); *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268, 272 (Emmett J). Section 19 of the *Court of Probate Act 1858* (Eng) later transferred the role of the Ordinary in this respect to the Judge of the English Court of Probate.

983 *Foster v Bates* (1843) 12 M & W 226; 152 ER 1180. See also *Ingall v Moran* [1944] KB 160, 168 (Luxmoore LJ).

984 Sir W Holdsworth, *A History of English Law* (5th ed, 1942) vol III, 569. See also *Foster v Bates* (1843) 12 M & W 226; 152 ER 1180.

985 The legislation in these jurisdictions is considered at [10.11]–[10.16] below.

986 In Victoria, State Trustees Limited is the equivalent of the public trustee: see *State Trustees (State Owned Company) Act 1994* (Vic). See also note 1021 below about further references in this chapter to the 'public trustee'.

987 In Tasmania, the property of a person who dies intestate vests in the Chief Justice of the Supreme Court: *Administration and Probate Act 1935* (Tas) s 12.

988 The legislation in these jurisdictions is considered at [10.17]–[10.33] below.

10.9 The legislation in all Australian jurisdictions provides for the vesting of the real estate of a deceased person.⁹⁸⁹ As a result, the old rule under which real property disposed of by will vested directly in the devisee or in the trustee of a testamentary trust no longer applies.

10.10 Generally, depending on the vesting scheme in place in the particular jurisdiction, real estate will vest in either the executor or, pending a grant of probate or letters of administration, the public trustee.⁹⁹⁰

Australian Capital Territory, New South Wales, Northern Territory, Western Australia

10.11 In the ACT, New South Wales, the Northern Territory and Western Australia, the legislation provides that, on the death of a person, whether testate or intestate, the person's property vests in the public trustee.⁹⁹¹

10.12 The legislation further provides that, on the granting of probate of the will or letters of administration of the estate of a deceased person, the real and personal property of which the person died seised or possessed, or to which the person was entitled in the jurisdiction,⁹⁹² vests in the executor or administrator, as the case may be.⁹⁹³

10.13 With the exception of the ACT, the legislation in these jurisdictions contains a statutory expression of the doctrine of relation back, and provides that, upon a grant being made, the estate vests in the executor or administrator as from the death of the deceased.⁹⁹⁴ For example, section 44(1) of the *Probate and Administration Act 1898* (NSW) provides:

989 *Administration and Probate Act 1929* (ACT) s 38A; *Probate and Administration Act 1898* (NSW) s 61; *Administration and Probate Act* (NT) s 49; *Succession Act 1981* (Qld) s 45, *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'property'); *Administration and Probate Act 1919* (SA) ss 4 (definition of 'estate'), 45, 46, 49; *Administration and Probate Act 1935* (Tas) ss 4(1), 12; *Administration and Probate Act 1958* (Vic) ss 5 (definition of 'estate'), 13, 19; *Public Trustee Act 1941* (WA) s 9.

990 See, however, the discussion at [10.20] below of how real property vests in Victoria between the date of death and the date of grant, where a deceased person leaves a will.

991 *Administration and Probate Act 1929* (ACT) s 38A; *Probate and Administration Act 1898* (NSW) s 61 (which provides that the property is 'deemed to be vested' in the public trustee); *Administration and Probate Act* (NT) s 49; *Public Trustee Act 1941* (WA) s 9.

992 See *Administration and Probate Act 1929* (ACT) s 41B, *Probate and Administration Act 1898* (NSW) s 46B and *Administration and Probate Act* (NT) s 56, which provide that real and personal property passing under a gift contained in a testator's will that operates as an appointment under a general power to appoint by will is to vest in the testator's personal representative as if the testator had been entitled to that property at the testator's death. These provisions are considered at [10.152]–[10.153] below.

993 *Administration and Probate Act 1929* (ACT) s 39; *Probate and Administration Act 1898* (NSW) s 44(1); *Administration and Probate Act* (NT) s 52; *Administration Act 1903* (WA) s 8.

994 *Probate and Administration Act 1898* (NSW) s 44(1); *Administration and Probate Act* (NT) s 52; *Administration Act 1903* (WA) s 8.

44 Real and personal estate to vest in executor or administrator

- (1) Upon the grant of probate of the will or administration of the estate of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted or administrator for all the person's estate and interest therein in the manner following, that is to say:
- (a) On testacy in the executor or administrator with the will annexed.
 - (b) On intestacy in the administrator.
 - (c) On partial intestacy in the executor or administrator with the will annexed.

10.14 The operation of the New South Wales provision has been described in the following terms:⁹⁹⁵

[Section 44] is a statutory enactment of the doctrine of relation back. The doctrine formerly applied only to acts of an administrator, since the property of an intestate never vested in him until the grant of administration, but did not apply to an executor because the property of the deceased did, and in England still does, vest in him from the date of death, and not from the grant of probate. By the combined effect of ss 44 and 61 an executor in New South Wales is in the same position between the date of a testator's death and the grant of probate as an administrator in England. He is not possessed of the legal estate in the deceased's property, and he therefore cannot dispose of it. He may purport to do so, and if subsequently probate is granted s 44 will operate to render valid such transactions when it is shown that they are for the benefit of the estate, or have been made in the course of administration.

10.15 The effect of these provisions is that, unlike the position under the general law (at least in relation to personal property), the title of an executor to the property of the deceased does not accrue until probate is granted. It has been held that the statutory provision dealing with the relation back of title does not retrospectively give an executor standing for proceedings commenced in a representative capacity at a time when he or she did not have title to the property of the deceased:⁹⁹⁶

the executor, prior to probate, could only commence proceedings with the authority, and in the name of, the Public Trustee. Section 44(1) retrospectively vests the property of the deceased in the executor. However, it does not, either in its own words or by implication, retrospectively give the executor standing in relation to proceedings commenced when the executor-elect had no title to the property.

⁹⁹⁵ *The Daily Pty Ltd v White* (1946) 63 WN (NSW) 262, 263 (Herron J).

⁹⁹⁶ *Byers v Overton Investments Pty Ltd* (2001) 109 FCR 554, 563 (Branson, North and Stone JJ).

10.16 As a result, proceedings instituted by an executor before probate is granted are a nullity.⁹⁹⁷

South Australia, Tasmania, Victoria

10.17 In South Australia, Tasmania and Victoria, there is a more limited regime for the vesting of property in a public official. The legislation in these jurisdictions provides that, from the death of a person who dies intestate until letters of administration are granted, the property of the person is vested, respectively, in the public trustee (in South Australia),⁹⁹⁸ the Chief Justice of the Supreme Court (in Tasmania)⁹⁹⁹ and State Trustees Limited (in Victoria).¹⁰⁰⁰

10.18 There are some differences, however, in relation to the vesting of property where a person dies testate.

10.19 In South Australia and Tasmania, real property vests in the executor as from the death of the deceased.¹⁰⁰¹ Although the legislation is silent about the vesting of personal property, it would seem that the general law still applies, and that, on a person's death, personal property vests in his or her executor.¹⁰⁰²

10.20 In Victoria, the legislation provides that, on the granting of probate or letters of administration, the real property of a person vests, as from the date of death, in the executor or administrator to whom the grant is made.¹⁰⁰³ The legislation is silent, however, as to how property vests between the date of death and the date of grant when a person dies testate. It seems that, as in South Australia and Tasmania, personal property vests in the executor on death. However, it appears that, between the deceased's death and the

997 Ibid. See also *Jeffery v Irzykiewicz* [2000] ACTSC 50, where this was held to be the effect of s 38A of the *Administration and Probate Act 1929* (ACT).

998 *Administration and Probate Act 1919* (SA) s 45.

999 *Administration and Probate Act 1935* (Tas) s 12.

1000 *Administration and Probate Act 1958* (Vic) s 19.

1001 *Administration and Probate Act 1919* (SA) s 46; *Administration and Probate Act 1935* (Tas) s 4. For this purpose, the Tasmanian legislation provides that a testator is deemed to have been entitled at his or her death to any interest in real property passing under any gift contained in his or her will that operates as an appointment under a general power to appoint by will: *Administration and Probate Act 1935* (Tas) s 6(2).

1002 RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [17.4.4].

1003 *Administration and Probate Act 1958* (Vic) s 13(1). This section refers to the vesting of 'all the hereditaments ... of such person', which are deemed by s 13(2)(a) to include 'all the estate of such person passing under any gift contained in his will which operates as an appointment under a general power to appoint by will'. A commentator on the provision notes that '[c]orporeal and incorporeal hereditaments together made up what is real property in the wide sense': RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 22.

granting of probate, real property vests in the heir at law or in the devisee,¹⁰⁰⁴ depending on whether the property is the subject of a disposition in the will.

10.21 The legislation in these jurisdictions does not deal with the vesting of property where a person dies testate, but the will fails to appoint an executor. Commentators on the Victorian legislation consider that the vesting of personal property is unclear in these circumstances.¹⁰⁰⁵

The old common law provided that it vested in the Ordinary. If the provisions which apply to intestate estates are wide enough to apply to cases of grants *cta*¹⁰⁰⁶ then the personal property in such estates could vest in the Public Trustees as successors to the Ordinary. (note added)

10.22 However, it is doubtful whether the provisions dealing with the vesting of property on the death of a person who dies intestate would apply in the case of a person who died testate, but simply failed to appoint an executor.¹⁰⁰⁷

Queensland

10.23 The Queensland provision is the most comprehensive of the provisions that ordinarily vest property in the public trustee only if there is an intestacy.

10.24 Section 45 of the *Succession Act 1981* (Qld) provides:

45 Devolution of property on death

- (1) The property to which a deceased person was entitled for an interest not ceasing on his or her death (other than property of which the deceased person was trustee) shall on his or her death and notwithstanding any testamentary disposition devolve to and vest in his or her executor and if more than 1 as joint tenants, or, if there is no executor or no executor able and willing to act, the public trustee.
- (2) Upon the court granting probate of the will or letters of administration of the estate of any deceased person the property vested in his or her executor or in the public trustee under the provisions of subsection (1) shall devolve to and vest in the person to whom the grant is made and if more than 1 as joint tenants.

¹⁰⁰⁴ See the discussion of this issue in RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 23, 35; RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [17.4.4]. In *Larkin v Drysdale* (1875) 1 VLR 164 the Court considered the effect of the precursor to s 13(1) of the *Administration and Probate Act 1958* (Vic) on the vesting of real property between the death of an intestate and the granting of letters of administration. The Court held (at 167) that, until a grant was made, property was vested in the heir at law, subject to being divested when a grant was made to any other person. Where a person died intestate, s 13(1) of the *Administration and Probate Act 1958* (Vic) would now take effect subject to s 19 of that Act, which vests the property of an intestate, on death, in State Trustees Limited. However, applying the reasoning in *Larkin v Drysdale* (1875) 1 VLR 164, the real property of a person who died testate should vest in the person in whom it would have vested under the general law, that is, in either the heir at law or the person to whom the property is devised by will.

¹⁰⁰⁵ RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [17.4.4].

¹⁰⁰⁶ A grant of letters of administration *cta* (*cum testamento annexo*) is a grant of letters of administration with the will annexed.

¹⁰⁰⁷ See RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 35.

- (3) Where at any time a grant is recalled or revoked or otherwise determined the property of the deceased vested at that time in the person to whom the grant was made shall be divested from the person and shall devolve to and vest in the person to whom a subsequent grant is made; and during any interval of time between the recall, revocation or other determination of a grant and the making of a subsequent grant the property of the deceased shall devolve to and vest in the public trustee.
- (4) The title of any administrator appointed under this Act to any property which devolves to and vests in the administrator shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment.
- (4A) However, all acts lawfully done by to or in regard to the public trustee before the appointment of an administrator shall be as valid and effectual as if they had been done by to or in regard to the administrator.
- (5) For the purposes of this section, and notwithstanding the provisions of the *Trusts Act 1973*, section 16, an executor includes an executor by representation under the provisions of section 47 of this Act.
- (6) While the property of a deceased person is vested in the public trustee under this section, the public trustee shall not be required to act in the administration of the estate of the deceased person or in any trusts created by the will of the deceased person, or exercise any discretions, powers, or authorities of a personal representative, trustee or devisee, merely because of the provisions of this section.
- (7) Nothing in this section affects the operation of an Act providing for the registration or recording of any person as entitled to any estate or interest in land in consequence of the death of any person notwithstanding that there has been no grant in the estate of the deceased person.

10.25 Section 45 deals with the vesting of property to which the deceased 'was entitled for an interest not ceasing on his or her death (other than property of which the deceased person was trustee)'.¹⁰⁰⁸ Accordingly, the section has no application to:

- property of which the deceased person was trustee;¹⁰⁰⁹
- property in which the deceased person's interest ceased on death, such as the interest of a life tenant;¹⁰¹⁰ or

1008 *Succession Act 1981* (Qld) s 45(1).

1009 This issue is considered at [10.55]–[10.66] below.

1010 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [1.50]. It is noted (at [1.50]) that property of this kind will devolve 'in accordance with the provisions of the document under which the life tenancy was created'.

- an interest in property held by the deceased person as joint tenant with a person who survives the deceased, as that interest will accrue to the surviving joint tenant by operation of the doctrine of survivorship.

10.26 The effect of section 45(1) is that, if a deceased person dies testate, and the will appoints an executor who is able and willing to act, the property of the deceased vests in that executor. Property vests in the public trustee only if the deceased dies intestate or, if the deceased dies testate, either the will does not appoint an executor or the executor is not able and willing to act.

10.27 When the Queensland Law Reform Commission examined this issue in its 1978 Report, it considered whether the estate of a deceased person should initially vest in the then equivalent of the public trustee, as occurs in several Australian jurisdictions.¹⁰¹¹ The Commission rejected that approach on two grounds. In its view, the longstanding principle under which the personal estate vested in the executor had operated 'without inconvenience'.¹⁰¹² Further, the Commission considered that the vesting of the whole estate in a public official was a departure from what was said to be 'the existing policy favouring the private administration of deceased estates'.¹⁰¹³

10.28 Section 45(2) provides that, on the granting of probate or letters of administration, the estate of a deceased person that vested under section 45(1) vests in the person to whom the grant is made.

10.29 Section 45(3) deals with the vesting of property in circumstances where a grant is recalled, revoked or otherwise determined.

10.30 Section 45(4) ensures that the doctrine of 'relation back' applies where an administrator is appointed, and that the administrator's title is deemed to have arisen on the death of the deceased. As the title of an executor is derived from the will,¹⁰¹⁴ rather than from the grant, the provision does not refer to the title of an executor.¹⁰¹⁵

10.31 Section 45(5) deals with the vesting of property when a person becomes the executor by representation of the deceased's will.¹⁰¹⁶

1011 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 30.

1012 Ibid.

1013 Ibid.

1014 *Succession Act 1981* (Qld) s 45(1).

1015 This issue is considered further at [10.72]–[10.81] below.

1016 This issue is considered in detail at [10.82]–[10.88] below.

10.32 The powers of the public trustee and the effect of any ‘acts lawfully done by to or in regard to the public trustee’¹⁰¹⁷ while property is vested in the public trustee are addressed in section 45(4A) and (6). Although these provisions do not impose any positive obligations on the public trustee in relation to the property, they ensure the validity of any lawful acts done by, or in relation to, the public trustee.¹⁰¹⁸

10.33 In Queensland, it is possible in certain circumstances for land that forms part of the estate of a deceased person to be transferred even though no grant has been obtained.¹⁰¹⁹ Section 45(7) simply provides that section 45 does not affect the operation of the legislation under which the land can be transferred.

ISSUES FOR CONSIDERATION

10.34 The legislative provisions outlined above raise a number of issues for consideration:

- how property should vest on the death of a person;
- how property of which a deceased person was trustee should vest;
- how property should vest when a grant is made;
- how the doctrine of relation back should be framed;
- how the unadministered property of a deceased person should vest on the death of the deceased person’s personal representative;
- how the deceased person’s unadministered property should vest in a person who later becomes the executor or administrator by representation of the will or estate of the deceased person;¹⁰²⁰
- how the property of a deceased person should vest if the executor or administrator by representation of the will or estate of the deceased person ceases to hold office;
- how the property of a deceased person should vest if one or more of the deceased person’s executors or administrators by representation ceases to hold office, but there is at least one other continuing executor or administrator by representation;

¹⁰¹⁷ *Succession Act 1981* (Qld) s 45(4A).

¹⁰¹⁸ This issue is considered further at [10.124]–[10.147] below.

¹⁰¹⁹ *Land Title Act 1994* (Qld) ss 111, 112; *Land Act 1994* (Qld) ss 377(2)(b), (c), 379. See the discussion of *Land Title Act 1994* (Qld) ss 111, 112 at [29.195]–[29.202] in vol 3 of this Report.

¹⁰²⁰ The transmission of the office of personal representative and the proposals for executors and administrators by representation are considered in Chapter 7 of this Report.

- the position of the public trustee (or the statutory equivalent)¹⁰²¹ when property is vested in the public trustee pending the making of a grant or a subsequent grant; and
- whether a deceased person should be taken to be entitled at his or her death to property passing under a gift contained in the deceased's will that operates as an appointment under a general power to appoint by will.

10.35 These issues are considered in turn below.

VESTING OF PROPERTY ON THE DEATH OF A PERSON

Introduction

10.36 Under section 45(1) of the *Succession Act 1981* (Qld), the property of a deceased person vests in the public trustee only where the deceased dies intestate, or where the deceased dies testate, but the will fails to appoint an executor who is able and willing to act. In all other cases, the property of the deceased vests in the executor appointed by the will. As noted previously, although the legislation in South Australia, Tasmania and Victoria provides for a vesting scheme that is broadly similar to that which applies under the Queensland legislation, the legislation in these jurisdictions does not provide expressly for the vesting of personal property on the death of the deceased; nor does it provide for the situation where the deceased leaves a will, but the will fails to appoint an executor who is able and willing to act.¹⁰²²

10.37 An advantage of the Queensland provision over those in the ACT, New South Wales, the Northern Territory and Western Australia is that, where a deceased person has appointed an executor who is able and willing to act, the estate is not vested in the public trustee pending a grant of probate.¹⁰²³ As a result, property is vested in a public official only as a last resort.

Discussion Paper

10.38 In the Discussion Paper, the National Committee considered several options for the vesting of property on the death of a person.¹⁰²⁴

1021 All further references in this chapter to the public trustee that do not relate to the public trustee of a particular jurisdiction are intended to include the statutory equivalent in any jurisdiction that does not have a public trustee. In Victoria, this will be a reference to State Trustees Limited.

1022 See [10.17]–[10.22] above.

1023 The legislation in these jurisdictions is discussed at [10.11]–[10.16] above.

1024 *Administration of Estates Discussion Paper* (1999) QLRC 176–7; NSWLRC [12.24]–[12.29].

10.39 In relation to the vesting of property in the public trustee, the National Committee referred to concerns that the trend towards the commercialisation of public trustees could result in the active management of estates while they remained vested in public trustees. It was thought that this could result in the imposition of fees, although the National Committee observed that, traditionally, a public trustee would not actively administer a deceased estate pending a grant. On the other hand, the National Committee acknowledged that the independence of the public trustee was recognised as a factor in favour of vesting property in the public trustee.¹⁰²⁵

10.40 The National Committee also referred to the position in Tasmania where, on the death of an intestate, the person's property vests in the Chief Justice of the Supreme Court.¹⁰²⁶ The National Committee expressed the view that it was inappropriate for property to vest in the Chief Justice of a jurisdiction.¹⁰²⁷

10.41 Consideration was also given to an alternative scheme,¹⁰²⁸ recommended by the Queensland Law Reform Commission in its 1993 Report on the intestacy rules, for the vesting of property where a person died intestate or where a will failed to appoint an executor.¹⁰²⁹ In that Report, the Commission recommended the creation of a statutory executor who could administer the estate in circumstances in which it would otherwise be necessary for an administrator to be appointed.¹⁰³⁰ The Commission's Draft Bill provided for who was entitled to be the statutory executor, depending on whether the deceased was survived by a spouse, by a spouse and issue, only by issue, only by next of kin, or by none of these persons.¹⁰³¹ It also provided that, on the death of an intestate, the person's property would vest in the statutory executor.¹⁰³²

10.42 In its Report, the Queensland Law Reform Commission gave two reasons for favouring that property vest, on the death of an intestate, in a statutory executor, rather than in the public trustee, as presently occurs under section 45(1) of the *Succession Act 1981* (Qld). In the first place, the Commission referred to the fact that, although property is vested in the public trustee, the public trustee is not in these circumstances required to act in the

1025 Ibid, QLRC 176–7; NSWLRC [12.25].

1026 *Administration and Probate Act 1935* (Tas) s 12.

1027 *Administration of Estates Discussion Paper* (1999) QLRC 177; NSWLRC [12.27].

1028 Ibid, QLRC 176, 177; NSWLRC [12.23], [12.28]–[12.29].

1029 Queensland Law Reform Commission, *Intestacy Rules*, Report No 42 (1993). This scheme has not been implemented.

1030 Ibid 71–2.

1031 Ibid, Draft Succession (Intestacy) Amendment Bill 1993 cl 7 (proposed ss 37–37S, 38 of the *Succession Act 1981* (Qld)).

1032 Ibid, Draft Succession (Intestacy) Amendment Bill 1993 cl 7 (proposed s 38D of the *Succession Act 1981* (Qld)).

administration of the estate.¹⁰³³ Further, the Commission commented on the costs involved in obtaining letters of administration:¹⁰³⁴

The only procedure available to divest the property of the Public Trustee and to vest it in the spouse or members of the intestate's family is to obtain Letters of Administration from the court. In the case of small estates this procedure is prohibitively costly.

10.43 However, the National Committee was concerned that the concept of a statutory executor in whom an intestate's property would vest on death could lead to uncertainty if a number of people claimed to be entitled to act.¹⁰³⁵

10.44 In view of these considerations, the National Committee favoured the scheme for vesting found in the Queensland provision. Its general proposal was that a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld) should be included in the model legislation.¹⁰³⁶

Submissions

10.45 Almost all the submissions that addressed the issue of vesting agreed with the National Committee's proposal that a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld) should be included in the model legislation. This was the view of the Bar Association of Queensland, a former ACT Registrar of Probate, the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁰³⁷

10.46 A former ACT Registrar of Probate expressed the view that the Queensland provision 'is more appropriate in current times'.¹⁰³⁸ Another respondent emphasised that there was no need for vesting private property in the public trustee in all cases.¹⁰³⁹ An academic expert in succession law commented in relation to the policy underlying the Queensland provision:¹⁰⁴⁰

1033 Ibid 72. See the discussion of this issue at [10.124]–[10.147] below.

1034 Ibid 72.

1035 *Administration of Estates Discussion Paper* (1999) QLRC 177; NSWLRC [12.29].

1036 Ibid, QLRC 178; NSWLRC 254 (Proposal 68). Section 45(7) of the *Succession Act 1981* (Qld) simply provides that s 45 does not affect the operation of Queensland legislation that enables an interest in land to be registered on the death of a person even though no grant has been made with respect to the estate of that person. See [29.195]–[29.202] in vol 3 of this Report.

1037 Submissions 1, 2, 4, 6, 7, 8, 12, 14, 15. The submission of the Public Trustee of New South Wales, who did not support the adoption of s 45 of the *Succession Act 1981* (Qld), is discussed at [10.144] below.

1038 Submission 2.

1039 Submission 13A.

1040 Submission 12.

The Public Trustee is here to stay and absent any other entity is an appropriate vestee of last resort.

10.47 However, the Public Trustee of South Australia, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia commented on the importance of vesting the property of an intestate in the public trustee, stating that it was the 'only safe and practical arrangement'.¹⁰⁴¹

The National Committee's view

10.48 The National Committee considers that the property of a deceased person should generally vest in the public trustee only as a last resort. Accordingly, subject to the matters discussed below, the model legislation should include a provision to the effect of section 45(1) of the *Succession Act 1981* (Qld).

10.49 Section 45(1) of the *Succession Act 1981* (Qld) provides that, on a person's death, the property to which the person was entitled vests:

in his or her executor and if more than 1 as joint tenants, or, if there is no executor or no executor able and willing to act, the public trustee.

10.50 It is implicit in section 45(1) that, if there are two or more executors and only one or some of them are able and willing to act, the deceased's property vests in those executors who are able and willing to act; the deceased's property vests in the public trustee only if there is *no* executor who is able and willing to act. In the National Committee's view, the intermediate position — where property vests in only some of the named executors — should be made clearer in the model legislation.

10.51 Further, although the National Committee supports the pre-grant vesting of property in the executor, it is concerned that the existing requirement in section 45(1) of the *Succession Act 1981* (Qld) that the executor is 'willing to act' has the potential to create uncertainty about whether property has in fact vested in a particular executor. The question may also be extremely artificial if the executor was not even aware at the time of the deceased's death that he or she had been appointed as executor.

10.52 The model legislation should therefore provide that the deceased person's property vests:

- in the executor or executors appointed by the will unless they lack 'legal capacity' to act as executor; and
- if the executor or all the executors lack legal capacity to act as executor, in the public trustee.

1041

Submissions 4, 6, 7.

10.53 This approach provides greater certainty about the vesting of property as it does not require a consideration of what a particular person's willingness was, at the time of the deceased's death, to act as executor (or what it would have been if the person had known at that time that he or she had been appointed as executor).

10.54 If a person who is appointed as executor has legal capacity to act as executor, but is unwilling to do so, that person may of course renounce the executorship.¹⁰⁴²

VESTING OF PROPERTY OF WHICH A DECEASED PERSON WAS TRUSTEE

Introduction

10.55 Property of which a deceased person was trustee is specifically excluded from the operation of section 45(1) of the *Succession Act 1981* (Qld). In Queensland, the vesting of trust property on the death of a sole trustee or a sole surviving or continuing trustee is dealt with by section 16 of the *Trusts Act 1973* (Qld). Section 16(2) of the *Trusts Act 1973* (Qld) provides:

16 Devolution of trust assets and trust powers upon death

...

- (2) Upon the death of a sole trustee or, where there were 2 or more trustees, of the last surviving or continuing trustee, the trust property shall devolve to and vest in the public trustee and shall remain vested in the public trustee until—
- (a) an appointment of a new trustee is made and (unless the appointment is made by the public trustee) notice in writing of the appointment is given to the public trustee, whereupon the trust property shall devolve to and vest in the person so appointed subject to and in accordance with the provisions of section 15; or
 - (b) if no such appointment is made—a grant of probate or letters of administration of the estate of the deceased trustee is made and notice in writing of such grant and of his or her intention to assume the trust of the trust property is given to the public trustee by the person to whom the grant was made, whereupon the trust property shall devolve to and vest in such person who shall be deemed to be the person appointed by the person nominated for the purpose of appointing new trustees.

10.56 The effect of section 16(2) is that, if a sole trustee or a last surviving or continuing trustee dies, the trust property vests in the public trustee and remains so vested until either:

¹⁰⁴²

Note that the Administration of Estates Bill 2009 cl 315(1), which is declaratory of the existing law, provides that an executor named in the will of a deceased person may renounce his or her executorship.

- a new trustee is appointed and the trustee gives the public trustee written notice of his or her appointment; or
- if no such appointment is made — a grant of probate or letters of administration of the estate of the deceased trustee is made, and the personal representative to whom the grant is made gives written notice to the public trustee of that appointment and of his or her intention to assume the trust of the trust property.

10.57 When either of these events occurs the trust property devolves to and vests in the new trustee or the person appointed as personal representative of the estate of the deceased trustee.¹⁰⁴³

10.58 Accordingly, under section 16 of the *Trusts Act 1973* (Qld), trust property will devolve to, and vest in, the personal representative of a deceased trustee only in those circumstances where the personal representative wishes to assume the trust and to be, for all purposes, the new trustee of the trust.

10.59 It has been suggested that there is ‘ample justification’ for separate rules with respect to the vesting of trust property and property owned beneficially by the deceased:¹⁰⁴⁴

A deceased trustee may own little or no property personally and there may be no need to take out a grant in respect of the estate. Further, the representatives might not wish to perform the trustees’ duties. They will generally wish to do so only where the trust is in some way connected with the family of the deceased and not, for example, where the deceased was a solicitor or accountant and so trustee of one or more trusts in a professional capacity.

10.60 In the other Australian jurisdictions, trust property held by a sole trustee or by a sole surviving or continuing trustee vests, on the trustee’s death, ‘in the manner prescribed by law for the devolution of all the property of the deceased trustee’.¹⁰⁴⁵ Although such property would vest subject to the trusts with which it was impressed, the legislation in these jurisdictions specifically provides that real property vests subject to the trusts and equities affecting it.¹⁰⁴⁶ Although trust property will, in these circumstances, vest on either death or the making of a grant in the personal representative, that does not, of itself, make the personal representative a trustee of the relevant trust, as ‘a person cannot have the

¹⁰⁴³ *Trusts Act 1973* (Qld) s 16(2)(a), (b).

¹⁰⁴⁴ AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [1.70].

¹⁰⁴⁵ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [8600] (at 24 February 2009). The manner in which property devolves or vests in these jurisdictions is discussed at [10.11]–[10.22] above.

¹⁰⁴⁶ *Administration and Probate Act 1929* (ACT) s 40 (real estate); *Probate and Administration Act 1898* (NSW) s 45 (real estate); *Administration and Probate Act 1919* (SA) s 46(1) (land); *Administration and Probate Act 1958* (Vic) s 13(1) (hereditaments); *Administration Act 1903* (WA) s 9 (real estate). In Queensland, where personal representatives become the registered proprietors of land, they ‘arguably take their interest subject to any equities created by the deceased in whose shoes they stand’: *Goodwin v Gilbert* [2000] QSC 309, [26] (Atkinson J).

powers authorities and discretions of a trustee unless that person has been appointed trustee by the person creating the trust or has been pointed to in some way as a person proper to exercise those powers authorities and discretions'.¹⁰⁴⁷

10.61 In Tasmania, Victoria and Western Australia, legislation provides that, until new trustees are appointed, the personal representative of a sole or last surviving or continuing trustee may exercise or perform any power or trust that was given to, or was capable of being exercised by, the sole or last surviving or continuing trustee.¹⁰⁴⁸ In the other Australian jurisdictions, however, unless the instrument by which the trust is created provides that 'the persons upon whom the trust assets will devolve upon the death of the sole trustee shall have all the powers discretions and authorities and be able to act in all respects as if they had been appointed trustees',¹⁰⁴⁹ such persons will not be able to exercise trust powers with respect to that property.¹⁰⁵⁰ They will simply hold the trust property as bare trustees until new trustees are appointed.¹⁰⁵¹

Discussion Paper

10.62 In the Discussion Paper, the National Committee proposed generally that a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld) should be included in the model legislation.¹⁰⁵²

Submissions

10.63 Although none of the submissions commented specifically on the exclusion of trust property from the operation of section 45(1) of the *Succession Act 1981* (Qld), almost all the submissions that commented on the vesting of property supported the inclusion of a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld).¹⁰⁵³

1047 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [8600] (at 24 February 2009). See also *Re Crunden and Meux's Contract* [1909] 1 Ch 690, 695 (Parker J).

1048 *Conveyancing and Law of Property Act 1884* (Tas) s 34; *Trustee Act 1958* (Vic) s 22; *Trustees Act 1962* (WA) s 45.

1049 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [8600] (at 24 February 2009).

1050 *Robson v Flight* (1865) De GJ & S 608; 46 ER 1054; *Crunden and Meux's Contract* [1909] 1 Ch 690.

1051 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [8600] (at 24 February 2009).

1052 *Administration of Estates Discussion Paper* (1999) QLRC 178; NSWLRC 254 (Proposal 68).

1053 See [10.45] above.

The National Committee's view

10.64 As explained earlier, although the legislation in some jurisdictions provides that property of which a deceased person was trustee vests in the same manner as property to which the deceased person was beneficially entitled, that does not, of itself, constitute the personal representative in whom the property vests as a trustee of the relevant trust.¹⁰⁵⁴ It may also be the case that, although a personal representative is willing to administer the deceased's estate, he or she does not wish to perform the duties of trustee in relation to trust property held by the deceased.

10.65 The National Committee therefore considers it more appropriate for the vesting of trust property to be dealt with in each jurisdiction's trustee legislation, rather than in the model administration legislation. Accordingly, property of which a deceased person was trustee should be expressly excluded from the operation of the model provision dealing with the vesting of property on the death of a person.

10.66 It will be necessary for individual jurisdictions to consider what amendments need be made to their trustee legislation to make provision for the vesting of property of which a deceased person was trustee.

VESTING OF A DECEASED PERSON'S PROPERTY WHEN A GRANT IS MADE

Introduction

10.67 Section 45(2) of the *Succession Act 1981* (Qld) provides that, on the making of a grant, the deceased's estate that vested in his or her executor, or in the public trustee, under section 45(1) vests in the person or persons to whom the grant is made. In the case of an intestacy, this provision is obviously important, as it divests the property from the public trustee and vests it in the newly-appointed administrator. However, section 45(2) can also apply where property has initially vested in executors named in a will. Where a will appoints more than one executor, section 45(1) has the effect that the property of the deceased vests in those executors as joint tenants. It may be that probate is not ultimately granted to all of the executors appointed by the will.¹⁰⁵⁵ In that situation, section 45(2) vests the estate in the executor or executors who are actually appointed by the grant of probate.

1054 See [10.60] above.

1055 One or more of the executors named in the will may have decided to renounce the executorship: see AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [1.80]. Alternatively, only some of the executors might apply for probate, leave being reserved to the others to come in and apply at a later date.

10.68 Section 45(3) further provides for the vesting of the deceased's estate where a grant is recalled, revoked or otherwise determined. It provides that, where at any time a grant is recalled, revoked or otherwise determined, the property of the deceased person that is vested at the time in the person to whom the grant was made is divested from the person whose grant is recalled, revoked or otherwise determined and vests in the person to whom a subsequent grant is made. It also provides that, if there is any interval of time between the recall, revocation or determination of the grant and the making of a subsequent grant, the property vests in the public trustee.

The National Committee's view

10.69 The model legislation should include a provision to the effect of section 45(2) of the *Succession Act 1981* (Qld). That section ensures that, where probate is granted to only some of the executors appointed by the will, the property is divested from those persons who are not named in the grant, and vested in the persons to whom the grant is ultimately made.

10.70 The model legislation should also include a provision to the effect of section 45(3) of the *Succession Act 1981* (Qld). However, for consistency with the model provisions that are based on section 45(1) and (2), the model provision that is based on section 45(3) should provide expressly that, if a subsequent grant is made to more than one person, the deceased person's property vests in the persons to whom the grant is made as joint tenants.

10.71 Section 45(3) of the *Succession Act 1981* (Qld) also provides that, during any interval of time between the recall, revocation or other determination of a grant and the making of a subsequent grant, the deceased's property is to vest in the public trustee. The model legislation should also include a provision to that effect.

HOW THE DOCTRINE OF RELATION BACK SHOULD BE FRAMED

Introduction

10.72 As explained earlier in this chapter, the doctrine of relation back, which developed in relation to administrators, has the effect that, when a grant is made, the deceased person's property vests in the personal representative as from the date of the deceased's death, rather than merely from the date of the grant.¹⁰⁵⁶

10.73 In Queensland, where the property of a person who dies leaving a will ordinarily vests, on death, in the deceased person's executor, the provision concerning relation back applies only to the title of an administrator. Section 45(4) of the *Succession Act 1981* (Qld) provides:

¹⁰⁵⁶

See [10.6]–[10.7] above.

45 Devolution of property on death

...

- (4) The title of any administrator appointed under this Act to any property which devolves to and vests in the administrator shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment.

10.74 In contrast, in New South Wales, the Northern Territory and Western Australia, where property vests, on the death of a person, in the public trustee,¹⁰⁵⁷ the legislation provides for the relation back of the title of both an executor and an administrator when a grant is made.¹⁰⁵⁸

10.75 There is therefore an issue as to whether the model legislation should provide for the relation back of only an administrator's title or should provide for the relation back of the title of both an executor and an administrator.

Discussion Paper

10.76 In the Discussion Paper, the National Committee proposed generally that a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld) should be included in the model legislation.¹⁰⁵⁹

Submissions

10.77 Although none of the submissions commented specifically on section 45(4) of the *Succession Act 1981* (Qld), almost all the submissions that commented on the vesting of property supported the inclusion of a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld).¹⁰⁶⁰

The National Committee's view

10.78 Earlier in this chapter, the National Committee has proposed that the model legislation should include a provision to the general effect of section 45(1) of the *Succession Act 1981* (Qld). The effect of that proposal is that, on the death of a person, the person's property will usually vest immediately in the person's executor; the person's property will vest in the public trustee only if:

- there is no executor; or
- the executor, or all the executors, lack legal capacity to act as executor.

¹⁰⁵⁷ See [10.11] above.

¹⁰⁵⁸ See [10.13]–[10.15] above.

¹⁰⁵⁹ *Administration of Estates Discussion Paper* (1999) QLRC 178; NSWLRC 254 (Proposal 68).

¹⁰⁶⁰ See [10.45] above.

10.79 Under the vesting scheme proposed by the National Committee, an executor will ordinarily derive his or her title from the will (which would make the doctrine of relation back unnecessary in relation to an executor). However, it is possible under the proposed vesting scheme that a grant of probate might be made to an executor who, at the time of the deceased's death, lacked legal capacity to act as executor. In those circumstances, the deceased's property would initially vest in the public trustee. However, the executor might then recover capacity sufficiently to apply for and obtain a grant of probate.

10.80 Because the National Committee's vesting proposals contemplate that a deceased person's property might, in rare circumstances, vest initially in the public trustee, even though a grant of probate is subsequently made to the executor named in the deceased person's will, the model provision dealing with the relation back of title should apply to both an executor and administrator. This will ensure that, where a grant is made to an executor, but the deceased's property vested initially in the public trustee, the property will vest in the executor as from the death of the deceased person.

10.81 Accordingly, the model legislation should contain a provision to the general effect of section 45(4) of the *Succession Act 1981* (Qld), but modified to apply to the title of both an executor and administrator. Further, as the model legislation also provides for the vesting of a deceased person's property in a person who becomes an executor or administrator by representation of the will or estate of the deceased person,¹⁰⁶¹ the relation back provision that is based on section 45(4) should also ensure that the title of an executor or administrator by representation relates back to the death of the deceased person.

VESTING OF A DECEASED PERSON'S UNADMINISTERED PROPERTY ON THE DEATH OF THE DECEASED PERSON'S PERSONAL REPRESENTATIVE

Introduction

10.82 As explained in Chapter 7 of this Report, legislation in the Australian jurisdictions provides expressly for the transmission of the office of executor upon the death of a last surviving, or sole, proving executor.¹⁰⁶² When the executor dies without having completed the administration of the testator's estate, an executor who obtains probate of the will of the deceased executor automatically becomes the executor of the original testator's estate. In relation to the 'original' or 'head' estate, the executor of the deceased executor is known as the 'executor by representation'.¹⁰⁶³

1061 See [10.95] below.

1062 See [7.4]–[7.5] above.

1063 The transmission of the office of executor is considered in Chapter 7 of this Report.

10.83 As noted earlier, section 45(1) of the *Succession Act 1981* (Qld) has the effect that property held by a person as trustee is generally excluded from the operation of section 45. Property held by a person as trustee instead vests in accordance with section 16 of the *Trusts Act 1973* (Qld).¹⁰⁶⁴ However, section 45 is expressed to take effect notwithstanding the provisions of section 16 of the *Trusts Act 1973* (Qld). Section 45(5) of the *Succession Act 1981* (Qld) provides:

- (5) For the purposes of this section, and notwithstanding the provisions of the *Trusts Act 1973*, section 16, an executor includes an executor by representation under the provisions of section 47 of this Act.

10.84 In its 1978 Report, the Queensland Law Reform Commission explained the reason for this reference to the *Trusts Act 1973* (Qld):¹⁰⁶⁵

If a sole executor dies having administered an estate only partially, the exception of trust property from the provisions of the section might have the effect that partially unadministered estates would vest in the Public Curator¹⁰⁶⁶ under the provisions of section 16 of the *Trusts Act 1973* as trust estates. But that would destroy the utility of the mechanism of executorship by representation which we propose to retain. (note added)

10.85 The Commission stated that section 45(5) of the *Succession Act 1981* (Qld) 'ensures that the devolution rules of this section apply to executors by representation'.¹⁰⁶⁷

10.86 It appears to be the intention of section 45 of the *Succession Act 1981* (Qld) that, if a deceased person's executor dies after obtaining probate, but before completing the administration of the deceased's estate, the deceased's property is to vest, by the combined operation of section 45(1) and (5), in the executor who obtains probate of the will of the deceased executor (and who thereby becomes the executor by representation of the original estate).

10.87 However, there is a problem with the present drafting of section 45. Section 45(1) provides that the property of a deceased person 'shall on his or her death ... vest in his or her executor'. Although section 45(5) provides that, for the purposes of the section, 'executor' includes an executor by representation, at the moment of a person's death, the person can never have an executor by representation. That can only occur when the deceased person's executor, having obtained probate, dies and a further grant of probate is made to the executor of the deceased executor. This means that there will always be an interval of time between a person's death and the point at which there is an executor by representation of the deceased person's estate.

¹⁰⁶⁴ *Trusts Act 1973* (Qld) s 16(2) is set out at [10.55] above.

¹⁰⁶⁵ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 31.

¹⁰⁶⁶ *Trusts Act 1973* (Qld) s 16 now refers to the public trustee.

¹⁰⁶⁷ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 31.

10.88 Accordingly, section 45 does not specifically address the vesting of a deceased person's property when the deceased person's executor (or indeed, the deceased person's administrator) dies.¹⁰⁶⁸

Discussion Paper

10.89 In the Discussion Paper, the National Committee proposed generally that a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld) should be included in the model legislation.¹⁰⁶⁹

Submissions

10.90 Although none of the submissions commented specifically on the vesting of a deceased person's unadministered property on the death of the deceased person's personal representative or on section 45(5) of the *Succession Act 1981* (Qld), almost all the submissions that commented on the vesting of property supported the inclusion of a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld).¹⁰⁷⁰

The National Committee's view

10.91 It is important for the model legislation to provide expressly for the vesting of a deceased person's unadministered property immediately on the death of the deceased person's last surviving, or sole, personal representative. As explained earlier, at that time, there will not yet be an executor or administrator by representation of the deceased person's will or estate. In fact, there may never be one.¹⁰⁷¹

10.92 Given the National Committee's view that property held by a person as trustee should not, on the person's death, vest automatically in the person's executor,¹⁰⁷² it would be inconsistent to recommend that, if a deceased

¹⁰⁶⁸ *Succession Act 1981* (Qld) s 45(3) deals with the vesting of a deceased person's property when a grant is 'recalled or revoked or otherwise determined'. That subsection appears to be limited to circumstances where the grant is brought to an end by court order, and does not appear to apply to the situation where a personal representative simply dies. This view is supported by the reference, in s 45(3), to the fact that property vested in the person to whom the grant was made is to be 'divested' from the person. The reference to divesting is appropriate to a person who would otherwise be capable of continuing to hold the title to the property, but not to a deceased person, who is not, at law, capable of holding the title to property.

¹⁰⁶⁹ *Administration of Estates Discussion Paper* (1999) QLRC 178; NSWLRC 254 (Proposal 68).

¹⁰⁷⁰ See [10.45] above.

¹⁰⁷¹ This would be the case where:

- the deceased personal representative was an executor who never obtained a grant of probate of the deceased person's will;
- no grant is ever made in relation to the will or estate of the deceased personal representative; or
- a person obtains a grant of the will or estate of the deceased personal representative but, before doing so, renounces the executorship, or administratorship, of the will or estate of the deceased person.

¹⁰⁷² See [10.64]–[10.65] above.

person's last surviving, or sole, executor or administrator dies, the deceased person's property should vest in the person named as executor in the will, if any, of the deceased executor or administrator. Further, such a proposal would have the effect of vesting the deceased person's property in a person who is not, and may never become, the executor or administrator by representation of the will or estate of the deceased person.

10.93 Accordingly, the vesting of a deceased person's unadministered property on the death of the deceased person's last surviving, or sole, personal representative should be consistent with the general approach found in section 45(3) of the *Succession Act 1981* (Qld). The model legislation should provide that, on the death of a deceased person's last surviving, or sole, personal representative (which would include an executor who had not obtained probate of the deceased's will), any property of the deceased person that is vested in the personal representative (the 'unadministered property') vests in the public trustee.

10.94 The model legislation should further provide that if, after the unadministered property vests in the public trustee, the court makes a grant of probate or letters of administration of the deceased person's will or estate, the deceased's person's unadministered property is divested from the public trustee and vests in:

- the person to whom the grant is made; or
- if the grant is made to more than one person — the persons to whom it is made as joint tenants.

10.95 As noted above, section 45(5) of the *Succession Act 1981* (Qld) is expressed to apply notwithstanding the provisions of section 16 of the *Trusts Act 1973* (Qld), which deals specifically with the vesting of trust property.¹⁰⁷³ The National Committee has proposed above that the model provision dealing with vesting on death should deal only with the vesting of property to which the deceased was beneficially entitled, and that individual jurisdictions should make provision in their trustee legislation for the vesting of property of which a deceased person was trustee.¹⁰⁷⁴ Accordingly, the model provision that deals with the vesting of a deceased person's unadministered property on the death of the deceased person's last surviving, or sole, personal representative should be expressed to apply notwithstanding the relevant provision in each jurisdiction that deals with the vesting of trust property.

1073 See [10.83] above.

1074 See [10.64]–[10.66] above.

VESTING OF A DECEASED PERSON'S UNADMINISTERED PROPERTY IN A PERSON WHO BECOMES THE DECEASED PERSON'S EXECUTOR OR ADMINISTRATOR BY REPRESENTATION

Introduction

10.96 In Chapter 7 of this Report, the National Committee has recommended that, in certain specified circumstances, a person will become the executor or administrator by representation of the will or estate of a deceased person.¹⁰⁷⁵ It is therefore important for the model legislation to provide for the vesting of a deceased person's property in a person who becomes an executor or administrator by representation of the deceased person's will or estate.

The National Committee's view

10.97 The model legislation should provide that, on becoming an executor or administrator by representation of the will or estate of a deceased person, the deceased's unadministered property:

- is divested from:
 - if it is vested in the public trustee — the public trustee; or
 - if it is vested in another person — the other person; and
- vests in:
 - the executor or administrator by representation; or
 - if there is more than one executor or administrator by representation¹⁰⁷⁶ — the executors or administrators by representation as joint tenants.¹⁰⁷⁷

¹⁰⁷⁵ See Recommendations 7-1 and 7-2 above.

¹⁰⁷⁶ Under the National Committee's proposals, if two or more persons are granted probate of the will, or letters of administration of the estate, of a deceased personal representative who was a last surviving, or sole, executor or administrator under a grant, they will be joint executors or administrators by representation of any estate of which the deceased personal representative was the executor or administrator under a grant or the executor or administrator by representation. For an example of joint executors by representation, see *Morgan v MacRae* [2001] NSWSC 1017, [4] (Young CJ in Eq).

¹⁰⁷⁷ This proposal is concerned with the vesting of a deceased person's unadministered property in the person's executor or administrator by representation. The relation back of the title of the executor or administrator by representation to that property is considered at [10.81] above.

VESTING OF A DECEASED PERSON'S UNADMINISTERED PROPERTY WHEN AN EXECUTOR OR ADMINISTRATOR BY REPRESENTATION CEASES TO HOLD OFFICE

Introduction

10.98 In Chapter 7 of this Report, the National Committee has recommended that the model legislation should provide for both executors and administrators by representation. It has also recommended that, in specified circumstances, a person is to cease to be the executor or administrator by representation of the will or estate of a deceased person.

10.99 This section of the chapter considers how the unadministered property of a deceased person should vest if a person ceases to be the executor or administrator by representation of the will or estate of the deceased person. In the National Committee's view, the model provision that is based on section 45(3) of the *Succession Act 1981* (Qld) does not deal with this situation, as that provision applies where a grant of a deceased person's estate is revoked or is otherwise ended. In the case of an executor or administrator by representation, there is no direct grant in relation to the will or estate of the deceased person.

The National Committee's view

Vesting of property when an executor or administrator by representation ceases to hold office because a further grant of probate is made to a previously non-proving executor of the deceased's will

10.100 In Chapter 7 of this Report,¹⁰⁷⁸ the National Committee has recommended that the model legislation should include a provision that:

- applies if:
 - a grant of probate was made to only one or some of the executors named in a deceased person's will (the 'proving executors');
 - leave to apply for a grant of probate at a later time was reserved to other executors who have not renounced their executorship (the 'non-proving executors');
 - the last surviving, or sole, proving executor dies; and
 - a person becomes the executor by representation of the deceased person's will; and

1078

See Recommendation 7-11 above.

- provides that, on the making of a grant of probate to one or more of the non-proving executors, the executor by representation of the deceased person's will ceases to be:
 - an executor by representation of the deceased's will; and
 - an executor or administrator by representation of any will or estate of which the deceased was the executor, the administrator, or the executor or administrator by representation.

10.101 In the National Committee's view, if a person ceases to be an executor or administrator by representation of the will or estate of a deceased person because of the granting of probate in these circumstances, any property of the deceased person that is vested in the executor or administrator by representation should vest in:

- the person to whom probate is granted; or
- if probate is granted to more than one person — the persons to whom probate is granted as joint tenants.

10.102 This proposal does not simply have the effect of vesting in the person or persons to whom probate is granted the unadministered property of the deceased person of whose will probate is granted. It also has the effect of vesting in that person, or those persons, the unadministered property of any other deceased person of whose will or estate the deceased person was the executor, the administrator, or the executor or administrator by representation.

Vesting of property when an executor or administrator by representation ceases to hold office because letters of administration are granted of the deceased person's estate

10.103 In Chapter 7 of this Report, the National Committee has recommended two circumstances in which an executor or administrator by representation should cease to hold that office because the court grants letters of administration in relation to the estate of the deceased person (that is, of the head estate).

10.104 The first circumstance is where all the beneficiaries under a deceased person's will or under the relevant intestacy rules are adults who agree¹⁰⁷⁹ that letters of administration should be granted to:

- without limiting the following paragraph, if there is more than one executor or administrator by representation — one or more of the executors or administrators by representation nominated by the beneficiaries; or

¹⁰⁷⁹

If any adult beneficiary lacks legal capacity to enter into the agreement, a reference to the beneficiary is taken to be a reference to the beneficiary's substitute decision-maker.

- another person nominated by the beneficiaries.¹⁰⁸⁰

10.105 The second circumstance is where a person who would, if there were no executor or administrator by representation of the will or estate of a deceased person, be entitled to letters of administration of the deceased person's estate, applies for letters of administration of that estate. The court may, on application by that person, grant the person letters of administration of the deceased person's estate.¹⁰⁸¹

10.106 The National Committee has recommended that, in each of these situations, on the granting of letters of administration of the deceased person's estate, the executor or administrator by representation ceases to be an executor or administrator by representation of:

- the will or estate of the deceased person; and
- any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.¹⁰⁸²

10.107 In the National Committee's view, if a person ceases to be an executor or administrator by representation of the will or estate of a deceased person because the court grants letters of administration to a person in either of these circumstances, any property of the deceased person that is vested in the executor or administrator by representation should vest in:

- the person to whom letters of administration are granted; or
- if letters of administration are granted to more than one person — the persons to whom letters of administration are granted as joint tenants.

10.108 This proposal does not simply have the effect of vesting in the person or persons to whom letters of administration are granted the unadministered property of the deceased person of whose estate they are directly appointed. It also has the effect of vesting in that person or those persons the unadministered property of any other deceased person of whose will or estate the deceased person was the executor, the administrator, or the executor or administrator by representation.

Vesting of property when an executor or administrator by representation ceases to hold office because the grant in relation to the deceased personal representative's will or estate is revoked, ends or ceases to have effect

10.109 In Chapter 7 of this Report, the National Committee has recommended that, if a person is granted probate of the will, or letters of administration of the

1080 See Recommendations 7-12 and 7-13 above.

1081 See Recommendation 7-15 above.

1082 See Recommendation 7-16 above.

estate, of a deceased personal representative and that grant is revoked, ends or ceases to have effect, the person ceases to be an executor or administrator by representation of any will or estate of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation.¹⁰⁸³

10.110 Subject to the exception mentioned below, the National Committee is of the view that, if the person is the last surviving, or sole, executor or administrator by representation of the will or estate of a deceased person and the person ceases to hold office because his or her grant in relation to the deceased personal representative's will or estate is revoked, ends or ceases to have effect, any property of the deceased person that is vested in the executor or administrator by representation should be divested from him or her and should vest in the public trustee. That should also be the case if there is more than one executor or administrator by representation of the deceased person's will or estate and all of them cease to hold office because the grant of the deceased personal representative's estate is revoked, ends or ceases to have effect.¹⁰⁸⁴

10.111 This proposal has the effect of vesting in the public trustee the unadministered property of each deceased person of whose will or estate the deceased personal representative was an executor, administrator, or executor or administrator by representation.

10.112 However, there is a situation in which the deceased's property should not vest in the public trustee, and the model provision should be subject to this exception. In Chapter 38 of this Report, the National Committee has recommended that certain local grants (that is, grants of the enacting jurisdiction) will cease to have effect if a later interstate grant is made and endorsed by the court making it to the effect that the deceased died domiciled in the interstate jurisdiction in which the court is situated.¹⁰⁸⁵ Further, the National Committee has recommended that the interstate grant has the same force, effect and operation in the enacting jurisdiction as if it had been originally made by the Supreme Court of the enacting jurisdiction.¹⁰⁸⁶

10.113 The effect of those recommendations is that it is possible for a person to cease to be an executor or administrator by representation of a deceased person's will or estate because the immediate grant under which the person is appointed (that is, of the deceased personal representative's estate) ceases to have effect as a result of the making of the interstate grant.

1083 See Recommendation 7-17 above.

1084 See [10.122]–[10.123] below for a discussion of the relevant principles where not all of the executors or administrators by representation renounce.

1085 See Recommendation 38-8(b)(i) in vol 3 of this Report.

1086 See Recommendation 38-3 in vol 3 of this Report.

10.114 In that situation, the person appointed under the interstate grant becomes the executor or administrator by representation of any will or estate of which the deceased personal representative was the executor, administrator, or executor or administrator by representation. As a result of the provision recommended earlier in relation to the vesting of property in a person who becomes an executor or administrator by representation, the unadministered estate that was previously vested in the executor or administrator whose grant ceased to have effect automatically vests in the person to whom the interstate grant was made.¹⁰⁸⁷

Vesting of property when an executor or administrator by representation renounces the executorship, or administratorship, by representation

10.115 In Chapter 7 of this Report, the National Committee has recommended that, if a person who is granted probate of the will, or letters of administration of the estate, of a deceased personal representative renounces the executorship, or administratorship, of the will or estate of any person (‘the deceased person’) of whose will or estate the deceased personal representative was the executor, the administrator, or the executor or administrator by representation, the person ceases to be an executor or administrator by representation of the will or estate of:

- that deceased person’s will or estate; and
- any will or estate of which that deceased person was the executor, the administrator, or the executor or administrator by representation.¹⁰⁸⁸

10.116 In the National Committee’s view, if a person who is a last surviving, or sole, executor or administrator by representation of the will or estate of a deceased person ceases to hold office as a result of the renunciation of the executorship or administratorship of the deceased person’s will or estate, any property of the deceased person that is vested in the executor or administrator by representation should vest in the public trustee. That should also be the case if there is more than one executor or administrator by representation of the deceased person’s will or estate and all of them renounce.¹⁰⁸⁹

10.117 This proposal has the effect of vesting in the public trustee the unadministered property of each deceased person of whose will or estate the executor or administrator by representation ceases to hold office, whether as a result of renouncing the executorship, or administratorship, of the will or estate of that deceased person or of another deceased person.

1087 See [10.97] above.

1088 See Recommendation 7-9 above.

1089 See [10.122]–[10.123] below for a discussion of the relevant principles where not all of the executors or administrators by representation renounce.

DIVESTING OF PROPERTY FROM THE PUBLIC TRUSTEE

The National Committee's view

10.118 The National Committee has proposed earlier in this chapter that, in certain specified circumstances, when a person ceases to be the executor or administrator by representation of the will or estate of a deceased person, the deceased's unadministered property is to vest in the public trustee.

10.119 The model legislation should provide that, if the unadministered property of a deceased person has vested in the public trustee under the provisions that give effect to these proposals, on the making of a grant of the deceased person's estate to another person, the unadministered estate:

- is divested from the public trustee; and
- vests in:
 - the person to whom the grant is made; or
 - if the grant is made to more than one person, the persons to whom the grant is made as joint tenants.

10.120 In the National Committee's view, it is necessary to include a specific provision to deal with vesting in this situation, as it is not covered by the model provision based on section 45(3) of the *Succession Act 1981* (Qld).

VESTING OF PROPERTY WHEN SOME, BUT NOT ALL, OF THE EXECUTORS OR ADMINISTRATORS BY REPRESENTATION CEASE TO HOLD OFFICE

Introduction

10.121 In some situations, although one or more executors or administrators by representation of a deceased person's will or estate cease to hold office, there may be another executor or administrator by representation, or other executors or administrators by representation, who continue to hold office. This raises the issue of what should happen to the deceased person's unadministered property in this situation.

The National Committee's view

10.122 If one or more, but not all, of the executors or administrators by representation stop holding office for any reason (the 'outgoing representatives'), it is not necessary for the deceased person's property to vest in the public trustee, as there is still at least one continuing executor or administrator by representation.

10.123 Accordingly, the model legislation should provide that, in this situation, the deceased person's unadministered property, to the extent it is vested in the outgoing representatives:

- is divested from the outgoing representatives; and
- vests in:
 - if only one person continues to be an executor or administrator by representation — the person; or
 - if more than one person continues to be an executor or administrator by representation — the persons as joint tenants.

THE POSITION OF THE PUBLIC TRUSTEE WHEN PROPERTY IS VESTED IN THE PUBLIC TRUSTEE PENDING THE MAKING OF A GRANT OR A FURTHER GRANT

Introduction

10.124 Earlier in this chapter, the National Committee has recommended that, in certain circumstances, the property of a person is to vest, on the person's death, in the public trustee. This raises the issue of the nature of the public trustee's role during the period between the death of the deceased person and the making of a grant.

10.125 In New South Wales, section 61 of the *Probate and Administration Act 1898* (NSW) provides that, until a grant is made, the property of the deceased is 'deemed to be vested' in the public trustee.¹⁰⁹⁰ The courts have considered the role of the public trustee under this and other similar legislative provisions on a number of occasions.

10.126 Initially, the courts adopted a restrictive view of the role of the public trustee and considered that the public trustee was 'a mere formal repository of the legal estate until the Probate Court should grant probate or administration'¹⁰⁹¹ with otherwise 'no functions, no powers and no duties in respect of the estate'.¹⁰⁹² However, the courts have since adopted a wider view of the public trustee's role.¹⁰⁹³

¹⁰⁹⁰ There are similar provisions in the legislation in the ACT, the Northern Territory and Western Australia: see [10.11]–[10.16] above.

¹⁰⁹¹ *Re Broughton* (1902) WN (NSW) 69, 70 (AH Simpson CJ in Eq), although it was not necessary in that case to decide the issue. See also *Ex parte the Public Trustee; Re Birch* (1951) 51 SR (NSW) 345, 350 (Street CJ).

¹⁰⁹² *Ex parte the Public Trustee; Re Birch* (1951) 51 SR (NSW) 345, 350 (Street CJ).

¹⁰⁹³ *Andrews v Hogan* (1952) 86 CLR 223, 251–2 (Fullagar J); *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268, 271 (Emmett J).

10.127 In *Andrews v Hogan*,¹⁰⁹⁴ Fullagar J commented in respect of the position of the public trustee under section 61 of the *Probate and Administration Act 1898 (NSW)*:¹⁰⁹⁵

It is unnecessary to attempt to define generally the position of the Public Trustee under s 61. That he has *some* rights and powers would seem almost necessarily to follow, though it may very well be that he has no active duties. (emphasis in original)

10.128 The parameters of the role of the public trustee under provisions such as section 61 of the New South Wales legislation are not entirely clear. While the public trustee is ‘no mere empty vessel’,¹⁰⁹⁶ it nevertheless appears that the public trustee may deal with property of the deceased only to a limited extent.¹⁰⁹⁷

10.129 It has been held that a notice to quit leased premises might properly be served upon the public trustee as the repository of the title of the estate.¹⁰⁹⁸ Further, it has been suggested that, in limited circumstances, the public trustee may be able to act more positively to be able to bind the estate of a deceased person.¹⁰⁹⁹

10.130 It appears, however, that the public trustee should not be joined as a party to court proceedings to represent ‘the estate of a deceased person whose interest is sought to be bound’,¹¹⁰⁰ and that the public trustee is under no obligation to pay rent.¹¹⁰¹

1094 (1952) 86 CLR 223.

1095 Ibid 250. See also *Holloway v Public Trustee* (1959) 59 SR (NSW) 308.

1096 *Byers v Overton Investments Pty Ltd* (2001) 109 FCR 554, 560 (Branson, North and Stone JJ).

1097 Ibid.

1098 *Andrews v Hogan* (1952) 86 CLR 223, 237 (McTiernan J), 245, 251–2 (Fullagar J), 255 (Kitto J).

1099 *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268, 271 (Emmett J). See also *Oxford Meat Co Pty Ltd v McDonald* [1963] NSW 1244 where the Full Court of the Supreme Court of New South Wales, in *obiter dictum*, suggested that the public trustee may act as a tenant to terminate a tenancy.

1100 *Re Hart* [1963] NSW 627, 631 (McClelland CJ in Eq); *Re Cameron* [1982] WAR 55. In *Re Broughton* (1902) 19 WN (NSW) 69, which was decided at a time when in New South Wales property vested in the Chief Justice prior to a grant, leave was sought to serve the Chief Justice along with the executors named in the will with certain legal proceedings. Although AH Simpson CJ in Eq found it unnecessary to decide the question, his Honour made the following comments (at 70) about the appropriateness of joining the Chief Justice:

My present impression is, however, that it would be improper to make him a party. I do not think that the Legislature intended to do more than make him a mere formal repository of the legal estate, until the Probate Court should grant probate or administration, and I am of opinion that it was never intended that he should thereby be put in the position of being joined as a party in litigious proceedings.

See, however, *Perpetual Trustee Co Ltd v The Public Trustee* (1956) 56 SR (NSW) 384 where it was held that the public trustee was a person against whom a summons may be issued and on whom it may be served.

1101 *Holloway v Public Trustee* (1959) 59 SR (NSW) 308.

10.131 The New South Wales provisions have been the subject of a good deal of litigation and do not appear to have worked well. In *Darrington v Caldbeck*,¹¹⁰² Young J suggested that section 61 of the *Probate and Administration Act 1898* (NSW) had 'caused a tremendous amount of problems to persons affected by it over the years'.¹¹⁰³

10.132 The legislation in the Northern Territory and Queensland addresses the nature of the public trustee's role while property is vested in the public trustee pending the granting of probate or letters of administration.

10.133 In the Northern Territory, section 50(1) of the *Administration and Probate Act* (NT) provides that, while property is vested in the public trustee pending the making of a grant or the filing of an election to administer, the public trustee may:

exercise the powers and perform the duties in relation to the property that he or she would have been authorised to exercise and perform if the deceased had died intestate and the Public Trustee had been granted administration of the estate.

10.134 However, section 50(2) provides that the public trustee must not:

- distribute any property to a beneficiary;
- sell, lease, exchange, mortgage, or partition any portion of the real property of the estate unless ordered to do so by the court; or
- sell any personal property without an order of the court unless the property is of a perishable nature or liable to deteriorate, or is for any reason liable to decrease unduly in value if retained.

10.135 The *Administration and Probate Act* (NT) requires the public trustee, before first acting under section 50, to 'serve a notice ... on any person that he or she knows of who would be entitled to apply for representation of the estate'.¹¹⁰⁴

10.136 Although section 50 of the *Administration and Probate Act* (NT) addresses the question of the public trustee's powers before a grant is made, it does not appear to address the legal status of acts performed in relation to the public trustee while property is vested in the public trustee during this period.

10.137 In Queensland, the role of the public trustee during the period between the death of a deceased person and the granting of letters of administration is addressed in section 45(4A) and (6) of the *Succession Act 1981* (Qld):

1102 (1990) 20 NSWLR 212.

1103 Ibid 218.

1104 *Administration and Probate Act* (NT) s 51(1). The requirements of the notice are set out in s 51(2) of the *Administration and Probate Act* (NT).

45 Devolution of property on death

...

- (4A) However, all acts lawfully done by to or in regard to the public trustee before the appointment of an administrator shall be as valid and effectual as if they had been done by to or in regard to the administrator.

...

- (6) While the property of a deceased person is vested in the public trustee under this section, the public trustee shall not be required to act in the administration of the estate of the deceased person or in any trusts created by the will of the deceased person, or exercise any discretions, powers, or authorities of a personal representative, trustee or devisee, merely because of the provisions of this section.

10.138 Although section 45(6) does not impose any positive obligations on the public trustee in relation to the property vested in the public trustee as a result of this section, section 45(4A) ensures the validity of ‘all acts lawfully done by to or in regard to the public trustee’ before the appointment of an administrator.

10.139 It has been said that section 45(6) of the *Succession Act 1981* (Qld) ‘conveniently summarises the position which appears from the oceans of litigation produced by s 61’ of the *Probate and Administration Act 1898* (NSW).¹¹⁰⁵

Discussion Paper

10.140 In the Discussion Paper, the National Committee considered whether section 45(6) of the *Succession Act 1981* (Qld) should be amended so that the vesting of property in the public trustee is a purely notional vesting. However, the National Committee noted that the public trustee might have legitimate reasons to act — for example, for the benefit of the beneficiaries or to maintain the estate. The National Committee also considered the possibility of providing that the public trustee must not charge a fee for services performed before a grant is made, but was of the view that such an approach would not be practicable.¹¹⁰⁶ Consequently, the National Committee did not make any proposal to alter the effect of section 45(6) of the *Succession Act 1981* (Qld) or to prohibit the public trustee from charging a fee for acting with respect to the estate while it remained vested in the public trustee.

¹¹⁰⁵ O Wood and GL Certoma, *Hutley, Woodman and Wood: Succession Commentary and Materials* (4th ed, 1990) 263.

¹¹⁰⁶ *Administration of Estates Discussion Paper* (1999) QLRC 177; NSWLRC [12.26].

Submissions

10.141 As noted previously, almost all the submissions that commented on the vesting of property supported the inclusion of a provision to the effect of section 45(1)–(6) of the *Succession Act 1981* (Qld).¹¹⁰⁷

10.142 Four submissions commented specifically on the role of the public trustee in the period between the death of a deceased person and the granting of letters of administration.

10.143 The Public Trustee of South Australia, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia supported the view expressed by the National Committee that the legislation should not prohibit a public trustee from charging for actual work undertaken between the death of the deceased and the making of a grant.¹¹⁰⁸

10.144 The Public Trustee of New South Wales was the only respondent who disagreed with the National Committee's proposal.¹¹⁰⁹ His opposition to the adoption of a provision to the effect of section 45 of the *Succession Act 1981* (Qld) appears to be based, however, on the view that the model provision would impose positive obligations on the public trustee.

The National Committee's view

10.145 In the National Committee's view, the model legislation should not impose any positive obligations on the public trustee while property is vested in the public trustee merely because of the operation of the vesting provisions proposed earlier in this chapter. Accordingly, the model legislation should include a provision to the effect of section 45(6) of the *Succession Act 1981* (Qld).

10.146 Further, it is apparent from the previous discussion in this chapter that the uncertainty of the legal status of acts done by, or in relation to, the public trustee before the appointment of a personal representative has given rise to a good deal of litigation. The National Committee is therefore of the view that the model legislation should also include a provision to the effect of section 45(4A) of the *Succession Act 1981* (Qld) and provide that all acts lawfully done by, to, or in regard to the public trustee while property is vested in the public trustee under the proposed provisions are to be as valid and effectual as if they had been done by, to, or in regard to the administrator.

1107 See [10.45] above.

1108 Submissions 4, 6, 7.

1109 Submission 11.

10.147 The model provision that gives effect to these proposals should be framed so as to apply in each of the circumstances proposed earlier in this chapter in which property is to vest in the public trustee.

VESTING OF PROPERTY APPOINTED BY WILL IN THE EXERCISE OF A GENERAL POWER OF APPOINTMENT

Introduction

10.148 A power of appointment confers on the donee of the power the right to appoint particular property among certain persons. Under a general power of appointment, the donee may distribute to any person at all, including the donee, and is not restricted to distributing among a class of specified persons.¹¹¹⁰ The instrument that confers a power of appointment usually specifies how the power may be exercised — that is, whether the donee may exercise the power ‘only during the donee’s lifetime or only by will or either during lifetime or by will’.¹¹¹¹

10.149 As explained in Chapter 15 of this Report, when a testator exercises a general power of appointment by his or her will, the appointed property can in equity ‘become liable for so much of the testator’s debts as the testator’s estate is insufficient to satisfy’.¹¹¹² At common law, however, appointed property does not vest in the testator’s executor.¹¹¹³

10.150 There has developed a rule of convenience under which an executor is entitled to claim the appointed property from the original trustees of the fund and, to that end, can give a valid receipt for that property.¹¹¹⁴ It has been held, however, that notwithstanding this relationship to the appointed property, the property ‘cannot be correctly described as ... passing to the executor as such’.¹¹¹⁵

10.151 The courts have drawn a distinction between property that comes into the hands of an executor by virtue of his or her office — which has been held to vest in the executor — and other property. Property will fall into the former category only if the executor would have a right to recover the property even if

¹¹¹⁰ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [5080] (at 24 February 2009).

¹¹¹¹ *Ibid* [5090] (at 24 February 2009).

¹¹¹² *O’Grady v Wilmot* [1916] 2 AC 231, 245 (Lord Buckmaster LC). Note that a number of jurisdictions provide expressly that such property constitutes assets for the payment of debts: see [15.23] in vol 2 of this Report.

¹¹¹³ *O’Grady v Wilmot* [1916] 2 AC 231, 248 (Lord Buckmaster LC), 259–60 (Lord Atkinson), 268 (Lord Sumner). See also *Hudson v Gray* (1927) 39 CLR 473, 492 (Isaacs J). Most references in the cases are to an executor, rather than to a personal representative, because the cases are concerned with a general power of appointment that has been exercised by a will. It is possible, however, for the question of vesting of appointed property to arise where there is an administrator under letters of administration with the will annexed.

¹¹¹⁴ *O’Grady v Wilmot* [1916] 2 AC 231, 250–1 (Lord Buckmaster LC), 270 (Lord Sumner).

¹¹¹⁵ *Ibid* 272 (Lord Sumner).

the testator's will had merely appointed the executor, and not dealt with the application of the testator's property. Property appointed under a general power does not fall into this category as it is necessary to have regard to the terms of the will in order to determine whether the power has been exercised.¹¹¹⁶

The existing legislative provisions

10.152 The legislation in five Australian jurisdictions — the ACT, New South Wales, the Northern Territory, Tasmania and Victoria — deals with the vesting of property that passes under a gift contained in a will that operates as an appointment under a general power.

10.153 In the ACT, New South Wales and the Northern Territory, the legislation vests the appointed property in the testator's personal representative as if the testator had been entitled to the property at his or her death.¹¹¹⁷ For example, section 46B of the *Probate and Administration Act 1898* (NSW) provides:

46B Appointments under general power

- (1) Real and personal estate passing under a gift in the will of a testator dying after the commencement of the *Conveyancing (Amendment) Act 1930* which operates as an appointment under a general power to appoint by will shall vest in the testator's personal representatives as if the testator had been entitled thereto at the testator's death, whether or not the testator was so entitled, and whether or not for an interest not determining on the testator's death.
- (2) Real and personal estate the subject of a gift contained in the will of a testator dying after the passing of the *Probate Act of 1890*, which operated as an appointment under a general power, shall be deemed to have vested under the provisions of that Act, or of this Act, as the case may require, in the testator's executors or administrators as if that property had been vested in the testator at the time of the testator's death, whether or not the testator was entitled thereto for an estate or interest not determining on the testator's death.
- (3) Nothing in subsection (2) shall affect any right or title accrued before the commencement of this section under any disposition by an appointee which would have been valid if this section had not been passed or shall affect the interpretation of section 44.

10.154 In Tasmania and Victoria, a similar result is achieved in relation to the vesting of real property that is appointed by will. However, instead of providing separately for the vesting of such property, the legislation in these two jurisdictions provides, in effect, that the real property of a person includes real property passing under a gift contained in the person's will that operates as an

¹¹¹⁶ Ibid 251–4 (Lord Buckmaster LC), 272–3 (Lord Sumner).

¹¹¹⁷ *Administration and Probate Act 1929* (ACT) s 41B; *Probate and Administration Act 1898* (NSW) s 46B; *Administration and Probate Act* (NT) s 56.

appointment under a general power.¹¹¹⁸ The Tasmanian provision is in the following terms:¹¹¹⁹

6 Interpretation in this Part of “real estate”

...

- (2) A testator shall be deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will which operates as an appointment under a general power to appoint by will.

10.155 In this way, the real property that passes under such a gift vests according to the general provisions in these jurisdictions dealing with the vesting of the testator’s real property.¹¹²⁰

10.156 In all five jurisdictions, the legislation refers to the vesting of property ‘passing’ under a gift contained in a will that operates as an appointment under a general power, and not simply to property ‘appointed’ by the will. Obviously, where a testator has not exercised the relevant power by his or her will, the property that was the subject of the power does not pass under such a gift and, therefore, will not vest in the testator’s personal representative. In some cases, however, it may be more difficult to determine whether property has ‘passed’ under a gift of this kind — for example, where a testator has made an appointment of the property in his or her will, but the appointee has predeceased the testator,¹¹²¹ or where the appointment is invalid because one of the witnesses to the will was an interested witness.¹¹²²

10.157 Whether property that is the subject of an appointment that fails for some reason will pass as part of the testator’s estate depends on the intention of the testator expressed in the will — that is, whether the testator meant, by the exercise of the power, ‘to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed’.¹¹²³ An intention to take the property out of the instrument will be found if the dispositions in the will blend the property in respect of which the testator held the power of appointment with the testator’s own property,¹¹²⁴ or if the will otherwise treats the property as if it

¹¹¹⁸ *Administration and Probate Act 1935* (Tas) s 6(2); *Administration and Probate Act 1958* (Vic) s 13(2)(a).

¹¹¹⁹ *Administration and Probate Act 1935* (Tas) s 6(2). This provision is based on s 3(2) of the *Administration of Estates Act 1925* (UK).

¹¹²⁰ *Administration and Probate Act 1935* (Tas) s 4(1); *Administration and Probate Act 1958* (Vic) s 13(1).

¹¹²¹ See, for example, *Re Davies’ Trusts* (1871) LR 13 Eq 163; *Re Thurston* (1886) 32 Ch 508; *Coxen v Rowland* [1894] 1 Ch 406; *Re Boyd* [1897] 2 Ch 232; *Re Marten* [1902] 1 Ch 314.

¹¹²² See, for example, *Re Vander Byl* [1931] 1 Ch 216. See also the discussion of the interested witness rule and the National Committee’s recommendations in *Wills Report* (1997) QLRC 18–26; NSWLRC [3.17]–[3.50].

¹¹²³ *Re Marten* [1902] 1 Ch 314, 320 (Vaughan Williams LJ). See also *Re Thurston* (1886) 32 Ch 508; *Coxen v Rowland* [1894] 1 Ch 406, 409 (Stirling J); *Re Boyd* [1897] 2 Ch 232, 235 (Romer J); *Re Vander Byl* [1931] 1 Ch 216, 221 (Luxmoore J).

¹¹²⁴ *Re Marten* [1902] 1 Ch 314.

were the testator's own property.¹¹²⁵ Where no such intention is found, the property the subject of the power will pass to the persons who would be entitled in default of appointment, rather than to the persons who would be entitled to take if the property passed as part of the testator's estate.¹¹²⁶

10.158 Because the various legislative provisions deal with the vesting of property that passes under a gift in a will that exercises a general power of appointment, they do not affect the threshold question of whether, in a particular case, the property has passed under the gift in question. That remains a question of construction of the will. However, where property does pass under such a gift, these provisions have the effect that the property vests in the testator's personal representative. It has been held that the New South Wales provision:¹¹²⁷

puts the appointed property in the same position so far as the executor is concerned as actual property of the testator. In my opinion one effect of the section is that the property passes to the executor by virtue of the probate *per se*.

10.159 On this basis, the Supreme Court of New South Wales has held that 'the appointed property is part of the estate of the testator and as such available as an asset in respect of which the Court may make an order under' the family provision legislation of that State.¹¹²⁸

Discussion Paper

10.160 In the Discussion Paper, the National Committee sought submissions on whether the model legislation should include a provision to the effect of section 46B of the *Probate and Administration Act 1898* (NSW).¹¹²⁹

Submissions

10.161 The ACT and New South Wales Law Societies both supported the adoption of a provision to the effect of section 46B of the *Probate and Administration Act 1898* (NSW).¹¹³⁰ The ACT Law Society suggested that such

¹¹²⁵ *Coxen v Rowland* [1894] 1 Ch 406, 410 (Stirling J). In *Re Davies' Trusts* (1871) LR 13 Eq 163; *Re Thurston* (1886) 32 Ch 508; and *Re Boyd* [1897] 2 Ch 232 the Court held that the mere appointment of an executor was not sufficient evidence of an intention on the part of the donee to make the property his or her own for all purposes.

¹¹²⁶ *Re Davies' Trusts* (1871) LR 13 Eq 163.

¹¹²⁷ *Re Carter* (1944) 44 SR (NSW) 285, 289 (Roper J).

¹¹²⁸ *Ibid.* Note, however, that in *Re Kensington* [1949] NZLR 382 the New Zealand Court of Appeal achieved a similar result in the absence of a provision to the effect of s 46B of the *Probate and Administration Act 1898* (NSW). The Court held that the testator had, by his will, intended to make the appointed property his own, and that the property was therefore liable to meet a family provision claim.

¹¹²⁹ *Administration of Estates Discussion Paper* (1999) QLRC 178; NSWLRC 254.

¹¹³⁰ Submissions 14, 15.

a provision clarifies ‘what otherwise might be a confusing situation’.¹¹³¹

10.162 The Queensland Law Society offered qualified support for the adoption of a provision of this kind, commenting that:¹¹³²

This would be in order as long as the distinction between that property and the general property of the estate is preserved so far as claims of creditors and family provision applicants is concerned.

10.163 The adoption of a provision to the effect of section 46B of the *Probate and Administration Act 1898* (NSW) was opposed by the Public Trustee of South Australia, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia.¹¹³³

The National Committee’s view

10.164 Even if the model legislation did not include a provision that deems a testator to be entitled, at his or her death, to property that passes under a gift contained in the testator’s will that operates as an appointment under a general power to appoint by will, property so appointed by the testator’s will would be liable in equity for the payment of the testator’s debts if the testator’s estate were otherwise insufficient.¹¹³⁴ However, where it is necessary for a personal representative to realise appointed property in order to pay the debts and liabilities of the testator’s estate, such a provision clarifies the basis on which a personal representative is entitled to call for the appointed property.

10.165 Further, the inclusion of such a provision ensures that, where property passes under a will that exercises a general power, the appointed property is available to meet a family provision claim made in respect of the testator’s estate. In jurisdictions that do not otherwise make appointed property available to meet such a claim,¹¹³⁵ this can have important consequences, especially where the main asset disposed of by the will is property the subject of a general power of appointment.

1131 Submission 14. As noted at [10.153] above, there is an equivalent provision in the ACT legislation.

1132 Submission 8. However, as noted earlier, in Queensland, the court may, on a family provision application, order that provision be made out of the estate of the deceased, which includes, for that purpose, ‘property over which the deceased exercises or is entitled to exercise a general power of appointment by will’: *Succession Act 1981* (Qld) s 5B. In relation to the claims of creditors, where the deceased has actually exercised the general power of appointment, the property the subject of the power is already liable in equity for the payment of the deceased’s debts to the extent to which his or her estate is otherwise insufficient.

1133 Submissions 4, 6, 7.

1134 See [15.21] in vol 2 of this Report.

1135 The family provision legislation in some jurisdictions enables the court to make provision out of property that is appointed in exercise of a general power of appointment (or in some cases, in exercise of a special power of appointment). See, for example, *Family Provision Act 1969* (ACT) s 13(1); *Family Provision Act* (NT) s 13(1); *Succession Act 1981* (Qld) ss 5B, 41 (which together enable the court to make provision out of property in respect of which the deceased exercises, or is entitled to exercise, a general power of appointment by will).

10.166 The adoption of a provision to this effect would also be consistent with, and complement, the National Committee's recommendations in its Family Provision Report. In that Report, the National Committee recommended the adoption of provisions to the effect of sections 21–29 of the *Family Provision Act 1982* (NSW), under which the court could designate certain property as part of the deceased's notional estate, and order that provision be made out of the notional estate so designated.¹¹³⁶ Under those provisions, the court had the power in certain circumstances to designate property as part of the deceased's notional estate if the deceased held a power of appointment in respect of the property, but failed to exercise the power before his or her death.¹¹³⁷

10.167 A possible disadvantage of adopting such a provision, at least where the appointed property consists of real property, is that additional costs might be incurred if it were necessary to register the property in the name of the testator's personal representative before registering a transfer to the appointee (assuming that the appointed property was not required to pay the testator's debts or to meet a family provision order).¹¹³⁸ However, this is arguably no different from the position that applies in all jurisdictions in relation to real property to which the deceased was beneficially entitled. Such property now vests in the personal representative (either on death or on grant), rather than vesting directly in the devisee, as it did at common law.

10.168 For these reasons, the National Committee is of the view that the model legislation should provide that a testator is taken to have been entitled, at his or her death, to any interest in property passing under a gift contained in his or her will that operates as an appointment under a general power to appoint by will.¹¹³⁹

1136 *Family Provision Report* (1997) Ch 6. The *Family Provision Act 1982* (NSW) was repealed when the *Succession Amendment (Family Provision) Act 2008* (NSW) commenced on 1 March 2009. Sections 21–29 of the *Family Provision Act 1982* (NSW) have been replaced by ss 74–90 of the *Succession Act 2006* (NSW).

1137 See *Family Provision Act 1982* (NSW) ss 22(1), (4)(a), (7), 23, which have been repealed and replaced by ss 75(1), (3), 76(2)(a), 80 of the *Succession Act 2006* (NSW). See also the provisions of the model family provision legislation that gave effect to these provisions: Draft Family Provision Bill 2004 cll 26(1), (3), 27(2)(a), 31.

1138 Depending on the real property legislation in the jurisdiction in question, it may be possible for the property to be registered in the name of the appointee without first being registered in the name of the personal representative: see, for example, *Real Property Act 1900* (NSW) s 93; *Land Title Act 1994* (Qld) s 112.

1139 This is similar to s 6(2) of the *Administration and Probate Act 1935* (Tas), except that, whereas the Tasmanian provision is expressed to apply in respect of real property, the model provision applies in respect of both real and personal property.

RECOMMENDATIONS***Vesting of property on the death of a person***

10-1 The model legislation should include a provision to the general effect of section 45(1) of the *Succession Act 1981* (Qld), and provide:¹¹⁴⁰

- (a)** that property to which a person was entitled for an interest not ceasing on the person's death (other than property of which the person was a trustee) vests, on the person's death:
 - (i)** if only one executor survives the person — in the surviving executor; or
 - (ii)** if more than one executor survives the person — in the surviving executors as joint tenants;
- (b)** that:
 - (i)** if any, but not all, of the executors lack legal capacity to act as executor, the property vests in the executor or executors who have legal capacity and, if more than one, as joint tenants; or
 - (ii)** if the executor, or all of the executors, lack legal capacity to act as executor, the property vests in the public trustee (or the statutory equivalent); and
- (c)** that if a person dies:
 - (i)** without leaving a will; or
 - (ii)** leaving a will appointing one or more executors, none of whom survives the person;the person's property vests, on the person's death, in the public trustee (or the statutory equivalent); and
- (d)** that the provisions giving effect to these recommendations apply despite a testamentary disposition to the contrary.

See Administration of Estates Bill 2009 cl 200.

1140

See [10.48]–[10.54] above.

Vesting of property of which a deceased person was trustee

10-2 As the model provision based on section 45(1) of the *Succession Act 1981* (Qld) does not apply to property of which the deceased person was trustee (except as provided for by Recommendations 10-7 to 10-9), individual jurisdictions may need to amend their trustee legislation to deal with the vesting of trust property.¹¹⁴¹

Vesting of a deceased person's property when a grant is made

10-3 The model legislation should include a provision to the effect of section 45(2) of the *Succession Act 1981* (Qld), and provide that, on the granting of probate of the will or letters of administration of the estate of a deceased person, the property that vested on the deceased person's death in his or her executor or in the public trustee (or the statutory equivalent):

- (a) is divested from the executor or the public trustee (or the statutory equivalent); and
- (b) vests in:
 - (i) the person to whom the grant is made; or
 - (ii) if the grant is made to more than one person — the persons to whom the grant is made as joint tenants.¹¹⁴²

See Administration of Estates Bill 2009 cl 202(1).

Vesting of a deceased person's property when a grant is revoked, ends or ceases to have effect

10-4 The model legislation should include a provision to the effect of section 45(3) of the *Succession Act 1981* (Qld), and provide that, if any grant is revoked, ends or ceases to have effect, any property of the deceased person that is vested at that time in the person to whom the grant was made:

- (a) on the revocation, ending or ceasing of effect, is divested from the person; and

¹¹⁴¹ See [10.64]–[10.66] above.

¹¹⁴² See [10.69] above.

- (b) on the making of a subsequent grant, vests in:
- (i) the person to whom the subsequent grant is made; or
 - (ii) if a subsequent grant is made to more than one person — the persons to whom the grant is made as joint tenants.¹¹⁴³

See Administration of Estates Bill 2009 cl 202(2), sch 3 dictionary (definitions of 'ceases to have effect', 'revoke').

10-5 The model legislation should include a provision to the effect of section 45(3) of the *Succession Act 1981* (Qld), and provide that, if there is any interval of time between the revocation, ending or ceasing of effect of the grant and the making of a subsequent grant, the deceased person's property vests in the public trustee (or the statutory equivalent) until the making of the subsequent grant.¹¹⁴⁴

See Administration of Estates Bill 2009 cl 202(3).

Relation back of title of executor, administrator or executor or administrator by representation

10-6 The model legislation should include a provision to the effect of section 45(4) of the *Succession Act 1981* (Qld), except that the model provision should provide not only for the relation back of the title of an administrator, but also for the relation back of the title of:

- (a) an executor to whom a grant of probate is made; and
- (b) a person who becomes the executor or administrator by representation of the will or estate of a deceased person.¹¹⁴⁵

See Administration of Estates Bill 2009 cl 206.

1143 See [10.70] above.

1144 See [10.71] above.

1145 See 10.78]–[10.81] above.

Vesting of a deceased person's unadministered property on the death of the deceased person's personal representative

10-7 The model legislation should provide that, on the death of a deceased person's last surviving, or sole, personal representative, any property of the deceased person that is vested in the personal representative vests in the public trustee (or the statutory equivalent).¹¹⁴⁶

See Administration of Estates Bill 2009 cl 203(1), (2).

10-8 The model legislation should provide that if, after the unadministered property vests in the public trustee (or the statutory equivalent), the Supreme Court makes a grant of the deceased person's unadministered estate, the deceased person's unadministered property:

- (a) is divested from the public trustee (or the statutory equivalent); and
- (b) vests in:
 - (i) the person to whom the grant is made; or
 - (ii) if the grant is made to more than one person — the persons to whom the grant is made as joint tenants.¹¹⁴⁷

See Administration of Estates Bill 2009 cl 203(3).

10-9 The model legislation should provide that the provisions that give effect to Recommendations 10-7 and 10-8¹¹⁴⁸ apply notwithstanding the relevant provision in the jurisdiction that deals with the vesting of trust property [in Queensland, *Trusts Act 1973* (Qld), section 16].¹¹⁴⁹

See Administration of Estates Bill 2009 cl 203(4).

¹¹⁴⁶ See [10.91]–[10.93] above.

¹¹⁴⁷ See [10.94] above.

¹¹⁴⁸ See Administration of Estates Bill 2009 cl 203(1)–(3).

¹¹⁴⁹ See [10.95] above.

Vesting of property in a person who becomes an executor or administrator by representation

10-10 The model legislation should provide that, if a person becomes the executor or administrator by representation of a deceased person's will or estate, on the happening of that event the deceased person's unadministered property:

- (a)** is divested from:
 - (i)** if it is vested in the public trustee (or the statutory equivalent) — the public trustee (or the statutory equivalent); or
 - (ii)** if it is vested in another person — the other person; and
- (b)** vests in:
 - (i)** the executor or administrator by representation; or
 - (ii)** if there is more than one executor or administrator by representation — the executors or administrators by representation as joint tenants.¹¹⁵⁰

See Administration of Estates Bill 2009 cl 204.

Vesting of property when an executor by representation ceases to hold office because a further grant of probate is made to a previously non-proving executor of the deceased's will

10-11 The model legislation should provide that, if a person ceases to be an executor or administrator by representation of the will or estate of a deceased person because the court makes a grant of probate to a person under the provision that gives effect to Recommendation 7-11,¹¹⁵¹ any property of the deceased person that is vested in the executor or administrator by representation:

- (a)** is divested from the executor or administrator by representation; and

¹¹⁵⁰ See [10.97] above.

¹¹⁵¹ See Administration of Estates Bill 2009 cl 341, which gives effect to Recommendation 7-11.

- (b) vests in:**
- (i) the person to whom probate is granted; or**
 - (ii) if probate is granted to more than one person — the persons to whom probate is granted as joint tenants.¹¹⁵²**

See Administration of Estates Bill 2009 cl 205(1)–(2).

Vesting of property when an executor or administrator by representation ceases to hold office because letters of administration are granted of the deceased person's estate

10-12 The model legislation should provide that, if a person ceases to be an executor or administrator by representation of the will or estate of a deceased person because the court grants letters of administration to a person under the provisions that give effect to Recommendations 7-12 to 7-14¹¹⁵³ or Recommendation 7-15,¹¹⁵⁴ any property of the deceased person that is vested in the executor or administrator by representation vests in:

- (a) the person to whom letters of administration are granted; or**
- (b) if letters of administration are granted to more than one person — the persons to whom letters of administration are granted as joint tenants.¹¹⁵⁵**

See Administration of Estates Bill 2009 cl 205(1), (3).

1152 See [10.100]–[10.102] above.

1153 See Administration of Estates Bill 2009 cl 350, which gives effect to Recommendations 7-12 to 7-14. See also cl 342, which deals with the cessation of the office of executor or administrator by representation when a grant is made in these circumstances.

1154 See Administration of Estates Bill 2009 cl 351, which gives effect to Recommendation 7-15. See also cl 342, which deals with the cessation of the office of executor or administrator by representation when a grant is made in these circumstances.

1155 See [10.103]–[10.108] above.

Vesting of property when an executor or administrator by representation ceases to hold office because the grant in relation to the deceased personal representative's will or estate is revoked, ends or ceases to have effect

10-13 The model legislation should provide that:¹¹⁵⁶

- (a) if a person who is the last surviving, or sole, executor or administrator by representation of the will or estate of a deceased person ceases to hold office because of the provision that gives effect to Recommendation 7-17,¹¹⁵⁷ other than because of the operation of the provision that gives effect to Recommendation 38-3,¹¹⁵⁸ any property of the deceased person that is vested in the executor or administrator by representation:
 - (i) is divested from the executor or administrator by representation; and
 - (ii) vests in the public trustee (or the statutory equivalent); and
- (b) if all of the executors or administrators by representation of the will or estate of a deceased person cease to hold office because of the provision that gives effect to Recommendation 7-17, other than because of the operation of the provision that gives effect to Recommendation 38-3, any property of the deceased person that is vested in the executors or administrators by representation:
 - (i) is divested from the executors or administrators by representation; and
 - (ii) vests in the public trustee (or the statutory equivalent).

See Administration of Estates Bill 2009 cl 205(4)–(7).

¹¹⁵⁶ See [10.109]–[10.114] above.

¹¹⁵⁷ See Administration of Estates Bill 2009 cl 343, which gives effect to Recommendation 7-17. The effect of cl 343 is that, if a person is the holder of a grant of a deceased personal representative's estate and the grant is revoked, ends or ceases to have effect, the person ceases to be an executor or administrator by representation of any will or estate of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation.

¹¹⁵⁸ See Administration of Estates Bill 2009 cl 335, which gives effect to Recommendation 38-3. The effect of cl 335 is that, in the specified circumstances, a grant made in the enacting jurisdiction ceases to have effect if an interstate grant is made and endorsed by the court making it to the effect that the deceased person died domiciled in the interstate jurisdiction in which the court is situated.

Vesting of property when an executor or administrator by representation renounces the executorship, or administratorship, by representation

10-14 The model legislation should provide that:¹¹⁵⁹

- (a) if a person who is the last surviving, or sole, executor or administrator by representation of the will or estate of a deceased person ceases to hold office because of the provision that gives effect to Recommendation 7-9,¹¹⁶⁰ any property of the deceased person that is vested in the executor or administrator by representation:**
 - (i) is divested from the executor or administrator by representation; and**
 - (ii) vests in the public trustee (or the statutory equivalent); and**

- (b) if all of the executors or administrators by representation of the will or estate of a deceased person cease to hold office because of the provision that gives effect to Recommendation 7-9, any property of the deceased person that is vested in the executors or administrators by representation:**
 - (i) is divested from the executors or administrators by representation; and**
 - (ii) vests in the public trustee (or the statutory equivalent).**

See Administration of Estates Bill 2009 cl 205(4)–(7).

¹¹⁵⁹ See [10.115]–[10.117] above.

¹¹⁶⁰ See Administration of Estates Bill 2009 cl 344, which gives effect to Recommendation 7-9. The effect of cl 344 is that, if a person is the holder of a grant of a deceased personal representative's estate and renounces the executorship or administratorship by representation of the will or estate of any deceased person of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation, the person stops being an executor or administrator by representation of the deceased person's will and of any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.

Divesting of property vested in the public trustee

10-15 If the unadministered property of a deceased person vests in the public trustee (or the statutory equivalent) under the provisions that give effect to Recommendations 10-13 and 10-14, on the making of a grant of the deceased's person's estate to another person, the unadministered estate:

- (a) is divested from the public trustee (or the statutory equivalent); and
- (b) vests in:
 - (i) the person to whom the grant is made; or
 - (ii) if the grant is made to more than one person, the persons to whom the grant is made as joint tenants.¹¹⁶¹

See Administration of Estates Bill 2009 cl 205(8).

Vesting of property when some, but not all, of the executors or administrators by representation cease to hold office

10-16 The model legislation should provide that, if one or more, but not all, of the executors or administrators by representation of a deceased person's will or estate stop holding office for any reason (the '*outgoing representatives*'), on the happening of that event, the deceased person's unadministered property, to the extent it is vested in the outgoing representatives:

- (a) is divested from the outgoing representatives; and
- (b) vests in:
 - (i) if only one person continues to be an executor or administrator by representation — the person; or
 - (ii) if more than one person continues to be an executor or administrator by representation — the persons as joint tenants.¹¹⁶²

See Administration of Estates Bill 2009 cl 205(9).

¹¹⁶¹ See [10.118]–[10.120] above.

¹¹⁶² See [10.122]–[10.123] above.

The position of the public trustee (or the statutory equivalent) when property is vested in the public trustee (or the statutory equivalent) pending the making of a grant or a further grant

10-17 The model legislation should include a provision to the effect of section 45(4A) and (6) of the *Succession Act 1981* (Qld), except that the model provision should apply when property is vested in the public trustee (or the statutory equivalent) under the provisions giving effect to Recommendations 10-1, 10-5, 10-7, 10-13 or 10-14.¹¹⁶³

See Administration of Estates Bill 2009 cl 207.

Vesting of property appointed by will in the exercise of a general power of appointment

10-18 The model legislation should provide that, for the purpose of the provisions dealing with the vesting of property, a deceased person is taken to have been entitled, at his or her death, to any interest in property in relation to which a disposition in the deceased's will operates as an exercise of a general power of appointment.¹¹⁶⁴

See Administration of Estates Bill 2009 cl 201.

1163 See [10.145]–[10.147] above.

1164 See [10.164]–[10.168] above.

Chapter 11

Rights and duties of a personal representative

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INTRODUCTION

11.1 This chapter examines the rights and duties of personal representatives. In considering the duties to which personal representatives should be subject, the National Committee has been mindful of the costs and inconvenience that some of the existing mandatory duties have the potential to impose on estates and personal representatives — especially in those jurisdictions where there is a requirement for the routine filing of inventories and accounts. At the same time, the National Committee has been concerned to protect the interests of beneficiaries and other persons who may be concerned about the administration of an estate. With that objective in mind, the National Committee has sought to clarify the duty of personal representatives to maintain documents about the administration of an estate and to provide beneficiaries and other specified persons with a mechanism to obtain access to the documents that must be maintained by personal representatives.

ASSIMILATION OF THE RIGHTS AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS

Existing legislative provisions

11.2 The legislation in the ACT, New South Wales, Queensland and Victoria expressly assimilates the rights and liabilities of administrators with the rights and liabilities of executors.¹¹⁶⁵

11.3 Section 50 of the *Succession Act 1981* (Qld), which is typical, provides:

50 Rights and liabilities of administrators

Subject to any provision contained in the grant every person to whom administration of the estate of a deceased person is granted shall have the same rights and liabilities and be accountable in like manner as if the person were the executor of the deceased.

Discussion Paper

11.4 In the Discussion Paper, the National Committee expressed the view that it was generally desirable to assimilate the rights and liabilities of administrators with those of executors.¹¹⁶⁶ It therefore proposed that a provision to the effect of section 50 of the *Succession Act 1981* (Qld) should be included in the model legislation.¹¹⁶⁷

¹¹⁶⁵ *Administration and Probate Act 1929* (ACT) s 13; *Imperial Acts Application Act 1969* (NSW) s 14; *Succession Act 1981* (Qld) s 50; *Administration and Probate Act 1958* (Vic) s 27. The liability of personal representatives in respect of specific conduct is considered in Chapter 14 of this Report.

¹¹⁶⁶ *Administration of Estates Discussion Paper* (1999) QLRC 57; NSWLRC [8.16].

¹¹⁶⁷ *Ibid*, QLRC 58; NSWLRC 87 (Proposal 24).

Submissions

11.5 All the submissions that addressed this issue — namely, the Bar Association of Queensland, the National Council of Women of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies — agreed that the model legislation should include a provision to the effect of section 50 of the *Succession Act 1981* (Qld).¹¹⁶⁸

The National Committee's view

11.6 The National Committee remains of the view that it is desirable for the rights and liabilities of administrators to be assimilated with the rights and liabilities of executors. The model legislation should therefore include a provision to the effect of section 50 of the *Succession Act 1981* (Qld).

STATUTORY EXPRESSION OF THE PRINCIPAL DUTIES OF A PERSONAL REPRESENTATIVE

Background

11.7 In Chapter 9 of this Report, the National Committee explained how, in England, administration bonds were abolished by the *Administration of Estates Act 1971* (UK), and replaced with a requirement for a guarantee to be given by a surety in certain circumstances.¹¹⁶⁹ That change implemented a recommendation made by the Law Commission of England and Wales in its 1970 Report on administration bonds and related matters.¹¹⁷⁰ The Law Commission noted that one of the purposes said to be served by administration bonds was that they repeated the duties of an administrator.¹¹⁷¹ However, it considered that the statement of duties in the bond was 'largely repetitive of the statement in the oath (which every administrator or executor has to make), and merely summarise[d] the duties falling on personal representatives under the general law',¹¹⁷² namely:¹¹⁷³

¹¹⁶⁸ Submissions 1, 3, 8, 11, 12, 14, 15.

¹¹⁶⁹ See *Supreme Court of Judicature (Consolidation) Act 1925* (UK) s 167, which was substituted by s 8 of the *Administration of Estates Act 1971* (UK). The *Supreme Court of Judicature (Consolidation) Act 1925* (UK) was subsequently repealed by the *Supreme Court Act 1981* (UK) s 152(4), sch 7.

¹¹⁷⁰ Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [12]–[15], [20] Recommendations (d), (e).

¹¹⁷¹ *Ibid* [10].

¹¹⁷² *Ibid*.

¹¹⁷³ *Ibid*.

- (a) Well and truly to administer the estate according to law.
- (b) To make or cause to be made a true and perfect inventory when lawfully called on to do so and to exhibit the same to the Probate Registry when required by law to do so.
- (c) To make a true and just account of the administration, whenever required by law to do so.
- (d) If the grant is to be obtained on the basis that the deceased died intestate, to deliver up the grant if a will is discovered and proof of it is sought.

11.8 The Law Commission observed that ‘duties (a) and (d) are nowhere laid down by statute but depend on common law and equity and, in the case of (d), the inherent powers of the court’.¹¹⁷⁴ It also considered it anomalous ‘that (d), unlike the others, is not repeated in the oath and is required to be stated in the bond only when administration is obtained on the basis of an intestacy’.¹¹⁷⁵ As the Commission observed, where ‘administration is granted with a will annexed or probate is granted of a will and a later will subsequently comes to light it may be equally necessary to require the delivering up of the grant’.¹¹⁷⁶

11.9 The Law Commission concluded that the statement of duties did not justify the retention of administration bonds.¹¹⁷⁷ However, it recommended that ‘it would make for simplicity and aid understanding if section 25 of the *Administration of Estates Act* were amended so as to state clearly and in modern language all four of the personal representatives’ duties in these respects’.¹¹⁷⁸

11.10 Section 25 of the *Administration of Estates Act 1925* (UK), which was substituted in 1971,¹¹⁷⁹ now collects the principal duties of a personal representative in a single provision:

25 Duty of personal representative

The personal representative of a deceased person shall be under a duty to—

- (a) collect and get in the real and personal estate of the deceased and administer it according to law;
- (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

1174 Ibid.

1175 Ibid.

1176 Ibid.

1177 Ibid.

1178 Ibid [11].

1179 See *Administration of Estates Act 1971* (UK) s 9.

- (c) when required to do so by the High Court, deliver up the grant of probate or administration to that court.

Existing legislative provisions

11.11 The Western Australian legislation includes a provision setting out the principal duties of a personal representative. Section 43(1) of the *Administration Act 1903* (WA), which was re-enacted in 1976,¹¹⁸⁰ is expressed in similar terms to section 25 of the *Administration of Estates Act 1925* (UK).

11.12 In Queensland, a number of a personal representative's duties have also been expressed in a single provision. Section 52 of the *Succession Act 1981* (Qld) provides relevantly:

52 The duties of personal representatives¹¹⁸¹

- (1) The personal representative of a deceased person shall be under a duty to—
- (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
 - (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
 - (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
 - (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be; and
 - (e) pay interest upon any general legacy—
 - (i) from the first anniversary of the death of the testator until payment of the legacy; or
 - (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy;

at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.

¹¹⁸⁰ See *Administration Act Amendment Act 1976* (WA) s 11.

¹¹⁸¹ The duties set out in s 52(1)(b) and (e) are considered separately at [11.23]–[11.24] and [11.106]–[11.109] below (inventories and accounts) and at [18.103]–[18.105], [18.133]–[18.134] in vol 2 of this Report (payment of interest on general legacies).

- (1A) Nothing in subsection (1) abrogates any rule or practice deriving from the principle of the executor's year or any rule or practice under which a beneficiary is entitled to receive interest upon any legacy from the date of the testator's death. (note added)

11.13 This provision gave effect to a recommendation made by the Queensland Law Reform Commission in its 1978 Report that it was desirable for the legislation to set out the duties of a personal representative and that, subject to certain modifications (which are discussed later in this chapter), the provision should be based on section 25 of the *Administration of Estates Act 1925* (UK), which had been substituted in 1971.¹¹⁸² The Commission stated that it had added paragraph (d) 'to restore to the law the provision of the *Statute of Distributions of 1670* that the personal representative is not under a duty to distribute the estate less than a year after the death of the deceased', but had couched the provision in positive terms.¹¹⁸³

Discussion Paper

11.14 In the Discussion Paper, the National Committee proposed that the model legislation should set out the general duties of a personal representative by including a provision to the effect of section 52(1) of the *Succession Act 1981* (Qld), as modified by the National Committee's recommendations in relation to particular duties.¹¹⁸⁴

Submissions

11.15 The proposal to set out the general duties of a personal representative was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Queensland Law Society, an academic expert in succession law and the ACT Law Society.¹¹⁸⁵ The last of these respondents commented:¹¹⁸⁶

It reminds all personal representatives of their duty, even though it will be read in the main part by solicitors who presumably know what the duties are.

11.16 However, the proposal was opposed by the Public Trustee of New South Wales and the New South Wales Law Society.

1182 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 36.

1183 Ibid. The English *Statute of Distributions of 1670* (22 & 23 Car II c 10) prescribed the manner in which the estate of an intestate was to be distributed and was the forerunner of the modern intestacy rules. Section 5 of the Act provided that, so that due regard can be had to creditors, no distribution of the goods of any person dying intestate is to be made until the expiry of one year after the intestate's death.

1184 *Administration of Estates Discussion Paper* (1999) QLRC 69; NSWLRC 101 (Proposal 29).

1185 Submissions 1, 3, 8, 12, 14.

1186 Submission 14.

11.17 The Public Trustee of New South Wales considered that the proposed provision would be of little use:¹¹⁸⁷

The duty of the personal representative is to well and truly administer the estate in a prudent and equitable manner.

To attempt an itemised statement of duties would result in an exhaustive list that would be too lengthy or a list that would be inadequate. S 52(1), *Succession Act 1981* (Qld) the recommended model does not refer to debt payments and debt priorities, investment of funds prudently, and refers to general legacies but does not explain that form of legacy and the other forms of legacies.

[The proposal] seems to achieve little and is not supported.

11.18 The New South Wales Law Society opposed the National Committee's proposal on the basis that the matters addressed under the proposed provision were already to be provided for separately in the model legislation.¹¹⁸⁸

The National Committee's view

11.19 In the National Committee's view, it is desirable for the model legislation to state expressly the principal duties of a personal representative. For that reason, the National Committee is of the view that the model legislation should include provisions to the effect of section 52(1)(a), (c) and (d) of the *Succession Act 1981* (Qld). Although professional personal representatives should be aware of these duties, the statutory expression of these duties emphasises their importance, as well as serving to inform lay personal representatives of their duties.

THE DUTY TO FILE AN INVENTORY

11.20 All Australian jurisdictions have provisions dealing with a personal representative's duty to file an inventory of the estate.

11.21 In Queensland, the duty arises when a personal representative is required by the court to file an inventory. In all other jurisdictions, there is a mandatory requirement to file an inventory when applying for a grant, coupled (in some cases) with a requirement to file a further inventory if undisclosed assets are subsequently discovered. In addition, the legislation in New South Wales and South Australia prohibits the disposition by a personal representative or trustee of assets that have not been disclosed to the court.

11.22 The different approaches are considered below.

1187 Submission 11.

1188 Submission 15.

Court-ordered inventories

Queensland

11.23 In Queensland, a personal representative is under a duty to:¹¹⁸⁹

when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate¹¹⁹⁰ to the court. (note added)

11.24 This provision was recommended by the Queensland Law Reform Commission in its 1978 Report.¹¹⁹¹ It was modelled on the English provision that was introduced in 1971.¹¹⁹²

Mandatory inventories

Australian Capital Territory

11.25 In the ACT, the legislation provides that the rules may require the executor or administrator of the estate of a deceased person to file an inventory of the estate.¹¹⁹³ Under the rules, a person who applies for a grant must annexe an inventory of the property of the estate to the affidavit filed in support of the application.¹¹⁹⁴

11.26 The legislation further provides that the Supreme Court may, by order, require the executor or administrator of the estate of a deceased person to file an inventory of the estate.¹¹⁹⁵

New South Wales

11.27 The New South Wales legislation contains quite detailed provisions in relation to inventories.

¹¹⁸⁹ *Succession Act 1981* (Qld) s 52(1)(b). Until the *Rules of the Supreme Court 1900* (Qld) were amended in 1978, every person to whom a grant was made was required to file an inventory within six months after the date of the grant, and to file a further inventory if additional estate came into the personal representative's hands or came to the personal representative's knowledge: *Rules of the Supreme Court 1900* (Qld) O 73 r 1. That rule was repealed by Order in Council dated 9 February 1978: see *Queensland Government Gazette* 11 February 1978, 492. This followed the abolition of succession duty in Queensland from 1 January 1977: see note 1140 in vol 3 of this Report.

¹¹⁹⁰ The duty to render an account when required to do so is considered separately at [11.106]–[11.109] below.

¹¹⁹¹ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 36.

¹¹⁹² *Administration of Estates Act 1925* (UK) s 25(b), substituted by s 9 of the *Administration of Estates Act 1971* (UK).

¹¹⁹³ *Administration and Probate Act 1929* (ACT) s 58(1)(a).

¹¹⁹⁴ *Court Procedures Rules 2006* (ACT) r 3010(6)(c).

¹¹⁹⁵ *Administration and Probate Act 1929* (ACT) s 58(2)(a).

11.28 Section 81A of the *Probate and Administration Act 1898* (NSW) applies to the administration of the estate of a person who dies on or after 31 December 1981.¹¹⁹⁶ Under this provision, the duty to file an inventory has two aspects. In the first instance, a person who applies for a grant must, in accordance with the rules, disclose to the court both the assets and the liabilities of the deceased.¹¹⁹⁷ In addition, an executor, administrator or trustee of an estate must, in accordance with the rules, disclose to the court any assets and liabilities of the deceased that have not previously been disclosed to the court.¹¹⁹⁸ As a result of the latter provision, an executor, administrator or trustee is subject to a continuing duty of disclosure.

11.29 Although section 81A is expressed to require disclosure of ‘the assets and liabilities of the deceased’, commentators on the New South Wales legislation suggest that the provision requires only the disclosure of New South Wales assets.¹¹⁹⁹

11.30 Section 85(5) of the *Probate and Administration Act 1898* (NSW) also contains a requirement in relation to the filing of an inventory:

Every executor, administrator or trustee of the estate of a deceased person shall verify and file an inventory of the estate of the deceased within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

11.31 The New South Wales legislation also contains a provision that prohibits an executor, administrator or trustee from disposing of estate assets that have not been disclosed to the court in accordance with section 81A of the Act. Section 81B provides:

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In New South Wales, the payment of death duty was abolished in respect of the estates of persons dying on or after 31 December 1981: see *Stamp Duties (Further Amendment) Act 1980* (NSW) and the discussion of this issue at [35.127]–[35.132] in vol 3 of this Report. It has been suggested that the abolition of succession duty in that State was the impetus for the enactment of s 81A of the *Probate and Administration Act 1898* (NSW) (see L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1413.1] (at 20 February 2009)):

Section 81A is the first of the substantial amendments to the Act effected by the *Wills, Probate and Administration (Amendment) [Act] 1981* operative on and from 31 December 1981. ... Most of the amendments flow from the abolition of death duty in New South Wales in respect of the estates of persons dying on or after 31 December 1981. As long as death duty was payable, s 122 of the *Stamp Duties [Act] 1920* prohibited most dealings with estate assets unless those assets were disclosed to the Commissioner of Stamp Duties and, in consequence, to persons interested in the estate.

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Probate and Administration Act 1898 (NSW) s 81A(1). Pt 78 r 24 of the *Supreme Court Rules 1970* (NSW), which deals with evidence in support of an application for probate, requires the application to be supported by affidavit in Form 97. The affidavit is to annexe a statement of the deceased’s assets (Form 96 — Inventory of property) and list the liabilities of the deceased of which the executor is aware. Similarly, Pt 78 r 24A of the *Supreme Court Rules 1970* (NSW), which deals with evidence in support of an application for administration, requires the application to be supported by affidavit in Form 98. The affidavit is to annexe a statement of the deceased’s assets (Form 96 — Inventory of property) and list the liabilities of the deceased of which the applicant is aware.

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Probate and Administration Act 1898 (NSW) s 81A(2).

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RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 544.

81B Power to deal with assets etc

- (1) Nothing in this Part enables an executor, administrator or trustee of the estate of a person who dies on or after 31 December 1981 to complete the disposition of, and such an executor, administrator or trustee shall not complete the disposition of, any property of the deceased vested in the deceased¹²⁰⁰ which has not been disclosed to the Court pursuant to section 81A (1) or (2).
- (2) Nothing in subsection (1) prevents an executor or administrator from effecting an appointment pursuant to section 75A.
- (3) Nothing in subsection (1) affects any interest in any property acquired from an executor, administrator or trustee referred to in that subsection by a person where the interest was acquired in good faith, for valuable consideration and without notice that the property had not been disclosed to the Court pursuant to section 81A (1) or (2). (note added)

Northern Territory

11.32 In the Northern Territory, the rules provide that an applicant for a grant of probate or administration must file an affidavit of the deceased's assets and liabilities in the prescribed form.¹²⁰¹

South Australia

11.33 In South Australia, there are detailed provisions in relation to the disclosure of the assets and liabilities of estates.

11.34 Section 121A of the *Administration and Probate Act 1919* (SA) provides:

121A Statement of assets and liabilities to be provided with application for probate or administration

- (1) A person who applies—
 - (a) for probate or administration; or
 - (b) for the sealing of any probate or administration granted by a foreign court,

in respect of the estate of a deceased person shall, in accordance with the rules, disclose to the Court the assets and liabilities of the deceased person known to him at the time of making the application.

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Commentators on the New South Wales legislation suggest that this reference to 'the deceased' was inserted in error, and that the provision is intended to refer to 'property of the deceased vested in the executor, administrator or trustee': see RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 545.

1201

Supreme Court Rules (NT) r 88.27.

- (2) An executor, administrator or trustee of the estate of a deceased person (being an estate in respect of which probate or administration has been granted or sealed by the Court) shall, in accordance with the rules, disclose to the Court any assets or liabilities of the deceased person (not being assets or liabilities previously disclosed under this section) which come to his knowledge while acting in that capacity.
- (2a) Where the deceased person was not, at the time of death, domiciled in Australia, the disclosure under subsection (1) or (2) is only required in respect of—
- (a) assets situated in Australia; and
 - (b) liabilities that are a charge on those assets or arose in Australia.
- (3) An executor, administrator or trustee of an estate shall not dispose of an asset of the estate in respect of which disclosure has not been made to the Court pursuant to this section.
- (4) Nothing in subsection (3) affects the interests of a person who acquires an asset of an estate in good faith for valuable consideration and without knowing that the asset has not been disclosed to the Court pursuant to this section.
- (5) An executor, administrator or trustee who contravenes or fails to comply with a provision of this section is guilty of a summary offence and liable to a penalty not exceeding two thousand dollars.
- (6) This section does not apply in respect of an estate of a deceased person who died before the commencement of this section.
- (7) A reference in this section to the assets and liabilities of a deceased person is a reference to—
- (a) assets and liabilities of the deceased at the date of his death; and
 - (b) assets falling into the estate after the death of the deceased not being an accretion to the estate arising out of an asset existing at the date of his death,
- but does not include a reference to any asset or liability prescribed by the rules.
- (7a) For the purposes of subsection (2a), if—
- (a) it is uncertain whether an asset is situated, or a liability arose, in Australia or elsewhere; or
 - (b) an asset is situated, or a liability arose, in part in Australia and in part elsewhere,

the asset will be taken to be situated, or the liability will be taken to have arisen in Australia.

(8) In this section—

administration includes an order under section 9 of the *Public Trustee Act 1995* authorising the Public Trustee to administer the estate of a deceased person.

11.35 The disclosure requirements under section 121A of the *Administration and Probate Act 1919* (SA) are similar to those that apply under the New South Wales legislation. In the first instance, a person applying for a grant must disclose to the court, in accordance with the rules, the assets and liabilities of the deceased known to the person at the time of making the application.¹²⁰² In addition, an executor, administrator or trustee of the estate of a deceased person (being one in respect of which a grant has been made) must disclose to the court, in accordance with the rules, any assets or liabilities of the deceased person that have not previously been disclosed to the court.¹²⁰³

11.36 The prescribed affidavits of assets and liabilities and of additional assets and liabilities refer specifically to assets situated in South Australia and to assets situated outside South Australia.¹²⁰⁴

11.37 Section 121A(3) prohibits the disposal by an executor, administrator or trustee of an asset that has not been disclosed to the court in accordance with section 121A. Significantly, section 121A(5) provides that an executor, administrator or trustee who contravenes the section is guilty of a summary offence and is liable to a penalty not exceeding \$2000.¹²⁰⁵ Liability under this provision could arise not only in respect of a disposal of undisclosed assets, but also in respect of a failure to disclose assets or liabilities in accordance with the section.

11.38 As a corollary to section 121A, section 44 of the Act creates a related offence for a person who deals with an asset that has not been disclosed under section 121A. Section 44 provides:

1202 *Administration and Probate Act 1919* (SA) s 121A(1). Rule 8.01 of *The Probate Rules 2004* (SA) provides that an applicant for a grant must lodge with the application an affidavit in the prescribed form disclosing the assets and liabilities of the deceased at the date of the deceased's death that are known to the applicant at the time of making the application.

1203 *Administration and Probate Act 1919* (SA) s 121A(2). Rule 8.02 of *The Probate Rules 2004* (SA) provides that assets and liabilities not previously disclosed under r 8.01 must be disclosed by affidavit in the prescribed form.

1204 *The Probate Rules 2004* (SA) Forms 68, 69.

1205 *Administration and Probate Act 1919* (SA) s 121A(5).

44 **Obligation of person dealing with asset to ensure that it has been properly disclosed**

- (1) A person who deals with an asset of the estate of a deceased person that is required to be disclosed under section 121A must satisfy himself by examination of the Registrar's certificate,¹²⁰⁶ or on the basis of some other reliable evidence, that the asset has in fact been so disclosed.
- (2) A person who fails to comply with subsection (1) shall be guilty of a summary offence and liable to a penalty not exceeding two thousand dollars.
- (3) This section does not apply to an asset of the estate of a deceased person who died before the day on which section 121A came into operation. (note added)

Tasmania, Victoria

11.39 The Tasmanian and Victorian provisions in relation to inventories are virtually identical.¹²⁰⁷ Section 26 of the *Administration and Probate Act 1935* (Tas) provides:

The personal representative of a deceased person shall when lawfully required so to do exhibit on oath in the Court, a true and perfect inventory and account of the real and personal estate of the deceased, and the Court shall have power as heretofore to require personal representatives to bring in inventories.

11.40 In Tasmania, the rules require a person who applies for a grant to lodge with the registrar an affidavit of assets and liabilities.¹²⁰⁸ If it is subsequently found that the affidavit is inaccurate or incomplete, the applicant must lodge a further affidavit with the registrar.¹²⁰⁹

11.41 In Victoria, the rules provide that an application for a grant must be supported by affidavit, which must exhibit, so far as the registrar requires, an inventory of assets of the estate of the deceased in Victoria and elsewhere and a statement of the known liabilities of the deceased as at the date of death.¹²¹⁰

1206 Rule 9.01 of *The Probate Rules 2004* (SA) deals with the issuing of the registrar's certificate. It provides that, when an affidavit of assets and liabilities has been filed under rr 8.01 or 8.02, the registrar must issue to the executor, administrator or trustee, as evidence of disclosure for the purposes of s 44(1) of the Act, a photocopy of the statement of assets and liabilities with the registrar's certificate attached, certifying the photocopy to be a true copy of the statement of assets disclosed to the court under s 121A of the Act.

1207 *Administration and Probate Act 1935* (Tas) s 26; *Administration and Probate Act 1958* (Vic) s 28(1). The duty to render an account when lawfully required to do so is considered separately at [11.97]–[11.121] below.

1208 *Probate Rules 1936* (Tas) r 63(1).

1209 *Probate Rules 1936* (Tas) r 63(3).

1210 *Supreme Court (Administration and Probate) Rules 2004* (Vic) rr 2.04(1), (2)(d)(iii), 3.02(1)(c), 4.04(1), (2)(d)(ii).

Western Australia

11.42 In Western Australia, every person to whom probate or administration is granted is under a duty to:¹²¹¹

file an inventory of the estate of the deceased, and pass his accounts relating thereto within such time, and from time to time, and in such manner as may be prescribed by the rules or as the Court may order.

11.43 The rules require the affidavit of an applicant for a grant to exhibit and verify a statement giving particulars of:¹²¹²

- all movable property, wherever situated, and all immovable property in Western Australia, comprised in the estate of the deceased;
- the value of that property at the time of the deceased's death; and
- all debts, wherever situated, owing by the deceased at the time of his or her death.

11.44 The Law Reform Commission of Western Australia has expressed the view that the requirement under the Western Australian legislation purports to embody the substance of section 25 of the *Administration of Estates Act 1925* (UK), but 'does not in fact exactly reproduce the English model, which is drafted in a critically different way'.¹²¹³ The Commission recommended that section 43(1)(b) of the *Administration Act 1903* (WA) 'should be amended to reflect ... the law in other comparable jurisdictions', such as England, where an inventory must be filed only when required by the court.¹²¹⁴

Discussion Paper

11.45 In the Discussion Paper, the National Committee sought submissions on whether the model legislation should include a provision to the effect of section 52(1)(b) of the *Succession Act 1981* (Qld), under which a personal representative is required to file an inventory when required by the court to do so.¹²¹⁵ The National Committee also sought submissions on whether, if such a provision were to be included, it should be expressed to apply to a personal representative or to any person administering an estate.¹²¹⁶

¹²¹¹ *Administration Act 1903* (WA) s 43(1)(b). The duty to pass accounts is considered separately at [11.97]–[11.121] below.

¹²¹² *Non-contentious Probate Rules 1967* (WA) r 9B.

¹²¹³ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [3.31]. The English provision, which is almost identical to s 52(1)(b) of the *Succession Act 1981* (Qld), does not include a requirement to file an inventory in accordance with the rules.

¹²¹⁴ *Ibid* [3.32].

¹²¹⁵ *Administration of Estates Discussion Paper* (1999) QLRC 62; NSWLRC 92.

¹²¹⁶ *Ibid*.

11.46 The National Committee also expressed support for a provision to the effect of section 121A of the *Administration and Probate Act 1919* (SA),¹²¹⁷ which imposes a mandatory duty to file an inventory, but sought submissions on whether a provision to that effect would be necessary if a provision to the effect of section 52(1)(b) of the *Succession Act 1981* (Qld) were included in the model legislation.

11.47 The National Committee also sought submissions on whether the model legislation should impose a criminal sanction on a personal representative who disposed of assets that had not been disclosed in accordance with the recommended requirements.¹²¹⁸

Submissions

Court-ordered inventories

11.48 All the respondents who addressed the issue — namely, the Bar Association of Queensland, a former ACT Registrar of Probate, the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, and the Queensland, ACT and New South Wales Law Societies — were of the view that the model legislation should include a provision to the effect of section 52(1)(b) of the *Succession Act 1981* (Qld), so that a personal representative would be required to file an inventory when required by the court to do so.¹²¹⁹ However, the former ACT Registrar of Probate qualified her support by stating that the circumstances in which a full inventory is to be required should be made clear.¹²²⁰

11.49 The Trustee Corporations Association of Australia expressed its support for the Queensland provision in the following terms:¹²²¹

This would allow action if there were cause for concern, but not otherwise.

11.50 Although the New South Wales Law Society supported a requirement that a personal representative must file an inventory when required by the court to do so, it suggested that the model provision should in addition state that the inventory must be filed ‘within such time and from time to time and in such manner as may be directed’.¹²²²

1217 Ibid, QLRC 129; NSWLRC 183 (Proposal 60).

1218 Ibid, QLRC 129; NSWLRC 183.

1219 Submissions 1, 2, 4, 6, 7, 8, 14, 15.

1220 Submission 2.

1221 Submission 6.

1222 Submission 15.

Scope of the provision

11.51 All the submissions that commented on the issue were of the view that the model provision in relation to the filing of inventories should apply to any person who was administering an estate, regardless of whether a grant had been made in favour of that person.¹²²³

Mandatory inventories

11.52 There was also some support for a provision to the effect of section 121A of the *Administration and Probate Act 1919* (SA), which requires a person who applies for a grant to disclose the assets and liabilities of the estate and, after a grant has been made, to disclose assets and liabilities that later come to his or her knowledge.

11.53 The Public Trustee of South Australia and the ACT Law Society both supported a provision to the effect of the South Australian provision.¹²²⁴

11.54 The New South Wales Law Society also supported the mandatory disclosure to the court of assets and liabilities, although it was of the view that non-disclosure of property should not of itself invalidate a disposition of that property.¹²²⁵

11.55 The mandatory filing of an inventory or other information about the estate assets was strongly supported by the Public Trustee of New South Wales, although he suggested a slightly different model from the South Australian provision, proposing that the requirements for an executor should differ from those that would apply to an administrator:¹²²⁶

An executor could file an inventory or approximate value statement when seeking confirmation as executor. This would be a simple task but assist creditors and potential [family provision] applicants in deciding whether to pursue a claim. Of course the estate value at death could be greater or less at time of any [family provision] litigation.

...

If an executor is compelled to provide an accounting to the beneficiaries, the assets would be accounted for in those reports.

11.56 In relation to the duty of an administrator, however, it was suggested that:¹²²⁷

1223 Submissions 1, 4, 6, 8, 14, 15.

1224 Submissions 4, 14.

1225 Submission 15.

1226 Submission 11.

1227 Ibid.

An administrator of an intestate estate should be obliged to provide an inventory with value because the beneficial interests will be determined by the value of the estate.

11.57 The Public Trustee of New South Wales doubted whether a different obligation should apply depending on whether an estate was being administered informally or pursuant to a grant.¹²²⁸

If an inventory achieves results that are worthwhile, it seems hard to argue that an informal administration grant does not need an inventory, but a personal representative who applies should file an inventory.

11.58 However, a number of submissions raised concerns about a mandatory requirement for the filing of an inventory, such as appears in the South Australian legislation.

11.59 The Public Trustee of Queensland commented:¹²²⁹

It is noted that the Committee's reasons for the re-introduction of inventories are generally related to the availability of information to interested parties. This is a public policy issue relating to the transparency of estate administration. It adds nothing to efficiency, but will add to the time and cost involved in obtaining a grant.

11.60 The Public Trustee of Queensland also noted that the South Australian provision would not require an inventory to be filed in circumstances where an estate was being administered informally, for example, where a will had not been admitted to probate.

11.61 The adoption of a provision to the effect of section 121A of the South Australian legislation was expressly opposed by the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the New South Wales Council of the Trustee Corporations Association of Australia and Trust Company of Australia Limited.¹²³⁰

11.62 The Trustee Corporations Association of Australia expressed the view that the preparation of inventories adds to the expense of administering an estate, and suggested that, in many cases, inventories were of doubtful utility.¹²³¹

Preparation of a statement of the assets and liabilities of a deceased person, wherever those assets may be located, is a time-consuming and often onerous part of the probate process. Dispensing with this requirement would

1228 Ibid.

1229 Submission 5.

1230 Submissions 6, 7, 10, 20.

1231 Submission 6.

significantly reduce the time from death to grant of probate. The requirement for the statement goes back to the days when states levied death duties.

Western Australia has abolished this requirement for probate applications made by trustee companies. In Queensland, neither statutory trustee companies nor private executors need lodge a statement.

Moreover, statements are often inaccurate and unreliable. This is because executors have no legal right to inquire into the affairs of the deceased until they receive the grant of probate. Creditors and debtors are not obliged, therefore, to provide an intended executor with the required information. This results in the filing of incomplete statements.

11.63 Trust Company of Australia Limited expressed a similar view:¹²³²

The preparation of inventories adds another dimension of cost, is time consuming and the most onerous part of the probate process. Inventories are often incomplete and inaccurate at the time of the probate application is made, as executors have no legal right to make full enquiries until probate is granted. Creditors and debtors are not obliged to provide an intended executor with the required information.

From a historical point of view, the original rationale for the submission of inventories, being the levying of State death duties, is no longer relevant.

11.64 The Queensland Law Society did not comment specifically on whether a provision to the effect of section 121A of the South Australian legislation should be included in the model legislation, but commented generally on the advantages and disadvantages of inventories.¹²³³

11.65 It was of the view that in Queensland, where there is no longer a mandatory requirement for a personal representative to file an inventory in every case, the reintroduction of a mandatory requirement would have the following advantages:¹²³⁴

1. It gives possible family provision claimants a means of determining broadly the assets of the estate and what the beneficiaries are likely to receive.
2. Creditors would be able to ascertain whether the estate was solvent.
3. Residual beneficiaries could use it to track the administration of the estate as each asset on the inventory was dealt with.

11.66 However, the Queensland Law Society also acknowledged that the reintroduction in Queensland of a mandatory requirement to file an inventory would result in additional expense to the estate, and that such a requirement would not apply where an estate was being administered informally. The

1232 Submission 10.

1233 Submission 8.

1234 Ibid.

Queensland Law Society also commented that, unless an inventory includes all personalty, realty and liabilities, wherever situated, it is unlikely to serve an effective purpose.¹²³⁵

11.67 A number of submissions commented on whether, if a provision to the effect of section 52(1)(b) of the *Succession Act 1981* (Qld) were included in the model legislation, a provision to the effect of section 121A of the *Administration and Probate Act 1919* (SA) would still be necessary.

11.68 Most of the respondents were of the view that, if the Queensland provision were adopted in the model legislation, it would not be necessary, in addition, to include a provision to the effect of section 121A of the South Australian legislation.¹²³⁶

11.69 Only the Public Trustee of South Australia and the ACT Law Society considered it necessary to include, additionally, a provision to the effect of section 121A of the South Australian legislation.¹²³⁷ The ACT Law Society suggested that such a provision was necessary to 'cover the case of assets discovered after the grant has been made'.¹²³⁸

Dealing with undisclosed assets

11.70 As noted previously, section 81B of the *Probate and Administration Act 1898* (NSW) and section 121A(3) of the *Administration and Probate Act 1919* (SA) prohibit an executor, administrator or trustee from disposing of an asset that has not been disclosed in accordance with the relevant legislative provision.

11.71 Trust Company of Australia Limited commented that any requirement to file an inventory should not include a provision to the effect of section 121A(3) of the South Australian legislation, suggesting that compliance with such a provision could operate to the detriment of an estate:¹²³⁹

inventories can be incomplete and we submit it would be inefficient and detrimental for estates to submit further inventories prior to dealing with subsequently discovered assets. For example, delays caused by the need to file further inventories may be detrimental where the new assets involved are listed securities in volatile markets and during takeover offers. Estates and beneficiaries may suffer serious commercial and financial loss by such a requirement.

1235 Ibid.

1236 Submissions 1, 6, 7, 10, 12, 15.

1237 Submissions 4, 14.

1238 Submission 14.

1239 Submission 10.

Criminal sanctions

11.72 A number of respondents commented on section 121A(5) of the *Administration and Probate Act 1919* (SA), which provides for a criminal sanction where an executor, administrator or trustee contravenes, or fails to comply with, a provision of section 121A. Almost all of these respondents expressed the view that the model legislation should not impose a criminal sanction for non-compliance with the disclosure requirements.¹²⁴⁰

11.73 The Bar Association of Queensland commented:¹²⁴¹

The model legislation should not include criminal sanctions upon personal representatives who deal with estate assets, without first disclosing them. Many representatives face great difficulty collecting and identifying estate assets and the opportunity for genuine error is frequent. Any disadvantage to beneficiaries may be repaired through damages: Queensland, s 52(2).¹²⁴² Any significant deliberate failure to disclose would, likely, involve fraud and offences against the criminal law. (note added)

11.74 The ACT Law Society expressed a similar view:¹²⁴³

Criminal sanctions appear inappropriate in this area. It would appear preferable to have the performance of duties by legal personal representatives encouraged by civil sanctions, not criminal.

11.75 The New South Wales Council of the Trustee Corporations Association of Australia was also of the view that the inclusion in the model legislation of specific criminal sanctions was inappropriate and unnecessary.¹²⁴⁴

The NSW Council believes that it is inappropriate for the model legislation to impose criminal sanctions on personal representatives who deal with assets of an estate without first disclosing them. Sufficient civil remedies exist to cover those circumstances where there is inadvertent non-disclosure of assets and where there is intentional non-disclosure and a clear intention to deprive someone of assets. The existing criminal law will provide a means of redress in such circumstances.

11.76 However, an academic expert in succession law, although opposed to a provision in the form of section 121A(5) of the South Australian legislation, expressed some support for the imposition of criminal sanctions, but only where a contravention of the legislation had caused loss to a person:¹²⁴⁵

1240 Submissions 1, 2, 4, 6, 7, 14, 15, 20.

1241 Submission 1.

1242 *Succession Act 1981* (Qld) s 52(2) is considered at [14.1]–[14.4] in vol 2 of this Report.

1243 Submission 14.

1244 Submission 20.

1245 Submission 12.

I can see the advantage in this provision but it makes a criminal out of every personal representative who fails to comply. That is oppressive to the poor and must be rejected. If a criminal sanction is to be tolerated the prosecution should be required to show that some person has been substantially defrauded. Without proof of criminal impropriety causing loss there should be no criminal sanction.

The National Committee's view

The duty to file a statement of assets and liabilities

11.77 The model legislation should provide that a personal representative must file a statement of assets and liabilities whenever required to do so by the court, and that the court may make an order to that effect if it considers it necessary in the circumstances of the case. As a result, the cost and inconvenience of preparing a statement will not be incurred in respect of every estate, but only in respect of those estates where the inventory has been required for a particular reason.¹²⁴⁶

Scope of the statement of assets and liabilities

11.78 Where the court requires a personal representative to file a statement of assets and liabilities, the statement should set out all the assets and liabilities of the estate, wherever situated.

Personal representatives who can be required to file a statement of assets and liabilities

11.79 The purpose of the model provision is to state the relevant duty of a 'personal representative' with respect to the filing of a statement of assets and liabilities. By referring to a 'personal representative', the provision will apply not only to a personal representative to whom a grant of probate or administration has been made, but also to an executor appointed by will who has not sought probate of the will, but who has assumed the duties of office.

Disposition of undisclosed assets

11.80 In the National Committee's view, a prohibition in respect of the disposal of undisclosed assets would be inconsistent with a requirement to file a statement of assets and liabilities when required by the court to do so. Although the New South Wales and South Australian legislation includes such a prohibition, the disclosure requirements in those jurisdictions operate in the context of a mandatory requirement to file the relevant statement, which itself applies only to a person to whom a grant has been made.

¹²⁴⁶

Of course, a personal representative will still be required to maintain such documents as are necessary to prepare a statement of assets and liabilities and to give an account of the administration of the estate (see [11.169]–[11.192] and Recommendations 11-8 and 11-9) and to provide access to those documents in accordance with the National Committee's recommendations (see [11.193]–[11.216] and Recommendations 11-11 to 11-17 below).

Criminal sanctions

11.81 In the National Committee's view, the model legislation should not impose any criminal sanctions. Such provisions are inappropriate in legislation of this nature. Specifically, the model legislation should not include provisions to the effect of section 121A(5) or 44 of the *Administration and Probate Act 1919* (SA).

THE DUTY TO FILE AN INVENTORY: RESEALED GRANTS

Existing legislative provisions and court rules

11.82 Section 121A of the *Administration and Probate Act 1919* (SA), which requires a person who applies for probate or administration to file a statement of the deceased's assets and liabilities, is also expressed to apply to a person who applies for the resealing of a foreign grant of probate or administration.¹²⁴⁷ Accordingly, an applicant for the resealing of a grant must disclose to the court the assets and liabilities of the deceased known to the applicant at the time of making the application and must also disclose to the court any other assets or liabilities that later come to his or her knowledge.

11.83 In the ACT, New South Wales, the Northern Territory, Tasmania and Western Australia, the requirements are found in the court rules.

11.84 In the ACT, the court rules provide that an affidavit supporting a person's application for the resealing of a grant must annexe an inventory of the property (in the ACT) or of the estate in the ACT.¹²⁴⁸

11.85 In New South Wales, the court rules require an applicant for the resealing of a grant to disclose all the assets and liabilities of the deceased of which he or she is aware and to disclose any other asset that later comes to his or her notice.¹²⁴⁹ This is consistent with the requirement for continuing disclosure that applies in that jurisdiction in relation to an application for an original grant.

11.86 In the Northern Territory, the court rules require an applicant for the resealing of a grant to file an affidavit of the assets and liabilities of which the applicant is aware at the date of swearing the affidavit.¹²⁵⁰

1247 *Administration and Probate Act 1919* (SA) s 121A is set out at [11.34] above.

1248 *Court Procedures Rules 2006* (ACT) r 3022(3)(b).

1249 *Supreme Court Rules 1970* (NSW) Pt 78 r 28, Form 106 paras 12, 13.

1250 *Supreme Court Rules* (NT) r 88.27(1), Form 88T para 2.

11.87 In Queensland, there is no specific provision dealing with the duty to file an inventory of the estate. However, because a resealed grant has the same force and effect as an original grant made in that jurisdiction,¹²⁵¹ a personal representative must exhibit on oath a full inventory of the estate when required to do so by the court.¹²⁵²

11.88 In Tasmania, the court rules require an applicant for the resealing of a grant to file an affidavit setting out the estate of the deceased in Tasmania.¹²⁵³

11.89 In Victoria, although the *Supreme Court (Administration and Probate) Rules 2004* (Vic) do not refer to the resealing of grants, the court's practice is to require that the affidavit in support of an application for resealing is to exhibit an inventory of assets of the estate of the deceased in Victoria and elsewhere, as if it were an application for an original grant.

11.90 In Western Australia, the court rules provide that the affidavit of an applicant for the resealing of a grant must exhibit and verify a statement giving particulars of:¹²⁵⁴

- (a) all movable and immovable property in Western Australia comprised in the estate of the deceased;
- (b) the value at the time of the death of the deceased of the property referred to in paragraph (a); and
- (c) all debts in Western Australia owing by the deceased at the time of his death.

Discussion Paper

11.91 In the Discussion Paper on the recognition and resealing of interstate and foreign grants, the National Committee sought submissions on whether the model legislation should require an applicant for resealing to disclose all assets and liabilities wherever situated.¹²⁵⁵

¹²⁵¹ *British Probates Act 1898* (Qld) s 4(1).

¹²⁵² *Succession Act 1981* (Qld) s 52(1)(b).

¹²⁵³ *Probate Rules 1936* (Tas) r 46, Form XXI para 4.

¹²⁵⁴ *Non-contentious Probate Rules 1967* (WA) r 9B(2). However, that rule does not apply where the applicant is the Public Trustee or a trustee corporation or where the court or the registrar, in special circumstances, so directs: *Non-contentious Probate Rules 1967* (WA) r 9B(3).

¹²⁵⁵ *Recognition of Interstate and Foreign Grants Discussion Paper* (2001) 145. See also *Recognition of Interstate and Foreign Grants Issues Paper* (2002) 78.

Submissions

11.92 The former Principal Registrar of the Supreme Court of Queensland was opposed to the preliminary recommendation in relation to the mandatory disclosure of assets and liabilities.¹²⁵⁶

11.93 However, the Public Trustee of New South Wales and the Trustee Corporations Association of Australia were of the view that an applicant for the resealing of a grant should be required to disclose all assets and liabilities wherever situated.¹²⁵⁷

The National Committee's view

11.94 In the National Committee's view, the duty of a person acting under a resealed grant to file a statement of assets and liabilities should be the same as the duty of a personal representative appointed under an original grant. Accordingly, a person acting under a resealed grant should be under a duty to file a statement of all the deceased's assets and liabilities, wherever situated, if required by the court to do so.

11.95 However, the National Committee does not consider it necessary for the model legislation to include a provision to this effect. In Chapter 34, the National Committee has recommended that, on the resealing of a grant, the person who made the application for resealing:¹²⁵⁸

- is to have the same rights and powers, perform the same duties, and be subject to the same liabilities as if he or she were the personal representative under a grant of probate or letters of administration made by the resealing court; and
- is to be taken, for all purposes, to be the personal representative of the deceased in respect of his or her estate within the resealing jurisdiction.

11.96 The effect of this recommendation is that a person who obtains the resealing of an interstate or overseas grant will automatically be under the same duty to file a statement of assets and liabilities as a personal representative appointed under an original grant made in the jurisdiction — namely, whenever required by the court to do so.¹²⁵⁹

1256 Submission R1.

1257 Submissions R2, R6.

1258 See Recommendation 34-2 in vol 3 of this Report.

1259 See [11.77] above.

THE DUTY TO FILE AND PASS ACCOUNTS

Introduction

11.97 The filing of accounts is the first step towards the passing of accounts, 'the process by which a personal representative submits formal accounts relating to the administration of the estate to the court for examination and approval'.¹²⁶⁰ The function of the court on an application for the passing of accounts has been described as follows:¹²⁶¹

the function of the Court ... is not merely to see that sums entered on the disbursement side of the Accounts have in fact been disbursed and proper vouchers and receipts produced, but, rather, is one akin to that of an auditor, concerned not only with ascertaining whether alleged disbursements have in fact been made, but also with determining whether disbursements have been properly, or improperly, made, in the latter of which cases the disbursements are to be disallowed ...

11.98 There are two situations in which accounts may be passed: the first is where the personal representative is compelled by an interested person to pass them; the second is where the personal representative voluntarily chooses to have them passed.¹²⁶²

11.99 All Australian jurisdictions have provisions about the circumstances in which a personal representative must file, or file and pass, the accounts of an estate. The various provisions are broadly of three kinds: those that require accounts to be filed and passed only when required by the court; those that require accounts to be filed and passed in all cases; and those that require certain categories of personal representatives to file and pass their accounts. The relevant provisions are considered below.

11.100 In most jurisdictions, the court rules deal with the procedure for the filing and passing of accounts, for example, the requirements for giving notice of the filing of accounts, for objecting to the passing of accounts, and for attending on the passing of accounts.¹²⁶³

¹²⁶⁰ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 278.

¹²⁶¹ *In the Estate of Orre* (Unreported, Supreme Court of New South Wales, Powell J, 19 December 1991) 4.

¹²⁶² Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 278. The latter situation is common where the personal representative wishes to claim commission.

¹²⁶³ See *Court Procedures Rules 2006* (ACT) rr 2749–2757; *Supreme Court Rules 1970* (NSW) Pt 78 rr 75, 76–78; *Supreme Court Rules* (NT) r 88.78; *Uniform Civil Procedure Rules 1999* (Qld) rr 647–654; *Non-contentious Probate Rules 1967* (WA) r 37(4)–(10).

Existing legislative provisions and court rules

Court-ordered accounts

Australian Capital Territory

11.101 In the ACT, the legislation provides that the Supreme Court may, by order, require the accounts of the executor or administrator of the estate of a deceased person to be examined and passed.¹²⁶⁴ The legislation also provides that the rules may require the accounts of the executor or administrator of the estate of a deceased person to be examined and passed.¹²⁶⁵

11.102 The previous ACT court rules required certain categories of personal representatives, within twelve months after the making of a grant, to file the accounts of the estate and to request the registrar to set a date for passing the accounts.¹²⁶⁶ However, the *Court Procedures Rules 2006* (ACT) do not require accounts to be filed in particular cases, but instead make provision for a beneficiary to apply to the court for an order requiring the examination and passing of the accounts of a personal representative or trustee.¹²⁶⁷

11.103 The rules also provide that, if a personal representative applies for the allowance of commission out of an estate, the personal representative must file a full and correct account of the administration of the estate.¹²⁶⁸ Similarly, if a trustee applies for an order for the allowance of commission out of the income or proceeds of trust property, the trustee must file a full and correct account of the trustee's administration of the trust property.¹²⁶⁹

11.104 As a result, there is ordinarily no mandatory requirement for a personal representative to file accounts. Unless a personal representative or trustee wishes to apply for the allowance of commission, accounts are required to be filed only when the court makes an order to that effect.

Northern Territory

11.105 Under the Northern Territory legislation, an executor or administrator must, when required to do so by the court or by the rules, file or file and pass accounts relating to the administration of the estate.¹²⁷⁰ As the rules do not contain a general requirement for an executor or administrator to file accounts,

1264 *Administration and Probate Act 1929* (ACT) s 58(2)(b).

1265 *Administration and Probate Act 1929* (ACT) s 58(1)(b).

1266 *Supreme Court Rules 1937* (ACT) O 72 r 38. The *Supreme Court Rules 1937* (ACT) expired on 1 July 2006: *Court Procedures Act 2004* (ACT) s 100.

1267 *Court Procedures Rules 2006* (ACT) r 2746. The rules about the examination and passing of accounts have been based on the equivalent rules in the *Uniform Civil Procedure Rules 1999* (Qld).

1268 *Court Procedures Rules 2006* (ACT) r 2748(1).

1269 *Court Procedures Rules 2006* (ACT) r 2748(2).

1270 *Administration and Probate Act* (NT) s 89.

the effect of the legislation is that an executor or administrator must file, or file and pass, accounts only when required by the court to do so.

Queensland

11.106 In Queensland, a personal representative is under a duty to:¹²⁷¹

when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court.

11.107 This provision was recommended by the Queensland Law Reform Commission in its 1978 Report.¹²⁷² It was modelled on the English provision that had been introduced in 1971.¹²⁷³

11.108 The rules provide that a 'beneficiary' may apply to the court for an order requiring the examination and passing of the personal representative's accounts of the estate.¹²⁷⁴

11.109 The rules also provide that, if a personal representative applies for the allowance of commission out of an estate, the personal representative must file a full and correct account of the administration of the estate.¹²⁷⁵ Similarly, if a trustee applies for an order for the allowance of commission out of the income or proceeds of trust property, the trustee must file a full and correct account of the trustee's administration of the trust property.¹²⁷⁶

Tasmania

11.110 The Tasmanian legislation requires a personal representative, when lawfully required to do so, to exhibit on oath a true and perfect account of the estate of a deceased person.¹²⁷⁷

¹²⁷¹ *Succession Act 1981* (Qld) s 52(1)(b). The duty to file an inventory when required to do so is considered separately at [11.23]–[11.24] above.

¹²⁷² See Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 36.

¹²⁷³ *Administration of Estates Act 1925* (UK) s 25(b), which is set out at [11.10] above.

¹²⁷⁴ *Uniform Civil Procedure Rules 1999* (Qld) r 644(1). The term 'beneficiary' is defined to include not only a person with a beneficial interest in the estate, but also a person with a right to compel the executor or administrator of the estate to complete the administration: *Uniform Civil Procedure Rules 1999* (Qld) r 644(4). Under the previous rule in relation to the filing and passing of accounts (*Rules of the Supreme Court 1900* (Qld) O 73 r 1), which did not include a similar definition, it was held that a beneficiary under a will was not a person 'beneficially interested in an estate' while the estate was still being administered: *Re Schilling* [1995] 1 Qd R 696, 698 (Ryan J).

¹²⁷⁵ *Uniform Civil Procedure Rules 1999* (Qld) r 646(1).

¹²⁷⁶ *Uniform Civil Procedure Rules 1999* (Qld) r 646(2).

¹²⁷⁷ *Administration and Probate Act 1935* (Tas) s 26.

11.111 The legislation also requires a personal representative who has advertised for claims against the estate to file an account of:¹²⁷⁸

- the assets that have come into his or her hands, possession or knowledge or into the hands or possession of any person for the personal representative; and
- the payment and distribution, or retainer, of those assets, and of any assets remaining in the personal representative's hands.

Mandatory accounts

South Australia

11.112 The South Australian requirements in relation to the filing and passing of accounts are unusual in that they include a mandatory requirement that applies only to administrators. Every administrator is required, within six months from the date of administration, or within such extended time as the Public Trustee may allow, to deliver to the office of the Public Trustee a verified statement and account of all the estate of the deceased and of the administration of that estate.¹²⁷⁹

11.113 The Act makes provision for the court, on the application of the Public Trustee or any person interested in the estate or on its own initiative, to order that an administrator deliver such a statement and account to the offices of the Public Trustee.¹²⁸⁰

Western Australia

11.114 In Western Australia, every person to whom probate or administration is granted is under a duty to pass his or her accounts relating to the estate of the deceased person 'within such time, and from time to time, and in such manner as may be prescribed by the rules or as the Court may order'.¹²⁸¹

11.115 The rules require every executor and administrator (other than the Public Trustee) to file his or her accounts in the prescribed form and to attend before the registrar at such time as the registrar may appoint to have the accounts passed and allowed.¹²⁸² The accounts must be filed 'within 12 months after the grant, or within such further time as a Judge or the Registrar

¹²⁷⁸ *Administration and Probate Act 1935* (Tas) s 56.

¹²⁷⁹ *Administration and Probate Act 1919* (SA) s 56(1). This duty does not apply to an executor: see the definitions of 'administrator' and 'administration' in s 4 of the Act. Nor does the duty apply to a trustee company that is acting as an administrator in pursuance of any powers granted to it by any Act: *Administration and Probate Act 1919* (SA) s 56(2).

¹²⁸⁰ *Administration and Probate Act 1919* (SA) s 56A.

¹²⁸¹ *Administration Act 1903* (WA) s 43(1)(b). This provision is considered further at [11.123]–[11.127] below.

¹²⁸² *Non-contentious Probate Rules 1967* (WA) r 37(1).

may allow', and must be verified by the affidavit of the executor or administrator.¹²⁸³

Mandatory accounts for specified personal representatives only

New South Wales

11.116 In New South Wales, there is no longer a mandatory requirement for every executor and administrator to file or file and pass the accounts of the estate.¹²⁸⁴ In respect of the estates of persons who have died on or after 31 December 1981, the legislation requires only certain persons to whom a grant is made to verify and file, or verify, file and pass,¹²⁸⁵ the accounts of the estate within the time and in the manner that the rules may fix or the court may order.¹²⁸⁶ The requirement applies to a personal representative who is:¹²⁸⁷

- (a) a creditor of the estate of the deceased,
- (b) the guardian of a minor who is a beneficiary of the estate of the deceased,
- (c) the executor or administrator of the estate where the whole, or a part which, in the opinion of the court, is a substantial part, of the estate passes to one or more charities or public benevolent institutions;
- (d) a person, not being a beneficiary, or, in the opinion of the Court, a substantial beneficiary, of the estate, selected at random by the Court; or
- (e) a person otherwise required to do so by the Court.

11.117 Under the rules, such a person must verify and file, or verify, file and pass, his or her accounts within twelve months after the grant is made.¹²⁸⁸ When accounts are required at the time of the making of the grant,¹²⁸⁹ the court's practice is for the notation 'ACCOUNTS' to appear on the actual

1283 *Non-contentious Probate Rules 1967* (WA) r 37(3).

1284 Where a person has died before 31 December 1981, every person to whom a grant is made must file, or file and pass, the person's accounts in relation to the estate within such time and in such manner as the rules may fix or the court may order: *Probate and Administration Act 1898* (NSW) s 85(1). The rules require such a person to file his or her accounts within twelve months of the granting of probate or administration unless the time for the filing of accounts is extended by the court: *Supreme Court Rules 1970* (NSW) Pt 78 rr 71, 73.

1285 Commentators on the New South Wales legislation suggest that the usual requirement is to verify, file and pass the accounts, although the court will sometimes dispense with the requirement to pass the accounts if the major beneficiaries consent to that course: see RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 561–2.

1286 *Probate and Administration Act 1898* (NSW) s 85(1AA).

1287 *Probate and Administration Act 1898* (NSW) s 85(1AA).

1288 *Supreme Court Rules 1970* (NSW) Pt 78 r 71.

1289 This would usually be in relation to an executor or administrator who falls within the categories of personal representative listed in s 85(1AA)(a)–(d) of the *Probate and Administration Act 1898* (NSW).

grant.¹²⁹⁰ It has been suggested that the introduction of the 'random selection' process, which was introduced in 1981, 'has resulted in more instances of executors and administrators being required to verify, file and pass accounts than was formerly the case'.¹²⁹¹

11.118 The legislation also provides that every trustee of the estate of a deceased person must also verify and file, or verify, file and pass the trustee's accounts within the time and in the manner that the rules fix or the court orders.¹²⁹²

11.119 The legislation specifically provides that a person to whom probate or administration has been granted, but who is not a person who is required to file accounts, may verify and file, or verify, file and pass, the person's accounts in relation to the estate.¹²⁹³

11.120 Although the legislation does not provide for the court to dispense with the requirements for the filing of accounts, an executor or administrator may apply for an order extending the period within which the accounts must be filed until the further order of the court.¹²⁹⁴

Victoria

11.121 In Victoria, the legislation provides generally that a personal representative must, when lawfully required to do so, exhibit on oath a true and perfect account of the estate of a deceased person.¹²⁹⁵ However, where a grant is made to a creditor in that capacity, the creditor must:¹²⁹⁶

- within 15 months from the date of the grant, file a true and just account of the administration of the estate, verified by affidavit as to receipts and disbursements and as to what portion is retained by the personal representative and what portion remains uncollected; and
- whenever, on the application of the registrar, ordered by the court to do so after the expiration of 15 months from the date of the grant, file such accounts verified by affidavit as the court thinks fit.

¹²⁹⁰ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1437.1] (at 20 February 2009).

¹²⁹¹ Ibid [1437.3] (at 20 February 2009).

¹²⁹² *Probate and Administration Act 1898* (NSW) s 85(1A).

¹²⁹³ *Probate and Administration Act 1898* (NSW) s 85(1B). A personal representative might choose to file and pass accounts if he or she intended to apply for commission. Claims for commission are considered in Chapter 27 of this Report.

¹²⁹⁴ *Supreme Court Rules 1970* (NSW) Pt 78 r 73.

¹²⁹⁵ *Administration and Probate Act 1958* (Vic) s 28(1). The rules provide further that the court or the registrar may at any time require a personal representative to file, in the prescribed form, a true and just account of the administration of the estate: *Supreme Court (Administration and Probate) Rules 2004* (Vic) r 6.03(1).

¹²⁹⁶ *Administration and Probate Act 1958* (Vic) s 28(2).

Issue for consideration

11.122 The main issue for consideration is how the duty to file and pass accounts should be framed — that is, whether a personal representative should be under a duty to file and pass accounts only when required by the court to do so, or whether there should be a mandatory obligation for all, or particular categories of, personal representatives to file and pass the accounts of their administration within a specified time of the making of the grant. As explained above, all three options are represented among the existing Australian provisions.

11.123 The Law Reform Commission of Western Australia has observed that, although the provisions in that State appear to impose a mandatory requirement on a personal representative to file the accounts of the estate,¹²⁹⁷ the provisions do not reflect the practice that has developed in that State.¹²⁹⁸

In fact it is the practice of registrars not to ‘appoint’ any time at all for the passing of accounts in the normal course of events.

11.124 It commented that, although the provisions appear to be mandatory:¹²⁹⁹

In practice ... it is only in exceptional cases that ... the requirement that ... accounts be filed, or that the personal representative attend upon the Registrar to have accounts passed and allowed, is ever observed. These are cases in which the Registrar requisitions the passing of accounts in relation to an estate, and are very infrequent. In short, for almost all practical purposes, section 43(1)(b) and rule 37 have fallen into desuetude.

11.125 The Western Australian Commission expressed the view that the administrative burden of requiring the passing of accounts in every case ‘would be out of all proportion to the requirements of the administration of justice’.¹³⁰⁰ It saw ‘no good reason why every executor and administrator ... should comply with the apparent requirements of section 43(1)(b) or rule 37, except when required to do so by order of the Court or pursuant to a Registrar’s requisition, as is in fact the existing practice’.¹³⁰¹

11.126 The Law Reform Commission of Western Australia therefore recommended that section 43(1)(b) of the *Administration Act 1903* (WA) ‘should be reformed so as to reflect that practice, and the law in other comparable jurisdictions’, such as England, where a personal representative is required to

¹²⁹⁷ The Western Australian provisions are discussed at [11.114]–[11.115] above.

¹²⁹⁸ Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [2.11].

¹²⁹⁹ *Ibid* [3.30].

¹³⁰⁰ *Ibid* [3.31].

¹³⁰¹ *Ibid* [3.32].

render an account of the administration of the estate when required to do so by the court.¹³⁰²

11.127 The Probate Rules Committee of Western Australia has also come to a similar view. It noted in its Preliminary Report that the current practice is for accounts to be required to be filed and passed only in special circumstances, such as ‘when someone complains to the Registrar that the estate has not been administered, or has not been administered properly’.¹³⁰³ It observed that ‘[t]he Registry could not cope if all executors and administrators filed and passed their accounts’.¹³⁰⁴ Moreover, the Committee was of the view that, ‘probably in the majority of cases, the appointed executor or administrator does his work honestly and properly and there is no particular need for an account’.¹³⁰⁵ In its Final Report, the Committee recommended that accounts need be filed and passed only when requested by the registrar.¹³⁰⁶

11.128 The Ontario Law Reform Commission also came to the view that there should be no mandatory requirement for the filing of accounts when it considered the issue in its 1991 Report.¹³⁰⁷ That Commission noted that, when a personal representative is required to render accounts only when lawfully required to do so:¹³⁰⁸

effective scrutiny of the personal representative’s accounts and dealings with the estate depends on the vigilance of interested persons. Unless they contest any aspect of the accounts presented, the judge can acquire only the most superficial knowledge of the state of the accounts and the administration of the estate. She is in no position to conduct an effective investigation on her own initiative concerning the management of the estate assets.

11.129 It noted that the most useful review of accounts in that province ‘occurs where a person under a legal disability has an interest in the accounts’, in which case notice of the passing of accounts must be given to either the Official Guardian or the Public Trustee, who then undertakes an independent review of the accounts.¹³⁰⁹ The Commission considered conferring on the court a role analogous to that undertaken by the Public Trustee and the Official Guardian, but rejected that option.¹³¹⁰

1302 Ibid.

1303 Probate Rules Committee (WA), *Revision of the Non-contentious Probate Rules 1967 of Western Australia*, Preliminary Report (October 2000).

1304 Ibid.

1305 Ibid.

1306 Probate Rules Committee (WA), *Revision of the Non-contentious Probate Rules 1967 of Western Australia*, Final Report (2002).

1307 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 282.

1308 Ibid 281.

1309 Ibid 282, referring to the requirement in *Estates Act*, RSO 1980, c 491, s 74(8), (9) (repealed).

1310 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 282.

we have come to the conclusion that the fundamental character of the passing of accounts procedure should not be altered. Primary responsibility for policing the management of estate assets should remain with interested persons — that is, beneficiaries and creditors — except, of course, where an interested person is under a legal disability. This report has reflected our conviction that the court should not be charged with the task of ongoing supervision of estates, but should intervene only when it is asked to do so by an interested person. We do not believe that a sufficiently strong reason exists to depart from that general principle in this context.

11.130 The Commission also considered, but rejected, imposing a statutory requirement for all accounts to be passed at a fixed interval, or within a certain period from the date of the grant:¹³¹¹

such a requirement would add to the expense of estate administration, as well as increase court costs, in return for what would be marginal advantages in enforcement.

Discussion Paper

11.131 In the Discussion Paper, the National Committee sought submissions on whether:¹³¹²

- the model legislation should include a provision to the effect of section 52(1)(b) of the *Succession Act 1981* (Qld), under which a personal representative is under a duty, when required by the court to do so, to render an account of the administration of the estate to the court; and
- if such a provision were to be included, it should be expressed to apply to a personal representative or to any person administering an estate.

11.132 The National Committee also sought submissions on whether the filing and passing of accounts should be a condition that the registrar or the court may impose on the making of a grant.¹³¹³

Submissions

Court-ordered accounts

11.133 All the respondents who addressed the issue — namely, the Bar Association of Queensland, the former ACT Registrar of Probate, the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, and the ACT and New South Wales Law Societies — were of the view that the model legislation should include a provision to the effect of section 52(1)(b) of the *Succession Act 1981* (Qld), so that a personal representative

1311 Ibid 282–3.

1312 *Administration of Estates Discussion Paper* (1999) QLRC 62; NSWLRC 92.

1313 Ibid, QLRC 137; NSWLRC 194.

would be required to render an account of the estate when required by the court to do so.¹³¹⁴

11.134 The Bar Association of Queensland, in supporting such a requirement, commented that '[c]oncerned or disgruntled beneficiaries have always had, and should continue to have, the right to call for an account'.¹³¹⁵

11.135 The Public Trustee of South Australia expressed support for the Queensland provision in the following terms:¹³¹⁶

This would allow action if there were cause for concern, but not if there is no dissatisfaction with the administration.

11.136 The Trustee Corporations Association of Australia expressed a similar view.¹³¹⁷

11.137 The Public Trustee of South Australia and the Trustee Corporations Association of Australia both stated that they did not support the current South Australian requirement under which an administrator must file accounts of the estate with the Public Trustee.¹³¹⁸

11.138 The ACT Law Society, which also supported the Queensland provision, commented:¹³¹⁹

If accounts were required in every case the Probate Office would be swamped with documentation most of which would be completely unnecessary and provide no useful information.

11.139 Although the New South Wales Law Society supported a requirement that a personal representative must file accounts when required by the court to do so, it suggested that the model provision should in addition state that the accounts must be filed 'within such time and from time to time and in such manner as may be directed'.¹³²⁰

Personal representatives who may be required to file and pass accounts

11.140 All the submissions that commented on the issue were of the view that the model provision in relation to the filing and passing of accounts should apply

1314 Submissions 1, 2, 4, 6, 7, 14, 15.

1315 Submission 1.

1316 Submission 4.

1317 Submission 6.

1318 Submissions 4, 6. The South Australian requirement in relation to administrators is discussed at [11.112] above.

1319 Submission 14.

1320 Submission 15.

to any person who was administering an estate, regardless of whether a grant had been made in favour of that person.¹³²¹

Filing and passing of accounts as a condition that may be imposed on the making of a grant

11.141 The majority of the submissions that addressed the issue were of the view that the filing and passing of accounts should be a condition that the registrar or the court may impose when making a grant.¹³²²

11.142 The Bar Association of Queensland suggested that such a condition would be appropriate 'where there are competing applicants for a grant and allegations raising concerns about potential maladministration or, otherwise, apparent considerable mistrust/suspicion'.¹³²³ It is implicit in this comment that the Association was contemplating a contested application for a grant, where the condition was imposed by the court, rather than by the registrar.

11.143 Other respondents, however, appeared to support the imposition of the requirement by the registrar.

11.144 The Trustee Corporations Association of Australia expressed the view that the registrar should be able to require the passing of accounts as a condition of making a grant.¹³²⁴

11.145 The Public Trustee of New South Wales expressed the view that the New South Wales rules provide a practical means for dealing with this issue.¹³²⁵ The New South Wales Law Society also commented that the 'passing of accounts should continue to be a condition which the Court may impose on the making of a grant.'¹³²⁶

11.146 A former ACT Registrar of Probate commented that the circumstances in which accounts should be passed are best left to the rules of court.¹³²⁷

11.147 However, the Queensland Law Society was of the view that neither the court nor the registrar should be able to impose, as a condition of making a grant, that the personal representative must pass the accounts of the estate.

1321 Submissions 1, 4, 6, 14, 15.

1322 Submissions 1, 2, 6, 7, 11, 14, 15.

1323 Submission 1.

1324 Submission 6.

1325 Submission 11.

1326 Submission 15. For a discussion of the current New South Wales practice see [11.117] above.

1327 Submission 2.

The National Committee's view

The relevant duty

11.148 In this review, the National Committee has been conscious, where appropriate, of simplifying the administration of estates and of not imposing unnecessary burdens on personal representatives. While it is obviously important to protect the interests of persons with an interest in the proper administration of an estate, the National Committee does not consider that that objective is best served by requiring personal representatives routinely to file, or to file and pass, accounts whether in every case or where the personal representative is of a particular category. Even where a personal representative is appointed on the basis of being a creditor of an estate, there will usually be other creditors who can seek an order for the filing, or filing and passing, of accounts if there is some circumstance that gives rise to a concern about whether the estate is being properly administered.

11.149 Accordingly, the model legislation should provide that a personal representative must file, or file and pass, accounts of the administration of the estate whenever required to do so by the court, and that the court may make an order to that effect if it considers it necessary in the circumstances of the case. By providing for court-ordered accounts, rather than for mandatory accounts, the cost and inconvenience of preparing formal accounts can be avoided in those estates where the circumstances do not warrant the imposition of such a requirement.

11.150 The National Committee has decided not to include a provision to the effect of section 85(1AA)(d) of the *Probate and Administration Act 1898* (NSW). That section enables the court to select, at random, a person to whom probate or administration is granted who must then verify and file or verify, file and pass the person's accounts relating to the estate. In the National Committee's view, the requirement to file or to file and pass accounts should be imposed only where there is a reason to make such an order, and should not be imposed on the basis of random selection.

11.151 In the National Committee's view, the model provision setting out a personal representative's duty in relation to the filing and passing of accounts should not provide, additionally, that the accounts must be filed and passed 'within such time and from time to time and in such manner as may be directed'.¹³²⁸ The National Committee does not consider that those words enlarge the court's powers or add to the clarity of the provision. Although the expression 'from time to time' imports the notion that the court may order the filing and passing of accounts on more than one occasion, the National Committee does not consider that, without the words, there would be any doubt that the court may order accounts relating to a particular period of an estate's administration and may do so on more than one occasion. In the National

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This suggestion was made by the New South Wales Law Society: see [11.139] above.

Committee's view, the requirement that accounts must be filed 'whenever' required by the court confers a sufficiently broad power for the court to require accounts on more than one occasion. Further, the expression 'within such time ... and in such manner as may be directed' merely states, in effect, that the personal representative must comply with the terms of any order made.

Personal representatives who may be required to, or who may, file and pass accounts

11.152 The purpose of the model provision is to state the relevant duty of a 'personal representative' with respect to the filing and passing of accounts. By referring to a 'personal representative', the provision will apply not only to a personal representative to whom a grant of probate or administration has been made, but also to an executor appointed by will who has not sought probate of the will, but who has assumed the duties of office.

11.153 As explained earlier, there are several reasons why a personal representative or trustee might wish to have the accounts of his or her administration of an estate passed. For that reason, the National Committee is of the view that the model legislation should provide that a personal representative or trustee may file the accounts of the estate and apply to have them passed.

Release of a personal representative or trustee

Background

11.154 As mentioned above, a personal representative may wish to apply for an order passing the accounts of his or her administration in order to obtain commission.¹³²⁹ However, a personal representative may also wish to apply for such an order:¹³³⁰

where the special circumstances of the case make it desirable for executors, administrators or trustees of deceased persons to pass their accounts, in order to bind the beneficiaries under the will or of the estate (as, where the estate is large, the administration complex, and a great number of beneficiaries concerned) ...

11.155 It has been suggested, in fact, that the exoneration of the personal representative and the binding of the beneficiaries are the primary object of the passing of accounts at the instigation of a personal representative:¹³³¹

In some cases an executor might be unhappy about the reception of his accounts by the beneficiaries and wish to have them approved.

1329 See [11.109] above.

1330 *Re Taylor* [1950] VLR 8, 9 (Herring CJ).

1331 ES Vance, *Executors' Commission* (1969) 44.

11.156 The Ontario Law Reform Commission has made a similar observation, noting that '[p]ersonal representatives may choose to pass their accounts in order to "close the books on that time frame of the administration"'.¹³³² That Commission considered that the alternative to the court passing of accounts, namely, release by the beneficiaries, would not always be a satisfactory option.¹³³³

The alternative to a court passing would be to present the accounts to the estate beneficiaries for their approval, and ask them to sign releases discharging them from personal liability. This alternative, however, is efficacious only where all the beneficiaries are known, are under no legal disability, and are willing to accommodate the executor or administrator. A personal representative who secures releases from all the adult beneficiaries nonetheless will remain exposed to possible future claims by beneficiaries who cannot give releases, such as unborn or minor beneficiaries.

11.157 The legislation in the ACT, New South Wales and Western Australia provides that an order of the court allowing the accounts operates as a release to the personal representative or trustee who filed the accounts.¹³³⁴

11.158 Section 85(3) of the *Probate and Administration Act 1898* (NSW), which is very similar to the provisions in the ACT and Western Australia, provides:¹³³⁵

85 Executor, administrator or trustee to pass accounts

...

- (3) The order of the Court allowing any such account shall be prima facie evidence of the correctness of the same, and shall, after the expiration of three years from the date of such order, operate as a release to the person filing the same, excepting so far as it is shown by some person interested therein that an error or omission or fraudulent entry has been made in such account.

...

11.159 In Tasmania, section 59 of the *Administration and Probate Act 1935* (Tas) protects a personal representative who files accounts in accordance with section 56¹³³⁶ of that Act. Section 59 provides:

¹³³² Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 278, referring to Armstrong, *Estate Administration: A Solicitor's Reference Manual* (1984) at 4.2.1.

¹³³³ Ibid 278–9.

¹³³⁴ *Administration and Probate Act 1929* (ACT) s 58(3), (4); *Probate and Administration Act 1898* (NSW) s 85(3); *Administration Act 1903* (WA) s 43(2).

¹³³⁵ The Western Australian provision is in virtually the same terms, except that the relevant exception is where 'a wilful or fraudulent error, omission, or entry has been made in such account'.

¹³³⁶ *Administration and Probate Act 1935* (Tas) s 56 is considered at [11.111] above.

59 Release to be in force except as to errors or omissions

If after such account as aforesaid, or any account of future assets, as hereinafter mentioned, has been filed, it is made to appear that any claim entered therein was erroneously allowed or satisfied, or that any payment entered therein was erroneously made or charged, or that any part of the assets had been omitted in such account, the release to the personal representative hereinbefore mentioned shall nevertheless be and remain in force, save only as respects such error or omission.

11.160 The effect of these provisions was not raised in the Discussion Paper, and the National Committee did not receive any submissions about them.

The National Committee's view

11.161 In the National Committee's view, it is desirable to include in the model legislation a provision to clarify the extent of the protection afforded to a personal representative or trustee by the passing of the accounts of the administration of the estate. However, the National Committee considers that the exceptions provided by section 85(3) of the *Probate and Administration Act 1898* (NSW) are too extensive. Clearly, the order of the court allowing the accounts should not release the person who filed the accounts from liability in respect of a fraudulent entry, irrespective of the period of time that has elapsed since the order was made. However, the additional exceptions of error and omission mean that the provision provides very limited protection.

11.162 The National Committee is therefore of the view that the order allowing the accounts should operate as an immediate release to the person who filed the accounts, subject to the following:

- within three years of the order it may be shown by a person interested in the accounts that an error or omission was made in the accounts; and
- the order should not operate as a release in respect of any material non-disclosure or in respect of any fraudulent entry or omission.

11.163 It will be necessary, of course, for this provision to be supported by rules detailing the notice requirements when a personal representative or trustee applies for an order allowing or passing the accounts and giving persons interested in the estate an opportunity to object. Comprehensive rules already exist in a number of Australian jurisdictions.¹³³⁷

Refunding disallowed amounts to the estate

11.164 Ordinarily, the disallowance by the court of an item in the accounts does not give the court the power to order that the amount be refunded to the estate. In *In the Will of Lucas-Tooth (No 2)*,¹³³⁸ although the Court was of the

¹³³⁷ See [11.100] above.

¹³³⁸ (1932) 50 WN (NSW) 86.

view that the registrar had properly disallowed a disbursement claimed by the trustee, it held that the disallowance of an item did not determine the liability of the executor or trustee to repay the money to the estate.¹³³⁹

11.165 However, section 85(4) of the *Probate and Administration Act 1898* (NSW) legislation provides:¹³⁴⁰

85 Executor, administrator or trustee to pass accounts

...

- (4) Where the Court, in passing any such accounts, disallows in whole or in part the amount of any disbursement, the Court may order the executor, administrator or trustee to refund the amount disallowed to the estate of the deceased.

Nothing in this subsection alters or diminishes the right of any person to proceed in equity in the same way as if this subsection had not been enacted.

11.166 During the second reading speech for the Bill that inserted section 85(4), the provision was described as strengthening the provisions in relation to the passing of accounts.¹³⁴¹

11.167 This provision was not raised in the Discussion Paper, and the National Committee did not receive any submissions about it.

The National Committee's view

11.168 In the National Committee's view, the model legislation should include a provision to the effect of section 85(4) of the *Probate and Administration Act 1898* (NSW). By empowering the court to order that an amount that has been disallowed on the passing of accounts be refunded to the estate, it increases the efficacy of the passing of accounts.

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Ibid 87. The Court held (at 87), however, that the executor would not get the benefit of s 85(3) of the *Probate and Administration Act 1898* (NSW) in respect of the disallowed item, as there would be no prima facie evidence of the correctness of the payment. It also held that, as commission is based on the registrar's certificate, the court may take into consideration in the allowance of commission the fact that the executor has not refunded the disallowed amount to the estate.

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Probate and Administration Act 1898 (NSW) s 85(4) was inserted by s 3(e)(ii) of the *Administration of Estates Act 1954* (NSW).

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New South Wales, *Parliamentary Debates*, Legislative Assembly, 16 November 1954, 1717 (Terence Sheahan, Attorney-General).

THE DUTY TO MAINTAIN DOCUMENTS

Introduction

11.169 Personal representatives have a duty 'to keep clear and distinct accounts' of the property that they are bound to administer.¹³⁴² They must render accounts when properly called upon and to be constantly ready to do so,¹³⁴³ and must keep 'such a record that their transactions can be understood and brought into the form of regular accounts if necessary'.¹³⁴⁴

11.170 Even when an action for the administration of an estate is made so late as to be dismissed, the failure to maintain proper records of the administration of the estate may preclude a personal representative from recovering the costs of defending the action:¹³⁴⁵

although I am satisfied as to the transaction of 1855, ... yet I cannot say that it was not the duty of the trustees to preserve evidence of that distribution in 1855; and as they have neglected to do that, unfortunate as it is for them, I cannot compel the Plaintiffs to pay the costs of that negligence which alone has allowed colour to be given to the institution of this suit.

11.171 In this chapter, the National Committee has recommended that a personal representative should be under a duty:

- to file a statement of the assets and liabilities of the estate whenever required by the court to do so; and
- to file, or to file and pass, the accounts of the administration of the estate whenever required by the court to do so.

11.172 The main issue is whether the model legislation should, in addition, include a specific duty in relation to the maintenance of documents or accounts that is separate from the duty to file particular documents if ordered by the court to do so.

11.173 This issue was considered by the Ontario Law Reform Commission in its review of that province's administration legislation. It noted that, under the existing legislation, personal representatives are required to account 'only at the behest of others', and that the legislation 'does not impose an obligation to keep accounts that is independent of the right of others to require the accounts to be

¹³⁴² *Freeman v Fairlie* (1812) 3 Mer 29; 36 ER 12, 17.

¹³⁴³ *Pearse v Green* (1819) 1 Jac & W 135; 37 ER 327, 329 (Sir T Plumer MR); *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740, 740-1 (Sir J Stuart VC); *Re Craig* (1952) 52 SR (NSW) 265, 267 (Roper J).

¹³⁴⁴ *Grunden v Nissen* (1911) VLR 267, 271-2 (Madden CJ). See also *Re Watson* (1904) 49 Sol Jo 54.

¹³⁴⁵ *Payne v Evens* (1872) LR 18 Eq 356, 367 (Sir J Bacon VC).

passed'.¹³⁴⁶ The Commission came to the view that there should be a statutory provision dealing with a personal representative's obligation in this respect:¹³⁴⁷

While, as a practical matter, personal representatives will keep accounts, we think that the information contained in accounts is so important that such an obligation should be made express in the legislation. Accordingly, we recommend that [personal representatives] should be under a statutory duty to keep accounts.

11.174 The Ontario Law Reform Commission also recommended that personal representatives should keep a complete inventory of the estate, which should be kept current, as '[t]he inventory can assist both beneficiaries and creditors in ascertaining their positions at any given time, and it can facilitate the determination whether the estate is being properly administered'.¹³⁴⁸

Discussion Paper

11.175 In the Discussion Paper, the National Committee expressed the view that the duty to maintain such documents as are necessary to render an account to the court is implicit in the broader duty to render an account when required to do so. Nevertheless, the National Committee considered it desirable to make the duty to maintain records clear, especially for lay executors and administrators.¹³⁴⁹ The National Committee therefore proposed that the model legislation should impose on a personal representative a duty to maintain such documents as are necessary to render an inventory or account to the court.¹³⁵⁰

Submissions

11.176 The National Committee's proposal was supported by all the respondents who addressed this issue — namely, the Bar Association of Queensland, a former ACT Registrar of Probate, the National Council of Women of Queensland, the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Public Trustee of New South Wales, an academic expert in succession law, and the New South Wales Law Society.¹³⁵¹

1346 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 46.

1347 Ibid.

1348 Ibid.

1349 *Administration of Estates Discussion Paper* (1999) QLRC 61; NSWLRC [8.26].

1350 Ibid, QLRC 62; NSWLRC 92 (Proposal 26).

1351 Submissions 1, 2, 3, 4, 6, 7, 11, 12, 15.

11.177 However, several respondents, although agreeing with the National Committee's proposal, suggested that the duty to retain documents should be subject to a time limit.

11.178 An academic expert in succession law commented:¹³⁵²

all personal representatives should be enjoined by statute to retain all papers connected with the administration of the estate for a period of time — probably 6 years.

11.179 The Queensland Law Society commented that, in view of the existing case law, it was important to limit the period for which a personal representative was required to maintain records.¹³⁵³ The Trustee Corporations Association of Australia and the Queensland Law Society suggested that the legislation should limit any requirement to maintain records to a period of '7 years after the vesting of the last disposition'.¹³⁵⁴

11.180 Both respondents also suggested that a personal representative should be relieved from liability if he or she 'acted bona fide and without negligence' in relation to the maintenance of the records.¹³⁵⁵

The National Committee's view

The duty to maintain documents

11.181 The National Committee has earlier in this chapter recommended a duty to file a statement of assets and liabilities and to file and pass accounts whenever required by the court. Although those duties arguably encompass a duty to maintain the necessary documents in order to comply with the relevant duties, the National Committee sees value in stating expressly in the model legislation the requirement to maintain documents. Many personal representatives are lay persons, and it is desirable for them to be aware of this fundamental requirement, since a failure to maintain such documents from the commencement of their administration will compromise their ability to comply with an order to file a statement of assets and liabilities or accounts of the administration of the estate if such an order is ever made.

11.182 The National Committee is therefore of the view that the model legislation should impose on a personal representative a duty to maintain such documents as are necessary to prepare a statement of assets and liabilities or to render an account of the administration of the estate to the court.

¹³⁵² Submission 12.

¹³⁵³ Submission 8. The Queensland Law Society referred to the decision in *Payne v Evens* (1872) LR 18 Eq 356, which is considered at [11.170] above. Although the Society commented on the period for which records should be maintained, it did not directly address the primary proposal that the model legislation should require a personal representative to maintain certain documents.

¹³⁵⁴ Submissions 6, 8.

¹³⁵⁵ *Ibid.*

The period for which documents must be maintained

11.183 Although the National Committee has proposed that the model legislation should impose on a personal representative a positive duty to maintain certain documents, it considers that a personal representative should not be under a duty to maintain those documents indefinitely. It has therefore considered what would be an appropriate period of time for the relevant documents to be maintained.

11.184 In the National Committee's view, it is not possible to fix on a simple period of some number of years, as the length of time for which estates are administered can vary greatly depending on their complexity and whether any testamentary trusts are created or any trusts arise as a result of the legal incapacity of any beneficiaries. For that reason, the relevant period of time needs to be, at least in part, determined by the nature of the interests involved.

11.185 The National Committee notes that, under the *Income Tax Assessment Act 1936* (Cth), where a person has possession of any records kept or obtained for the purposes of the Act, the usual requirement is that the person must retain those records until the end of five years after the records were prepared or obtained, or the completion of the transactions or acts to which the records relate, whichever is the later.¹³⁵⁶ The National Committee also notes the suggestion by two respondents that the relevant period should be seven years from the vesting of the last disposition.¹³⁵⁷

11.186 The National Committee has considered whether a combination of these two formulas could provide an appropriate requirement — for example, if a personal representative were required to maintain the relevant documents for a period of five years from when they were prepared or obtained, or from the vesting in possession of the last interest in the estate to vest in possession, whichever is the later. However, the National Committee considered that it would be difficult for many personal representatives to determine when the last interest in the estate to vest in possession did so.

11.187 For that reason, the National Committee has decided that a personal representative should be required to maintain the relevant documents for a period of three years after the administration of the estate is complete.

11.188 Of course, while this is to be the period for which a personal representative has a duty to maintain documents, a personal representative may well choose to maintain documents for a longer period, particularly having

¹³⁵⁶ *Income Tax Assessment Act 1936* (Cth) s 262A(4).

¹³⁵⁷ See [11.179] above.

regard to the limitation periods that apply to various causes of action against personal representatives and trustees.¹³⁵⁸

Power of court to relieve personal representative from liability

11.189 The National Committee notes that two respondents suggested that the court should be able to excuse a personal representative from any liability in respect of a failure to maintain records if the personal representative has acted bona fide and without negligence in relation to the maintenance of records.¹³⁵⁹

11.190 The trustee legislation of every Australian jurisdiction provides that, if it appears to the court that a trustee (which is defined to include a personal representative) is, or may be, personally liable for any breach of trust, but has acted honestly and reasonably, and ought fairly to be excused from the breach of trust and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach of trust, the court may relieve the trustee either wholly or partly from personal liability for that breach.¹³⁶⁰ The National Committee has considered whether, in light of these provisions, it is necessary for the model legislation to include a similar provision. On one view, a failure to comply with the statutory duty to maintain documents would constitute a breach of trust within the meaning of those provisions, with the result that the court could, in appropriate circumstances, excuse the personal representative from liability.

11.191 However, the National Committee wishes to avoid any doubt about whether the provisions in the trustee legislation would apply to a personal representative who failed to maintain the relevant documents. It is conscious that, because the administration legislation creating the duty to maintain documents will necessarily be later in time than the trustee legislation, there may be some doubt as to whether, if the administration legislation does not expressly enable the court to excuse a breach of the duty to maintain documents, that legislation may be construed to have excluded the application of the trustee legislation provision.

11.192 The model provision should be expressed in terms that are generally consistent with the provisions in the trustee legislation. However, given the context in which this provision appears, it is unnecessary for the model provision to refer to 'personal' liability; a reference to 'liability' will be sufficient, as it is clear that the model provision is directly related to the provision that imposes a duty on the personal representative to maintain the relevant

¹³⁵⁸ See, for example, *Limitation of Actions Act 1974* (Qld) ss 27 (Actions in respect of trust property), 28 (Actions claiming personal estate of a deceased person); *Limitation of Actions Act 1936* (SA) s 31 (Application of Act to express trusts); *Limitation of Actions Act 1958* (Vic) ss 21 (Limitation of actions in respect of trust property), 22 (Actions claiming personal estate of a deceased person).

¹³⁵⁹ See [11.180] above.

¹³⁶⁰ *Trustee Act 1925* (ACT) ss 2, 85, dictionary; *Trustee Act 1925* (NSW) ss 5, 85; *Trustee Act* (NT) ss 49A, 82; *Trusts Act 1973* (Qld) ss 5(1), 76; *Trustee Act 1936* (SA) ss 4(1), 56; *Trustee Act 1898* (Tas) ss 4, 50; *Trustee Act 1958* (Vic) ss 3(1), 67; *Trustees Act 1962* (WA) ss 6(1), 75.

documents. It should therefore provide that where it appears to the court that a personal representative is, or may be, personally liable for breach of the statutory duty to maintain documents, but has acted honestly and reasonably, and ought fairly to be excused from that breach, the court may relieve the personal representative either wholly or partly from personal liability for that breach.

THE DUTY TO PROVIDE ACCESS TO DOCUMENTS

Background

11.193 A personal representative has certain obligations to give information about the assets of an estate to a beneficiary.¹³⁶¹ It has been held that a beneficiary has ‘a clear right to have a satisfactory explanation of the state of the testator’s assets, and an inspection of the accounts, but he [has] no right to require a copy of the accounts at the expense of the estate’.¹³⁶² This includes the provision of information about the investment of trust property and, where trust property has been mortgaged, production of the mortgage deeds, so that the beneficiary can ascertain that the trustee’s statement about the investment of the trust property is correct.¹³⁶³ The right of inspection may be exercised by a person on behalf of a beneficiary and a personal representative needs a ‘strong reason’ to justify a decision to refuse a right of inspection to a beneficiary’s solicitor.¹³⁶⁴

11.194 There are, however, limits to a trustee’s duty to provide information. A trustee is not bound to give one beneficiary information in relation to the dealings of the share of another beneficiary, in whose share he or she has no interest.¹³⁶⁵ Further, where the information sought requires the personal representative to provide information that cannot be given without undertaking investigations and incurring expenses, the personal representative is not required to provide the information unless the beneficiary is willing to bear the cost of its production.¹³⁶⁶ Where there is no statutory duty to provide the

1361 *Williams v Stephens* (Unreported, Supreme Court of New South Wales, Young J, 24 March 1986) 3. For a general discussion of the scope of the duty, see D Hayton (ed), *Underhill and Hayton: Law Relating to Trusts and Trustees* (17th ed, 2006) [60.28]–[60.70].

1362 *Ottley v Gilby* (1845) 8 Beav 602; 50 ER 237, 238 (Lord Langdale MR).

1363 *Re Tillott; Lee v Wilson* [1892] 1 Ch 86, 88 (Chitty J). In that case, where trust funds were invested in Bank of England ‘consols’ (or consolidated annuities), it was held that the trustee’s duty extended to giving the beneficiary an authority to apply to the bank to confirm that the investment was free from any encumbrances.

1364 *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740, 741 (Sir J Stuart VC).

1365 *Re Tillott; Lee v Wilson* [1892] 1 Ch 86, 89 (Chitty J).

1366 *Re Bosworth; Martin v Lamb* (1889) 58 LJ Ch 432.

information or documents, a trustee can also refuse to make the disclosure by claiming the privilege against self-incrimination.¹³⁶⁷

11.195 In its 1991 Report, the Ontario Law Reform Commission considered the degree of access that different parties should have to information about the administration of an estate.

11.196 In relation to beneficiaries, that Commission came to the view that:¹³⁶⁸

While the entitlement of beneficiaries to accounts and information is established under the present law, the scope of their right is uncertain. ... it is unclear whether personal representatives must accord them an opportunity of inspection or give them a copy of the accounts.

11.197 The Commission recommended that a beneficiary should have 'a right of inspection of the accounts, which would include the inventory, and books and records'.¹³⁶⁹ It proposed that this should 'entail inspection of not only financial books and records, but all books and records in the possession or control of the [personal representative]', and that this right should be exercisable on reasonable notice.¹³⁷⁰ It also recommended that this right 'should include a right to obtain a copy of the accounts, books and records at the expense of the beneficiary', which should also be exercisable on reasonable notice.¹³⁷¹

11.198 The Ontario Law Reform Commission considered that, '[t]o be effective in practice, statutory recognition of the beneficiary's right of access to information must be accompanied by an expeditious enforcement procedure'.¹³⁷² It therefore recommended that the legislation should 'provide a summary procedure for a beneficiary to apply to the court if the [personal representative] fails to afford access to the accounts, books and records'.¹³⁷³ In order to encourage compliance with this obligation, the Commission further recommended that:¹³⁷⁴

- where a beneficiary obtains an order for disclosure and is awarded his or her costs, 'the court should be empowered to order that the costs be paid by the [personal representative] personally'; and

¹³⁶⁷ *Bishopsgate Investment Management Ltd (in prov liq) v Maxwell* [1993] Ch 1; *Reid v Howard* (1995) 184 CLR 1.

¹³⁶⁸ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 47.

¹³⁶⁹ *Ibid.*

¹³⁷⁰ *Ibid.*

¹³⁷¹ *Ibid.*

¹³⁷² *Ibid.*

¹³⁷³ *Ibid.* 48.

¹³⁷⁴ *Ibid.*

- a personal representative ‘should be liable in damages to the beneficiary for any loss caused by a failure to comply with the statutory provisions respecting the maintenance of, and access to, accounts, books and records’.

11.199 The Ontario Law Reform Commission also recommended a statutory right of access to information for creditors and persons eligible to apply for family provision out of the deceased’s estate, although the extent of the access recommended was less than that recommended for beneficiaries:¹³⁷⁵

While creditors share with beneficiaries an expectation that the estate will be properly administered to protect the value of the assets, they have an interest that is adverse to the estate and the beneficiaries. Dependants are in a position analogous to that of creditors, for they may also have a claim against the estate.

11.200 Accordingly, the Commission recommended that creditors and dependants should be ‘entitled to apply to the court for an order giving ... such access to accounts, books and records as [they] can demonstrate should reasonably be made available’.¹³⁷⁶

The National Committee’s view

Beneficiaries’ statutory entitlement to inspect documents

11.201 Although the National Committee is mindful of not imposing unnecessary burdens on personal representatives, it nevertheless considers it desirable to encourage openness in the administration of estates. In an area where suspicion and distrust are common, access to information has the potential to diffuse many conflicts and avoid unnecessary litigation. It was for this reason that the National Committee, in its Wills Report, recommended a provision giving a statutory entitlement to various people to see the deceased’s will.¹³⁷⁷

11.202 For the same reason, the National Committee is of the view that the model legislation should give beneficiaries a statutory entitlement to inspect the documents that relate to the administration of the estate.

11.203 The National Committee has considered whether a beneficiary should have access to all documents that are required to be maintained in relation to the administration of the estate, or only to such of those documents as are relevant to the beneficiary’s interest. If access were restricted to documents relevant to the particular beneficiary’s interest, a residuary beneficiary would be entitled to access to a wider range of documents than, say, the beneficiary of a

1375 *Ibid.*

1376 *Ibid.*

1377 *Wills Report* (1997) 109–12. See now *Wills Act* (NT) s 54; *Succession Act 2006* (NSW) s 54; *Succession Act 1981* (Qld) s 33Z; *Wills Act 2008* (Tas) s 63; *Wills Act 1997* (Vic) s 50.

specific disposition. Although this approach would be consistent with the right of access under the general law,¹³⁷⁸ it has the potential to give rise to disputes about whether particular documents are relevant to an individual beneficiary's interests. For that reason, the National Committee is of the view that every beneficiary should be entitled to have access to the documents that the personal representative is required to maintain.

11.204 The model legislation should therefore provide that a beneficiary may, on giving reasonable notice to the personal representative, inspect the documents that the personal representative is required to retain and obtain copies of those documents.

11.205 The model legislation should also provide that the personal representative must allow the beneficiary, or the beneficiary's agent, to inspect the documents or obtain copies of the documents.

11.206 Although a beneficiary is to have a right to obtain copies of documents, the beneficiary should be required to bear the cost of producing copies of those documents.

Enforcement

11.207 The model legislation should provide that, if a personal representative fails to comply with the obligation to give access to documents, the beneficiary may apply to the court for an order requiring the personal representative to comply with that obligation. That provision should be supported by court rules that create a summary procedure for the enforcement of the right of access. This is consistent with the other recommendations in this Report that provisions dealing with how particular applications are to be made should be in the court rules, rather than in the legislation.¹³⁷⁹

11.208 Any procedure should be framed in a way that ensures that the court has a discretion in relation to ordering that documents be produced for inspection or copying, so that, in an appropriate case, the court may exercise its discretion to refuse the application for access.

Orders for costs against the personal representative

11.209 In the National Committee's view, it is not necessary to include a provision to the effect that the court may order that the costs of a successful applicant be paid by the personal representative personally.

¹³⁷⁸ See [11.194] above.

¹³⁷⁹ See [14.43]–[14.46] in vol 2 of this Report, where the National Committee has recommended that the provision providing a form of summary relief for beneficiaries when a personal representative refuses to pay a legacy should be contained in court rules, rather than in the legislation.

Damages

11.210 In the National Committee's view, the model legislation should not include a provision, as recommended by the Ontario Law Reform Commission, to the effect that a personal representative should be liable in damages to a beneficiary for any loss caused by a failure to comply with the statutory provisions in relation to the maintenance and disclosure of documents. The National Committee has already recommended that the model legislation should include a provision, based on section 52(2) of the *Succession Act 1981* (Qld), so that, if a personal representative fails to perform his or her duties as set out in the legislation, the court may make such order as it thinks fit, including an order for damages.¹³⁸⁰ In view of that recommendation, it is unnecessary to include a specific provision to enable the court to award damages to a beneficiary for any loss caused by a breach of the duty to maintain documents or to allow inspection of those documents.

Family provision applicants and creditors

11.211 The National Committee notes that the Ontario Law Reform Commission recommended a slightly different entitlement to information for persons who are eligible to apply for family provision out of the deceased's estate and for creditors of the estate.¹³⁸¹ The National Committee agrees that persons who are eligible for family provision and creditors should not have an automatic right to inspect and copy documents in relation to the administration of an estate, but should be able to apply to the court for access to such documents as the court considers appropriate.

11.212 In the National Committee's view, the model legislation should provide that a person who is eligible to apply for family provision or a creditor may apply to the court for such an order and that the court may order that the personal representative give access to such documents as it considers appropriate, for example, by allowing the inspection of documents or providing copies of documents. However, the procedure for making such an application should be contained in court rules, rather than in the model legislation.

11.213 For consistency with the recommendations in relation to beneficiaries, the model legislation should provide that any right of access given by the court to a person eligible to apply for family provision or a creditor may be exercised by the person personally or by an agent. The model legislation should also provide that the person to whom the court gives access is required to pay the personal representative's cost of producing any copies of documents sought by the person.

1380 See Recommendation 14-1 in vol 2 of this Report.

1381 See [11.200] above.

11.214 These provisions should be supported by court rules creating a summary procedure for the enforcement of any right of access that is given by the court.

The privilege against self-incrimination

11.215 The National Committee notes that, for so long as the duty to produce documents is not based in statute, a personal representative may refuse to produce documents on the ground that the documents might incriminate him or her. However, once the decision is made to include a statutory provision requiring the disclosure of documents, it is necessary to consider whether that provision should preserve or abrogate the privilege against self-incrimination. The privilege may be abrogated expressly or by implication. In the absence of express words of abrogation, however, the exclusion of the privilege will depend on whether the provision in question sufficiently demonstrates the relevant intention by 'necessary implication'.¹³⁸² The High Court has rejected the notion that an expression in general terms is sufficient to abrogate a fundamental common law right.¹³⁸³

11.216 The National Committee considers that the main problem sought to be addressed by the model legislation is not the prosecution of personal representatives who may have defrauded beneficiaries, but the lack of certainty surrounding the rights of beneficiaries to information about the administration of estates. In the National Committee's view, the latter problem can be addressed by the creation of a statutory right to inspect and copy documents, without taking the further step of abrogating the personal representative's right to claim the privilege against self-incrimination. The National Committee takes the view that, by not expressly abrogating the privilege, it is preserving the privilege.

THE EXECUTOR'S YEAR

11.217 This section of the chapter examines the principle of the executor's year, a broad principle that encompasses a number of duties that must ordinarily be performed by a personal representative within a year of the deceased's death. It also examines the various Australian provisions that refer to, or have a bearing on, some aspect of the principle.

¹³⁸² *Sorby v The Commonwealth of Australia* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ).

¹³⁸³ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [39] (McHugh J). See also at [32] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), [90], [111] (Kirby J) and [134] (Callinan J). Although the issue in that case was whether a provision had impliedly abrogated legal professional privilege, the observations of the Court on the abrogation of fundamental common law rights strongly indicate the approach that the Court would be likely to take in relation to the privilege against self-incrimination.

The nature of the ‘executor’s year’

11.218 The ‘executor’s year’ is the period of one year from the deceased’s death. Some commentators have suggested that the term has its origins in the English *Statute of Distributions of 1670*,¹³⁸⁴ which provided that no distribution of the goods of any person dying intestate was to be made until the expiry of one year after the intestate’s death.¹³⁸⁵ In *Beckford v Tobin*,¹³⁸⁶ however, the Court suggested, in the context of deciding whether a legacy carried interest from the testator’s death, that the general rule that interest on a general legacy is payable from one year after the testator’s death is not based on the *Statute of Distributions*, but was a rule of the Ecclesiastical Courts, ‘which gave the executor a year to get in the estate, and pay the legacy, before he should be compelled to give an account’.¹³⁸⁷

11.219 Whatever the origins of the term, the principle of the executor’s year is now accepted as applying to both executors and administrators. It recognises that ‘[a]s a general guide the representative is allowed the executor’s year to complete the administration of the estate’.¹³⁸⁸ The nature of the duties that are ordinarily to be completed within a year of the deceased’s death have been described as follows:¹³⁸⁹

the executor, before the end of the first year after the testator’s death, ought, if possible, to convert all the assets into money, and pay the funeral and testamentary expenses, debts and legacies, and hand over the clear residue to the residuary legatee, or, if the residue is bequeathed to one for life, to secure the capital ... for the benefit of those ultimately entitled, and if from any cause the assets cannot be sold, so as to effect this purpose, the right of the tenant for life will commence from that date.

11.220 However, the principle is ‘not an absolute one’, but is based on what is reasonable in the circumstances.¹³⁹⁰

Duty to sell property

11.221 It has been observed that it is not possible to ‘fix one period for selling every species of property’.¹³⁹¹ What is a reasonable period of time ‘depends on

¹³⁸⁴ See RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [18.8.1].

¹³⁸⁵ 22 & 23 Car II c 10 s 5. The *Statute of Distributions* set out the manner in which the personal estate of an intestate was to be distributed: see note 1183 above.

¹³⁸⁶ (1749) 1 Ves Sen 309; 27 ER 1049.

¹³⁸⁷ Ibid 1050.

¹³⁸⁸ RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [18.8.1].

¹³⁸⁹ *Wightwick v Lord* (1857) 6 HLC 217; 10 ER 1278, 1286 (Lord Wensleydale).

¹³⁹⁰ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [48.24].

¹³⁹¹ *Hughes v Empson* (1856) 22 Beav 181; 52 ER 1077, 1078 (Sir John Romilly MR).

the particular nature of the property and the evidence affecting it'.¹³⁹² Nevertheless, the prima facie rule is that unauthorised investments¹³⁹³ should be sold within a year of the deceased's death, and a personal representative who fails to do so bears the onus of justifying the delay.¹³⁹⁴ Where a personal representative fails to sell assets within a year of the deceased's death, and is unable to justify the delay, he or she may be held liable to make good any loss that the deceased's estate sustains by not selling the property within the year.¹³⁹⁵

11.222 Much of the older case law was concerned with the realisation of unauthorised investments, especially in relation to estates where the will established trusts for the benefit of various beneficiaries. As explained later in this chapter, the longstanding distinction between authorised and unauthorised investments no longer applies in Australia.¹³⁹⁶ However, the principle of the executor's year has also been expressed more generally:¹³⁹⁷

executors and administrators (subject to any powers of postponement given to executors by the will under which they act) ought to realise the property of the deceased within what is commonly known as the executor's year.

11.223 If the principle requires that a personal representative should ordinarily be in a position to distribute the estate within a year of the deceased's death, it must, by implication, require the personal representative, within that period of time, to sell such property as may be necessary to pay the deceased's debts, regardless of the types of property or investments that comprise the estate.¹³⁹⁸

11.224 More recently, some doubt has been cast on whether, in every case, a personal representative should have a full year in which to administer an estate (at least in those jurisdictions where the legislation does not provide that a personal representative cannot be compelled to distribute within a year of the deceased's death¹³⁹⁹).¹⁴⁰⁰

1392 Ibid.

1393 The distinction between authorised and unauthorised investments is discussed at [11.229] below.

1394 *Grayburn v Clarkson* (1868) LR 3 Ch App 605, 606 (Sir W Page Wood LJ).

1395 *Grayburn v Clarkson* (1868) LR 3 Ch App 605; *Sculthorpe v Tipper* (1871) LR 13 Eq 232. In both cases, the executors retained shares beyond the first anniversary of the deceased's death (for 17 and two years respectively) in companies that had unlimited liability. The executors were held liable to make good the loss to the estates that was incurred when the companies were wound up.

1396 See [11.229] below.

1397 *In the Estate of Keenan* (1899) 10 B & P 10, 13 (Walker J), which concerned the administration of an intestate estate.

1398 Of course, where there are no debts and a will makes dispositions of specific property to particular beneficiaries, there would be no duty to realise or convert that property.

1399 See [11.234]–[11.237] below for a discussion of the Tasmanian and Victorian provisions that prevent a personal representative from being compelled to make a distribution within a year of the deceased's death.

1400 *Williams v Stephens* (Unreported, Supreme Court of New South Wales, Young J, 24 March 1986) 3.

The court and the public expect that routine probate work will be handled speedily. However, there seems to be a general idea that an executor has a year to do his work, and so long as he acts within that year he is not impeachable.

Duty to pay debts

11.225 The courts have also rejected any fixed rule that a personal representative must pay the deceased's debts within a year of the deceased's death, and have instead cast the duty as one to pay debts with due diligence, having regard to the circumstances of the estate:¹⁴⁰¹

there is, in my opinion, no rule of law that it is the duty of executors to pay such debts within a year from the testator's death. The duty is to pay with due diligence. Due diligence may, indeed, require that payment should be made before the expiration of the year, but the circumstances affecting the estate and the assets comprised in it may justify non-payment within the year, but, if debts are not paid within the year, the onus is thrown on the executors to justify the delay.

Equitable apportionment: 'the rule in *Howe v Lord Dartmouth*'

11.226 The executor's year is relevant to a trustee's duty to make certain apportionments of the income deriving from the investment of trust property. The duty in relation to apportionments arises where 'there is a trust for sale for the benefit of persons in succession', as 'it is inevitable that some investments will favour the life tenant and others will favour the remainderman'.¹⁴⁰² In recognition of this potential imbalance, '[e]quity has developed technical rules which seek to restore a balance between those interested in trust capital and those interested in trust income'.¹⁴⁰³ The main duty in relation to apportionments¹⁴⁰⁴ is known as the rule in *Howe v Lord Dartmouth*.¹⁴⁰⁵

11.227 The first aspect of the rule applies where the 'residuary personal estate is held on trust for persons in succession' and requires that personal representatives 'are obliged to convert all unauthorised investments of a wasting or hazardous nature and to invest the proceeds in authorised investments'.¹⁴⁰⁶ The problem sought to be addressed by the rule is that

1401 *Re Tankard* [1942] 1 Ch 69, 73 (Uthwatt J). The duty is subject to any provision contained in the will conferring a power to retain assets: *Re Tankard* [1942] 1 Ch 69, 74 (Uthwatt J). See also *Grayburn v Clarkson* (1868) LR 3 Ch App 605, 606 (Sir W Page Wood LJ).

1402 Law Commission (England and Wales), *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [3.2].

1403 *Ibid.*

1404 It has been observed that, although the relevant equitable rules of apportionment are 'sometimes collectively referred to as the rule in *Howe v Dartmouth* but ... the rule in *Howe v Dartmouth* forms in effect only one of the three relevant major rules [and] these are better described as the rules of equitable apportionment' (note omitted): JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [77–01].

1405 (1802) 7 Ves Jun 137; 32 ER 56.

1406 Law Commission (England and Wales), *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [3.6].

wasting or hazardous investments often yield a higher return in the short-term, which is to the benefit of the person entitled to the income of the trust, but may not retain their value for the person entitled in remainder.

11.228 The second aspect of the rule (to which the ‘executor’s year’ is relevant) is that, if the unauthorised investments are still retained at the end of the first year after the testator’s death, the personal representative must pay the life tenant interest (usually at the rate of 4 per cent per annum¹⁴⁰⁷) on the capital value of the unauthorised investments as at the end of the first year after the testator’s death.¹⁴⁰⁸ The rationale for paying interest based on a notional conversion of the investments is that equity treats that which ought to be done as having been done.¹⁴⁰⁹

11.229 The rule in *Howe v Lord Dartmouth* developed at a time when a distinction was drawn between authorised and unauthorised investments, and trustees were permitted to invest trust property only in authorised investments.¹⁴¹⁰ However, since 1995, all Australian States and Territories have progressively abolished the statutory list of authorised investments and replaced it with the ‘prudent person’ doctrine, which enables a trustee to invest trust funds in any form of investment.¹⁴¹¹ The trustee legislation of the various jurisdictions specifies a lengthy list of matters to which trustees must have regard when exercising a power of investment, including the purposes of the trust and the needs and circumstances of the beneficiaries, the desirability of diversifying trust investments, the need to maintain the real value of the capital

1407 Ibid [3.21].

1408 *Re Fawcett* [1940] 1 Ch 402, 406–8 (Farwell J). See also *Brown v Gellatly* (1867) LR 2 Ch App 751, 759 (Lord Cairns LJ). Generally, see Law Commission (England and Wales), *Capital and Income in Trusts: Classification and Apportionment*, Consultation Paper No 175 (2004) [3.15]–[3.23].

1409 *Re Fawcett* [1940] 1 Ch 402, 407 (Farwell J).

1410 Ford and Lee note that, in the late eighteenth century, the courts required trust money to be invested in government stock (in particular, in 3 per cent bank annuities): HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [10.030] (at 24 February 2009).

In 1859, the passing of *Lord St Leonards’ Act* (22 & 23 Vict c 35) created the first statutory list of authorised investments: C Eason, ‘Should the list of authorised trustee investments in the Irish Free State be extended?’ (1932) vol 15 no 2 *Journal of the Statistical and Social Inquiry Society of Ireland* <http://www.tara.tcd.ie/bitstream/2262/4641/1/jssisiVolXV1_10.pdf> at 21 February 2009. Section 2 of that Act prescribed the following as authorised investments: rent or heritable securities in Great Britain or Ireland; Government stocks in the United Kingdom; the stocks of the Bank of England and Ireland; and East India Stock.

The statutory lists of authorised investments that developed during the nineteenth century enlarged trustees’ investment powers, but still favoured investments that were of a government, public nature: HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [10.030] (at 24 February 2009).

1411 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [10.1000] (at 24 February 2009). See *Trustee Act 1925* (ACT) ss 14, 14A; *Trustee Act 1925* (NSW) ss 14, 14A; *Trustee Act* (NT) ss 5, 6; *Trusts Act 1973* (Qld) ss 21, 22; *Trustee Act 1936* (SA) ss 6, 7; *Trustee Act 1898* (Tas) ss 6, 7; *Trustee Act 1958* (Vic) ss 5, 6; *Trustees Act 1962* (WA) ss 17, 18. In exercising a power of investment, a trustee must, if the trustee is a professional trustee or is in the profession or business of investing money for other persons, exercise the care, diligence and skill that a prudent person engaged in that profession or business would exercise in managing the affairs of other persons. If the trustee’s profession, business or employment does not include acting as a trustee or investing money for other persons, the trustee must exercise the care, diligence and skill a prudent person of business would exercise in managing the affairs of other persons.

or income of the trust, and the likely income return and the timing of income return.¹⁴¹²

11.230 The trustee legislation provides that '[a]ny rules and principles of law or equity that impose a duty on a trustee exercising a power of investment continue to apply except to the extent that they are inconsistent with this or any Act or instrument creating the trust'.¹⁴¹³ Although Ford and Lee observe that '[t]he general tenor of these provisions retains allusions to trusts for successive beneficiaries',¹⁴¹⁴ they consider that 'with the abolition of the list of authorised investments the law no longer requires an unconsidered application of the rule in *Howe v Lord Dartmouth*'.¹⁴¹⁵ This is because they view the basis for the rule in *Howe v Lord Dartmouth* as being inconsistent with the new approach to trustees' investment powers that is reflected in the legislation:¹⁴¹⁶

This is because the application of the rule [in *Howe v Lord Dartmouth*] was governed by the list both in its definition of what investments were unauthorised and in its requirement that the proceeds of sale of unauthorised investments should be invested within the list, actually or notionally. It epitomised the investment-by-investment approach to trust investing. Now that the list has been abolished the trustees' duty is to decide what sort of accounting procedure they should adopt. In the case of a smaller trust they may decide to scrutinise each investment for its suitability as a vehicle for maintaining fairness between capital and income, and to use the rules under discussion as a guide. Otherwise they may decide to scrutinise the portfolio of investments as a whole and determine whether the portfolio is suitably constructed to ensure a proper income return and security of capital. They may adopt different approaches to different parts of the trust.

11.231 It is not clear, however, what a trustee's duty would be as regards any apportionment of trust income where the sole asset of a trust is a highly speculative investment that, under the prudent person doctrine and having regard to the matters relevant to the exercise of a trustee's power of investment, should be realised and invested in a form of investment that is more suitable. The resolution of that issue, which essentially concerns the duties of a trustee, is outside the scope of this project. However, it is necessary for the National Committee to consider, to the extent that any vestige of the rule in *Howe v Lord Dartmouth* might survive, whether any provisions in the model legislation concerning the executor's year could inadvertently affect the nature of the trustee's duty.

1412 *Trustee Act 1925* (ACT) s 14C(1)(a), (b), (d), (g); *Trustee Act 1925* (NSW) s 14C(1)(a), (b), (d), (g); *Trustee Act* (NT) s 8(1)(a), (b), (d), (g); *Trusts Act 1973* (Qld) s 24(1)(a), (b), (d), (g); *Trustee Act 1936* (SA) s 9(1)(a), (b), (d), (g); *Trustee Act 1898* (Tas) s 8(1), (b), (d), (g); *Trustee Act 1958* (Vic) s 8(1)(a), (b), (d), (g); *Trustees Act 1962* (WA) s 20(1)(a), (b), (d), (g).

1413 *Trustee Act 1925* (ACT) s 14B(1); *Trustee Act 1925* (NSW) s 14B(1); *Trustee Act* (NT) s 7(1); *Trusts Act 1973* (Qld) s 23(1); *Trustee Act 1936* (SA) s 8(1); *Trustee Act 1898* (Tas) s 9(1); *Trustee Act 1958* (Vic) s 7(1); *Trustees Act 1962* (WA) s 19(1).

1414 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [10.2030] (at 24 February 2009).

1415 *Ibid* [11140] (at 24 February 2009).

1416 *Ibid* (at 24 February 2009).

Jurisdictions with statutory provisions

11.232 Several Australian jurisdictions have statutory provisions in their administration legislation that refer to at least some aspect of the principle of the executor's year. The three main types of provisions found deal with:

- the time within which a personal representative cannot be compelled to distribute the estate;
- the preservation of the rules regarding equitable apportionment; and
- the court's power to postpone the sale of property and to authorise the carrying on of a business.

11.233 These matters are dealt with in turn below.

No compulsion to distribute within a year of the deceased's death

11.234 As noted earlier in this chapter, the *Statute of Distributions of 1670* (Eng) provided that a personal representative was not to distribute the estate within a year after the deceased's death.¹⁴¹⁷

11.235 The legislation in Tasmania and Victoria includes a similar provision, and gives the strongest recognition of the executor's year of all Australian jurisdictions. Section 43(1) of the *Administration and Probate Act 1935* (Tas), which is in virtually identical terms to section 49 of the *Administration and Probate Act 1958* (Vic), provides:¹⁴¹⁸

43 Power to postpone distribution: Executor's year

- (1) Subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death.

...

11.236 These provisions are in the same terms as section 44 of the *Administration of Estates Act 1925* (UK). It has been suggested that, in England, even apart from section 44 of the legislation, a personal representative cannot be compelled to make a distribution before that time, although it is

¹⁴¹⁷ See [11.13] above.

¹⁴¹⁸ It has been observed that the Tasmanian provision preserves the 'executor's year': *Re King; Official Trustee in Bankruptcy v RZO Pty Ltd* (Unreported, Federal Court of Australia, Burchett, Carr and Kiefel JJ, 6 February 1997) 10.

acknowledged that a personal representative nevertheless has the authority to do so.¹⁴¹⁹

11.237 Although the Law Institute of Victoria was of the view that the model legislation should include a provision to the effect of section 49 of the *Administration and Probate Act 1958* (Vic), that provision and its Tasmanian counterpart are inconsistent with the recommendation made earlier in this chapter that the model legislation should include a provision to the effect of section 52(1)(d) of the *Succession Act 1981* (Qld), which imposes on a personal representative the duty, subject to the administration of the estate, to distribute the estate as soon as may be.¹⁴²⁰

Preservation of any rule or practice deriving from the executor's year

Existing legislative provision

11.238 The enactment of section 52(1)(d) of the *Succession Act 1981* (Qld), which casts a personal representative's duty to distribute the estate in positive terms, reflected quite a different approach from the *Statute of Distributions of 1670* (Eng) in relation to the executor's year.¹⁴²¹

11.239 The Queensland Law Reform Commission therefore recommended in its 1978 Report that the new Queensland succession legislation include a proviso to section 52(1) to ensure 'that the different drafting approach adopted does not affect rules dependent upon the principle of the executor's year such as apportionments under the rule in *Howe v Lord Dartmouth*'.¹⁴²²

11.240 The proviso is now found in the first limb of section 52(1A), which qualifies the operation of section 52(1). Section 52(1A) provides relevantly:

(1A) Nothing in subsection (1) abrogates any rule or practice deriving from the principle of the executor's year ...

11.241 As mentioned earlier in this chapter, there is now a real doubt as to whether, in view of the changes to the provisions in relation to trustee investments, the rule in *Howe v Lord Dartmouth* still applies.¹⁴²³ As a result, there is an issue as to whether it is necessary to include a provision to the effect of section 52(1A) of the *Succession Act 1981* (Qld) in the model legislation so as not to affect the operation of that rule.

¹⁴¹⁹ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [10–01] referring to *Pearson v Pearson* (1802) 1 Sch & Lef 10; *Angerstein v Martin* (1823) 1 Turn & R 232, 241; 37 ER 1087, 1090 (Eldon LC); *Garthshore v Chalie* (1804) 10 Ves Jun 1, 13; 32 ER 743, 747–8 (Eldon LC).

¹⁴²⁰ See [11.19] above.

¹⁴²¹ See [11.13] above.

¹⁴²² Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 36.

¹⁴²³ See [11.229]–[11.231] above.

Discussion Paper

11.242 In the Discussion Paper, the National Committee commented that ‘no change should be made to the principle of the executor’s year’.¹⁴²⁴ Its preliminary proposal was that the model legislation should include a provision to the effect of section 52(1A) of the *Succession Act 1981* (Qld).¹⁴²⁵ In coming to this view, however, the National Committee did not refer to changes that had recently been made to trustees’ investment powers and to the effect that those changes might have on any rule or practice that section 52(1A) purported to preserve.

Submissions

11.243 The proposal to include a provision to the effect of section 52(1A) was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Queensland Law Society and the ACT Law Society.¹⁴²⁶

11.244 The provision was opposed, however, by the Public Trustees of South Australia and New South Wales and by the New South Wales Law Society.¹⁴²⁷ Both Public Trustees appeared to regard the Queensland provision as entrenching the executor’s year as a rule with fixed requirements.

11.245 The Public Trustee of South Australia commented:¹⁴²⁸

I see no need to legislate the general principle. I believe that there are many circumstances where this principle cannot for good reason be met. If this is the case, enacting the principle in legislation is not advisable ...

11.246 The Public Trustee of New South Wales observed that the *Statute of Distributions of 1670* did not allow any distribution to be made until one year had expired after the intestate’s death, and was opposed to fixing a time for the administration of an estate:¹⁴²⁹

The administration of the estate of a deceased person should be finalised as soon as practical. Every estate is different. No minimum nor maximum time should be prescribed by legislation.

11.247 The New South Wales Law Society, which also opposed the inclusion of a provision to the effect of section 52(1A) of the *Succession Act 1981* (Qld),

1424 *Administration of Estates Discussion Paper* (1999) QLRC 70; NSWLRC [8.49].

1425 *Ibid*, QLRC 71; NSWLRC 104 (Proposal 30).

1426 Submissions 1, 3, 8, 14.

1427 Submissions 4, 11, 15.

1428 Submission 4.

1429 Submission 11.

suggested that the provision addressed matters already provided for in the model legislation.

11.248 An academic expert in succession law, who did not express a view about whether the model legislation should include a provision to the effect of section 52(1A), commented on the rationale for the provision's inclusion in the Queensland legislation:¹⁴³⁰

In the context of Queensland's s [52(1)] it was desirable to refer to the principle of the executor's year in s [52(1A)] in case it was mistakenly thought that somehow the principle had been compromised by the provision. As far as I know the rule in *Howe v Dartmouth* is the principal if not the only occupation of the principle.

The National Committee's view

11.249 As explained above, the reason for including section 52(1A) in the *Succession Act 1981* (Qld) in the first place was to confirm that the drafting of section 52(1) of the Act was not to affect any rules dependent on the principle of the executor's year, such as the rule in *Howe v Lord Dartmouth*.¹⁴³¹

11.250 The National Committee doubts, however, that section 52(1A) was necessary, even at the time. Although section 52(1)(d) changed a personal representative's duty by providing that the estate of a deceased person must be distributed 'as soon as may be', that duty was nevertheless expressed to be subject to the administration of the estate. In a situation where the rule in *Howe v Lord Dartmouth* applied, namely, where there was a trust for beneficiaries in succession (such as a life tenant and a remainderman), the duty to administer 'as soon as may be' would always have a different content from the situation where all beneficiaries have interests vested in possession and the personal representative should be distributing the estate as soon as the debts are paid (subject to any considerations that may arise in respect of potential family provision applications). Moreover, section 52(1)(d) concerns the time within which an estate should be distributed, whereas the rule in *Howe v Lord Dartmouth* concerns not the distribution of the estate, but the time within a notional conversion of certain trust property should be made. The National Committee does not consider that, in the absence of section 52(1A), section 52(1)(d) would have had the effect of accelerating, or otherwise affecting, the time for notional conversion under the rule in *Howe v Lord Dartmouth*.

11.251 As explained earlier, it is arguable that that rule is now obsolete. To the extent that any aspect of the rule might still survive, the National Committee is of the view that there is nothing in the recommended provisions that would affect the operation of the rule and that it is therefore not necessary for the model legislation to include a provision to the effect of section 52(1A) of the *Succession Act 1981* (Qld).

1430 Submission 12.

1431 See [11.238]–[11.240] above.

Authority to postpone realisation of property and carry on business

11.252 As explained earlier, a personal representative should ordinarily realise assets that are required to be sold within a year of the deceased's death.¹⁴³²

11.253 Further, a personal representative's power to carry on a business that forms part of the estate of a deceased person has always been limited to carrying on the business for the sole purpose of realising it.¹⁴³³

Existing legislative provisions

11.254 Most Australian jurisdictions have statutory provisions that affect these principles by enabling the court to authorise the postponement of the sale of property and the carrying on of a business.

Provisions in administration legislation

11.255 In the ACT, the Northern Territory, South Australia and Tasmania, the relevant provisions are found in the administration legislation. They enable the court to authorise a personal representative to postpone the realisation of any part of the estate of a deceased person or to carry on a business of the deceased.¹⁴³⁴

11.256 Section 43(2) and (3) of the *Administration and Probate Act 1935* (Tas), which are similar to the provisions in the other jurisdictions, provide:¹⁴³⁵

43 Power to postpone distribution: Executor's year

...

- (2) Upon application as prescribed, a judge may, if he thinks it expedient and prudent so to do, empower the personal representative to—
- (a) postpone, for such period as the judge may think expedient, the realization of the estate of the deceased or any part thereof;
 - (b) carry on, for such period as the judge may think expedient, the business or affairs of the deceased, and for that purpose use his estate or such part thereof as the judge directs.

¹⁴³² See [11.221]–[11.224] above.

¹⁴³³ *Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319, 324 (Latham CJ). An executor may be authorised by will to carry on the business: 324. Ford and Lee suggest, however, that as trustees now have a 'general power to invest trust property in "any kind of investment"', the limitation in relation to carrying on a business may no longer apply: HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [12.9650] (at 24 February 2009).

¹⁴³⁴ *Administration and Probate Act 1929* (ACT) s 51A; *Administration and Probate Act* (NT) s 83; *Administration and Probate Act 1919* (SA) s 64; *Administration and Probate Act 1935* (Tas) s 43(2). The ACT and South Australian trustee legislation also includes provisions under which the court may, in certain circumstances, authorise the postponement of sale of trust property and the carrying on of a business: see note 1440 below.

¹⁴³⁵ The ACT and Northern Territory provisions do not have an equivalent of s 43(3) of the *Administration and Probate Act 1935* (Tas).

- (3) A personal representative acting in pursuance of leave given under this section shall not be answerable for consequent loss, except in case of breach of trust, negligence, or wilful default.

11.257 The Victorian administration legislation includes a provision dealing with a personal representative's powers of management. Section 44 of the *Administration and Probate Act 1958 (Vic)* provides:

44 Powers of management

- (1) In dealing with the real and personal estate of the deceased his personal representatives shall for purposes of administration have—
- (a) the same powers and discretions including power to raise money by mortgage with or without a power of sale or charge (whether or not by deposit of documents) as a personal representative had before the first day of January One thousand eight hundred and seventy-three with respect to personal estate vested in him; and
 - (b) all the powers discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale; and
 - (c) all the powers conferred by statute on trustees for sale and so that every contract entered into by a personal representative shall be binding on and be enforceable against and by the personal representative for the time being of the deceased, and may be carried into effect or be varied or rescinded by him and in the case of a contract entered into by a predecessor as if it had been entered into by himself.
- (2) Nothing in this section shall affect the right of any person to require an assent or conveyance to be made.

11.258 Section 44(1)(b) provides that, in dealing with the real and personal estate of a deceased person, a personal representative has, for the purposes of administration, 'all the powers discretions and duties conferred or imposed by law on trustees holding land upon an effectual trust for sale'. This would include a power to postpone the sale of property.¹⁴³⁶

Provisions in trustee legislation

11.259 In New South Wales, Queensland and Western Australia the relevant provisions are found in the trustee legislation, rather than in the administration legislation.¹⁴³⁷

¹⁴³⁶ See *Trustee Act 1958 (Vic)* s 13(5).

¹⁴³⁷ See also the *Administration (Validating) Act 1900 (NSW)* s 5, which applies where any person has died intestate as to any real or personal estate.

11.260 The *Trustee Act 1925* (NSW) provides that a power to postpone sale is implied in every trust for sale, unless a contrary intention appears.¹⁴³⁸ The power to postpone the sale of trust property has been held to imply a power to carry on the business of a testator.¹⁴³⁹ The legislation also provides that where, in the management or administration of any property vested in trustees, any dealing is in the court's opinion expedient, but the trustees cannot effect the dealing or transaction because of an absence of power for that purpose, the court may confer the necessary power on the trustees and may authorise the trustees to postpone the sale of trust property and to carry on any business forming part of the trust property during any period for which a sale may be postponed.¹⁴⁴⁰

11.261 In Queensland and Western Australia, the trustee legislation includes very broad provisions in relation to the carrying on of a business.¹⁴⁴¹ Section 55 of the *Trustees Act 1962* (WA), which is similar to section 57 of the *Trusts Act 1973* (Qld),¹⁴⁴² provides:

55 Business, trade, etc. of deceased, power to carry on

- (1) Subject to the provisions of any other Act, if at the time of his death any person is engaged (whether alone or in partnership) in carrying on a business, trade or occupation, it shall be lawful for his trustee to continue to carry on that business, trade or occupation, in the same manner, for any one or more of the following periods, namely—
- (a) 2 years from the death of that person;
 - (b) such period as may be necessary or desirable for the winding up of the business; or
 - (c) such further period or periods as the Court may approve.

1438 *Trustee Act 1925* (NSW) s 27B(1). A similar provision is found in the Victorian trustee legislation: *Trustee Act 1958* (Vic) s 13(5).

1439 *Re Hammond* (1903) 3 SR (NSW) 270.

1440 *Trustee Act 1925* (NSW) s 81(2)(b), (c). Provisions in the same terms are also found in the ACT and South Australian trustee legislation (*Trustee Act 1925* (ACT) s 81(2)(b), (c); *Trustee Act 1936* (SA) s 59B(2)(b), (c)) in addition to the provisions found in the administration legislation of these jurisdictions. It has been observed that these provisions are 'much more extensive than the court's inherent jurisdiction as to render the latter virtually obsolete': JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [1706].

1441 *Trusts Act 1973* (Qld) s 57; *Trustees Act 1962* (WA) s 55. See also s 29 of the *Trustee Companies Act 1968* (Qld), which applies where administration of the estate of an intestate is granted to a trustee company, part of the property in the estate was being employed by the intestate in carrying on a business, and one or more of the persons beneficially entitled to the property is an infant. The section provides that the trustee company may, with the sanction of the court, postpone the sale and conversion of the property into money and manage and carry on the business with such property and for such period during the minority of the infant or infants as the Court thinks fit.

1442 *Trusts Act 1973* (Qld) s 57 does not refer to a business carried on by a person at the time of his or her death, but to a business carried on by a settlor at the commencement of a trust. The provision may nevertheless be used by a personal representative to carry on a business that forms part of the estate of a deceased person: AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [9.170]. For a more detailed consideration of the application of the provision to a business forming part of a deceased estate, see WA Lee, *Manual of Queensland Succession Law* (1st ed, 1975) §74.

- (2) In exercise of the powers conferred by this section or by the instrument creating the trust, a trustee may—
- (a) employ any part of the deceased's estate that is subject to the same trusts;
 - (b) from time to time increase or diminish the part of the estate employed as provided by paragraph (a);
 - (c) purchase stock, machinery, implements, and chattels for the purpose of the business mentioned in subsection (1);
 - (d) employ such managers, agents, servants, clerks, workmen and others as he thinks fit;
 - (e) at any time enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the death of the deceased or at any time thereafter and notwithstanding that the trustee was a partner of the deceased in his own right; and
 - (f) enter into share-farming agreements.
- (3) Application to the Court for leave to carry on a business may be made by the trustee or any person beneficially interested in the estate at any time, whether or not any previous authority to carry on the business has expired; and the Court may make such an order, or may order that the business be not carried on, or be carried on subject to conditions, or may make such other order as, in the circumstances, it thinks fit.
- (4) Nothing in this section affects any other authority to do the acts thereby authorised to be done.
- (5) Where a trustee is in any manner interested or concerned in a trade or business, he may make such subscriptions as it would be prudent for him to make, if he were acting for himself, out of the income of the assets affected, to any fund created for objects or purposes in support of any trade or business of a like nature and subscribed to by other persons engaged in a like trade or business.

11.262 The powers conferred on a trustee by section 55 of the *Trustees Act 1962* (WA) apply subject to a contrary intention expressed in the instrument (if any) creating the trust, and have effect subject to the terms of that instrument.¹⁴⁴³ That is also the position under section 57 of the *Trusts Act 1973* (Qld).

11.263 An advantage of the Queensland and Western Australian provisions over the provisions contained in the administration legislation in the ACT, the Northern Territory, South Australia and Tasmania is that an application to the court for approval to carry on a business will not be required until at least two years after the deceased's death.

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Trustees Act 1962 (WA) s 5(2)–(3).

11.264 The trustee legislation in Queensland and Western Australia also confers on a trustee the power to postpone the sale of property that the trustee has a duty to sell.¹⁴⁴⁴

Discussion Paper

11.265 In the Discussion Paper, the National Committee sought submissions on whether the model legislation should include a provision to the effect of section 43(2) of the *Administration and Probate Act 1935* (Tas).¹⁴⁴⁵

Submissions

11.266 Three respondents — the Bar Association of Queensland, a former ACT Registrar of Probate and the Queensland Law Society — expressed the view that the model legislation should include a provision to the effect of section 43(2) of the *Administration and Probate Act 1935* (Tas).¹⁴⁴⁶

11.267 The Bar Association of Queensland commented:¹⁴⁴⁷

There is often good reason why an executor might better serve an estate by postponing the realisation of assets or carrying on business for more than the executor's traditional year; and a power in the Court to extend that year if it is 'expedient and prudent' is appropriate.

11.268 The former ACT Registrar of Probate expressed a similar view:¹⁴⁴⁸

Where an estate is complex, there may be a delay in administration and the Court is the appropriate forum to decide whether an extension of the executor's year is appropriate. It is important to note that where beneficiaries want property (often for sentimental reasons) rather than just the money, the executor's year can be a real barrier.

11.269 The inclusion in the model legislation of a provision to this effect was, however, opposed by two respondents.

11.270 An academic expert in succession law commented on section 43 of the *Administration and Probate Act 1935* (Tas) generally. He observed that section 43(1), which provides that a personal representative cannot be compelled to make a distribution within the executor's year, is inconsistent with the

1444 *Trusts Act 1973* (Qld) s 32(1)(c); *Trustees Act 1962* (WA) s 27(1)(c). In Queensland, this power does not apply in respect of property that is of a wasting, speculative or reversionary nature. In Western Australia, the power to postpone applies in respect of trust property of that kind, but for no longer than is reasonably necessary to permit its prudent realisation.

1445 *Administration of Estates Discussion Paper* (1999) QLRC 71; NSWLRC 104. Section 43(2) of the *Administration and Probate Act 1935* (Tas) is set out at [11.256] above.

1446 Submissions 1, 2, 8.

1447 Submission 1.

1448 Submission 2.

requirement in section 52(1)(d) of the *Succession Act 1981* (Qld) that the estate must be distributed as soon as may be. He considered that:¹⁴⁴⁹

Some personal representatives might construe the Tasmanian provision as justifying the retention of the estate for a year however simple the administration and however desperate the needs of beneficiaries. I doubt whether one should go further than the Queensland provision.

11.271 In relation to section 43(2) of the Tasmanian legislation, this respondent acknowledged that '[s]ome estates take far longer than a year to administer and it may be essential to maintain a business on foot pending sale or perhaps a decision to transfer to a beneficiary when that beneficiary is ready to take it on'. However, he considered that the Tasmanian provisions enabling an application to be made to the court 'are probably already the law anyway'.¹⁴⁵⁰

11.272 The ACT Law Society opposed the inclusion of a provision to the effect of section 43(2) of the *Administration and Probate Act 1935* (Tas) on the basis that the provision was unnecessarily restrictive. It suggested that, in practice, many personal representatives exceed the time limit referred to in the provision, and that the time limit referred to in the provision 'would often be ignored'.¹⁴⁵¹

11.273 The Law Institute of Victoria suggested that the model legislation should include a provision to the effect of section 44 of the *Administration and Probate Act 1958* (Vic),¹⁴⁵² which has the effect of conferring on a personal representative the power to postpone the sale of property.¹⁴⁵³

The National Committee's view

11.274 In the National Committee's view, it is inevitable that there will be circumstances where it is in the best interests of an estate that the personal representative should be able to postpone the sale of property in the estate or carry on a business that forms part of the estate. Ideally, the same provisions in relation to the postponement of the sale of property and the carrying on of a business should apply to both personal representatives and trustees. However, given the differences that apply under the trustee legislation of the various jurisdictions, the National Committee is of the view that specific provisions should be included in the model legislation.

11.275 The model legislation should include a provision to the effect of section 43(2)(a) of the *Administration and Probate Act 1935* (Tas) so that the court may, if it considers it expedient and prudent to do so, authorise a personal

1449 Submission 12.

1450 Ibid.

1451 Submission 14.

1452 Submission 19.

1453 *Administration and Probate Act 1958* (Vic) s 44 is set out at [11.257] above.

representative to postpone, for such period as the court considers appropriate, the realisation of the estate or any part of it.

11.276 The legislation should also include provisions to authorise the carrying on of a business that formed part of the estate of a deceased person. The National Committee considers that section 55 of the *Trustees Act 1962* (WA) is a more useful provision than section 43(2)(b) of the *Administration and Probate Act 1935* (Tas). It therefore recommends the inclusion in the model legislation of provisions to the effect of section 55 of the *Trustees Act 1962* (WA), subject to the following modifications.

11.277 First, the model provision that is based on section 55(1) of the *Trustees Act 1962* (WA) should omit the expression 'whether alone or in partnership'. The National Committee wishes to avoid any argument that the model provision does not apply if the deceased was the sole shareholder of a corporation through which he or she carried on a business. The omission of this expression should ensure the broadest application of this provision.

11.278 Secondly, the model provision that is based on section 55(1) of the *Trustees Act 1962* (WA) should simply provide that, in the relevant circumstances, it is lawful for the personal representative to continue to carry on the business for:

- the period, up to two years from the deceased's death, that is necessary or desirable for the winding up of the business; or
- the further period or periods that the Supreme Court approves.

11.279 The National Committee is concerned that the current reference in section 55(1)(a) of the *Trustees Act 1962* (WA) to '2 years from the death of that person' would allow a personal representative to carry on the deceased's business (and employ any part of the estate in the business) for a period longer than that which is necessary or desirable to wind up the business. It is also concerned that the current reference in section 55(1)(b) of the Act to 'such period as may be necessary or desirable for the winding up of the business' has the potential to authorise a personal representative to carry on the business well in excess of two years, possibly leading to disputes with beneficiaries about the period of time that is necessary or desirable to wind up a particular business. In its view, it is simpler to authorise the personal representative to carry on the business for the period, up to two years from the deceased's death, that is necessary or desirable for the winding up of the business, and to enable an application to be made for approval to carry on the business for any longer period.

11.280 Thirdly, section 55(2)(a) currently provides that the trustee may employ any part of the deceased's estate that is subject to the same trusts. The model provision that is based on section 55(2)(a) should instead provide that the personal representative may employ any part of the deceased's estate 'as is reasonably necessary'.

11.281 Fourthly, the model provisions should apply subject to any contrary intention in the deceased's will, if any.¹⁴⁵⁴

DUTY OF ADMINISTRATOR HOLDING PROPERTY FOR CERTAIN BENEFICIARIES TO TRANSFER PROPERTY TO THE PUBLIC TRUSTEE

Existing legislative provisions

11.282 The *Administration and Probate Act 1919* (SA) requires an administrator, other than a trustee company, who is holding property belonging to a person who is not *sui juris* or resident within the State to transfer the property to the Public Trustee, who is then required to administer the property. Section 65 provides:

65 Administrator to pay over money and deliver property to Public Trustee

- (1) Every administrator who is possessed of or entitled to any property within this State, whether personal or real, belonging to any person who—
 - (a) is not *sui juris*, or
 - (b) is not resident in this State, and has no duly authorised agent or attorney therein:shall deliver, convey, or transfer such property to the Public Trustee immediately after the expiration of one year from the date of the death of the intestate or testator, or within six months after such sooner time as the same or such portion thereof as is available for that purpose, has been sold, realised, collected, or got in.
- (2) The Public Trustee shall then administer such property according to law, and in accordance with any will affecting such property.
- (2a) The Public Trustee may, in his discretion, (but subject to the provisions of any will or instrument of trust) realise, or postpone the realisation of, any real or personal property delivered, conveyed or transferred to him under subsection (1) of this section.
- (3) This section shall not apply in any case where the administrator is a limited company incorporated or taken to be incorporated under the *Corporations Act 2001* of the Commonwealth, and is acting as administrator in pursuance of any powers granted to it by any Act.
- (4) This section shall not apply to an administrator acting under any probate or administration not granted by the Supreme Court but sealed with the seal of the Supreme Court in pursuance of the provisions of section 17 of this Act.

1454

See [11.262] above.

- (5) Subject to the provisions of any will or instrument of trust, the Public Trustee may, if he is satisfied that it will be advantageous to the beneficiaries, authorise the sale of any trust property, not exceeding four thousand dollars in value, to the administrator, or to the administrator conjointly with any other person, notwithstanding that the property has not been offered for sale by public auction or otherwise.

11.283 The term ‘administrator’ is defined in the legislation to mean ‘any person to whom administration has been granted’.¹⁴⁵⁵ ‘Administration’ is defined to mean ‘all letters of administration of the effects of deceased persons, whether with or without the will annexed, and whether granted for general, special, or limited purposes’.¹⁴⁵⁶ As a result, the duty to transfer property to the Public Trustee arises only where letters of administration have been granted to an administrator; an executor is not subject to the same duty. The duty does not apply to an administrator acting under a grant issued elsewhere that has been resealed in South Australia.¹⁴⁵⁷

11.284 The legislation provides that, once an administrator delivers, conveys or transfers the property to the Public Trustee under section 65 of the Act, the administrator and any surety are discharged from any further responsibility in respect of the property.¹⁴⁵⁸

11.285 Section 67 of the *Administration and Probate Act 1919 (SA)* enables an administrator or proposed administrator to apply for an order that he or she is not to be bound by section 65 of the Act:

67 Judge may dispense wholly or partially with compliance with section 65

- (1) A Judge may, on being satisfied by affidavit that it is beneficial or expedient so to do, order—
- (a) that any administrator, or proposed administrator, shall not be bound by section 65; or
 - (b) that any administrator, or proposed administrator, shall not be bound by the said section 65 until after a certain time to be mentioned in the order.
- (2) The time mentioned in any order made under subdivision (b) of subsection (1) may be extended by a subsequent order.
- (3) Any order under subsection (1) or (2) may be obtained without notice to any interested party on the application of the administrator or proposed administrator.

1455 *Administration and Probate Act 1919 (SA)* s 4.

1456 *Administration and Probate Act 1919 (SA)* s 4.

1457 *Administration and Probate Act 1919 (SA)* s 65(4).

1458 *Administration and Probate Act 1919 (SA)* s 66. Note that the National Committee has recommended the abolition of the requirement for an administrator to provide an administration bond or surety: see Chapter 9 of this Report.

- (4) An order under subdivision (a) of subsection (1) may be granted notwithstanding that an order has already been made under subdivision (b) of subsection (1).
- (5) If the Court so directs, an order under this section has the effect of discharging the administrator and any surety from further responsibility in respect of the property to which the order relates.
- (6) The Public Trustee, or any person interested, may issue a summons requiring the administrator, or proposed administrator, to appear before a Judge to show cause why any order made under this section should not be set aside, and the Judge may set aside such order, or vary the same, or make such other order as seems to him best.

11.286 Factors relevant to the exercise of the court's discretion to relieve an administrator of the duty to transfer property to the Public Trustee include the cost to the estate of transferring the property, the cost that would be incurred by the estate by way of commission charged by the Public Trustee, and the administrator's capacity to manage the relevant property effectively and at a reasonably conservative cost structure.¹⁴⁵⁹

Discussion Paper

11.287 In the Discussion Paper, the National Committee proposed that, subject to two qualifications, a provision to the general effect of sections 65 and 67 of the *Administration and Probate Act 1919* (SA) should be included in the model legislation.¹⁴⁶⁰ The first qualification was that the provision should not impose a mandatory obligation; instead, an order requiring the transfer of property to the public trustee should simply be one of a number of possibilities to protect persons who are not *sui juris*. The second qualification was that the model provision should not apply to the situation where the beneficiary is resident out of the jurisdiction, as section 65(1)(a) of the South Australian legislation presently does.

Submissions

11.288 The National Committee's proposal was supported by the Bar Association of Queensland, a former ACT Registrar of Probate, the National

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Re Sopru (1992) 165 LSJS 132, 146 (Legoe J); *Re Freebairn* (2005) 93 SASR 415. In *Re Sopru*, Legoe J made an order that the applicant, who was the deceased's widow and the proposed administrator, be relieved of the duty to transfer to the Public Trustee the share of the deceased's estate to which her minor children were entitled. The estate included substantial real estate holdings as well as an air charter business. Legoe J noted that the transfer of the property would incur considerable conveyancing costs and that the commission charged by the Public Trustee on the capital and income of the estate would be substantial. Importantly, his Honour found that the applicant was well qualified to manage the air charter business. Legoe J considered that, if the assets of the business were transferred to the Public Trustee, the Public Trustee would have to contract out the management of the business, and that the only logical person to whom it could contract that out was the applicant herself.

¹⁴⁶⁰

Administration of Estates Discussion Paper (1999) QLRC 64–5; NSWLRC 96 (Proposal 27).

Council of Women of Queensland, the Public Trustee of New South Wales and the New South Wales Law Society.¹⁴⁶¹

11.289 Subject to one modification, the proposal was also supported by the Public Trustee of South Australia, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia.¹⁴⁶² These respondents were of the view that the model legislation should not simply provide that the court may order the transfer of property to the Public Trustee, but should give the court ‘the discretion to appoint the appropriate trustee(s)’, which might be the Public Trustee, a trustee company or a natural person.¹⁴⁶³

11.290 The Trustee Corporations Association of Australia commented that:¹⁴⁶⁴

there should be more than one trustee if a professional trustee is not selected, to ensure there are checks and balances in place.

11.291 An academic expert in succession law did not address the National Committee’s proposal to give the court a discretion to order property to be transferred to the public trustee, but disagreed strongly with the mandatory requirement imposed by the South Australian legislation. He queried the reference to property ‘belonging’ to a person who is not *sui juris* and was critical of the effect of the requirement to transfer property to the public trustee:¹⁴⁶⁵

Does it mean that if a parent is the administrator of a deceased spouse’s estate, and a child of the marriage is entitled to share in the estate but is a minor, the parent must within 12 months hand over the minor’s ‘property’ to the Public Trustee? If so it is unacceptable having regard to the fact that the Public Trustee must charge commercial trustee’s rates for acting. The law is that the personal representative is trustee of any part of the estate held for the benefit of a person not *sui juris* and that should suffice.

11.292 This respondent also cautioned against too readily imposing requirements in the hope of minimising the risk of fraud:¹⁴⁶⁶

To the extent that there may be some uneasiness about an infant’s property being managed by a sole trustee, that is a question for the law of trusts. But the law of trusts has never been able to ensure that more than one trustee is always in office. The Probate Court may take the view that where persons not *sui juris* are entitled to share in an estate the grant should be made to at least two persons; or perhaps, that a sole administrator should furnish a bond. But it could be difficult to find a second administrator willing to act without fee; and bonds have never really worked. The beneficiary will be entitled to an account

1461 Submissions 1, 2, 3, 11, 15.

1462 Submissions 4, 6, 7.

1463 Ibid.

1464 Submission 6.

1465 Submission 12.

1466 Ibid.

through a next friend or upon attaining adulthood. The trouble with making complicated attempts to ensure that no fraud is ever perpetrated upon a person not *sui juris* is that they are costly and do not necessarily guarantee complete honesty of administration. They could be disastrous to the administration of small estates.

...

Lastly, why distrust administrators, who are appointed by the Court, but trust executors, whom the deceased may have appointed upon a mistaken belief as to their trustworthiness? Legislation should address the slippery issue of fraud only where there is a clear need for particular redress.

11.293 The Queensland Law Society was also opposed to the mandatory requirement in section 65 of the *Administration and Probate Act 1919* (SA) that an administrator transfer property to the public trustee, and queried 'why the State should be able to curtail a trusteeship'.¹⁴⁶⁷ It acknowledged that a personal representative may not wish to continue acting as trustee for a beneficiary who lacked capacity, but suggested that, if it were considered desirable to give the personal representative the option of transferring the trust property to the public trustee, a provision to that effect could perhaps be included in the public trustee legislation.¹⁴⁶⁸

11.294 The National Committee's proposal was opposed by the ACT Law Society, which considered the provisions to be 'unnecessary'. The ACT Law Society was also of the view that the provision 'gives too much work to the Public Trustee' and that the interests of persons who are not *sui juris* could be protected in other ways.¹⁴⁶⁹

The National Committee's view

11.295 Although section 65 of the *Administration and Probate Act 1919* (SA) is no doubt intended to protect the interests of minor and other vulnerable beneficiaries, it does so by the creation of a very blunt instrument. It assumes that the property held on trust for the beneficiary is at risk if it stays in the hands of the original administrator, and subjects all property held on trust for persons who lack capacity to the costs of professional administration. In the National Committee's view, unless there is a real question as to the administrator's suitability or capacity to administer the property, it is not appropriate for the administrator to be required to transfer the property to the public trustee. The provision has the potential to cause hardship in the case of smaller estates, and even in larger estates raises an issue of the benefit to be gained relative to the cost that will inevitably be incurred. Although the court has the power, under section 67 of the *Administration and Probate Act 1919* (SA), to dispense with

1467 Submission 8.

1468 Ibid.

1469 Submission 14.

the requirement, that in itself involves an expense to the estate in making the necessary application to the court.

11.296 The National Committee is therefore of the view that the model legislation should not include a provision to the effect of section 65 of the *Administration and Probate Act 1919* (SA).

11.297 Although the South Australian provision refers to property 'belonging' to a beneficiary who lacks legal capacity, it could only apply once the personal representative has completed the executorial duties and has assumed the trusteeship of the property. However, the courts in all Australian jurisdictions already have the power, under their trustee legislation, to appoint a new trustee or to replace an existing trustee and to vest the trust property in the trustee so appointed.¹⁴⁷⁰

11.298 Accordingly, the National Committee does not consider it necessary for the model legislation to include, as an alternative to adopting section 65 of the *Administration and Probate Act 1919* (SA), an express provision to empower the court, in an appropriate case, to order the transfer to the public trustee of property held on trust for a beneficiary who lacks legal capacity. The National Committee is also concerned that the inclusion of an express provision to that effect could, of itself, create a perception that property held on trust for a minor should ordinarily be ordered to be transferred to the public trustee.

RECOMMENDATIONS

Assimilation of the rights and liabilities of personal representatives

11-1 The model legislation should include a provision to the effect of section 50 of the *Succession Act 1981* (Qld), so that every person to whom a grant of letters of administration is made has the same rights and liabilities and is accountable in the same manner as if the person were the deceased's executor.¹⁴⁷¹

See Administration of Estates Bill 2009 cl 400.

General duties of personal representatives

11-2 The model legislation should include provisions to the effect of section 52(1)(a), (c) and (d) of the *Succession Act 1981* (Qld), and provide that a personal representative has a duty:

¹⁴⁷⁰ *Trustee Act 1925* (ACT) ss 70, 71; *Trustee Act 1925* (NSW) ss 70, 71; *Trustee Act* (NT) ss 27, 28; *Trusts Act 1973* (Qld) ss 80–83; *Trustee Act 1936* (SA) ss 36, 37; *Trustee Act 1898* (Tas) ss 32, 33; *Trustee Act 1958* (Vic) ss 48, 51; *Trustees Act 1962* (WA) ss 77, 78.

¹⁴⁷¹ See [11.6] above.

- (a) to collect and get in the estate of the deceased and administer it according to law;
- (b) to deliver up the grant of probate or letters of administration to the court when required by the court to do so; and
- (c) to distribute the estate of the deceased, subject to its administration, as soon as practicable.¹⁴⁷²

See Administration of Estates Bill 2009 cl 401.

Duty to provide a statement of assets and liabilities

11-3 The model legislation should provide that:¹⁴⁷³

- (a) a personal representative has a duty, whenever required by the court to do so, to file a statement of assets and liabilities of the estate, wherever situated; and
- (b) the court may make such an order if it considers it necessary in the circumstances of the case.

See Administration of Estates Bill 2009 cl 402(1)(a), (2).

Duty to file and pass accounts

11-4 The model legislation should provide that:¹⁴⁷⁴

- (a) a personal representative has a duty, whenever required by the court to do so, to file, or to file and pass, his or her accounts of the administration of the estate; and
- (b) the court may make such an order if it considers it necessary in the circumstances of the case.

See Administration of Estates Bill 2009 cl 402(1)(b), (2).

1472 See [11.19] above.

1473 See [11.77]–[11.79] above. See also [11.94]–[11.96] above.

1474 See [11.97]–[11.152] above.

11-5 A personal representative or trustee who has not been required to file, or to file and pass, his or her accounts of the administration of the estate may apply to have those accounts passed or allowed.¹⁴⁷⁵

See Administration of Estates Bill 2009 cl 428.

Effect of order passing or allowing accounts of the administration of an estate

11-6 The model legislation should include a provision, based in part on section 85(3) of the *Probate and Administration Act 1898* (NSW), to provide that an order of the court passing or allowing a personal representative's or trustee's accounts of the administration of an estate operates as an immediate release to the person who filed the accounts, subject to the following:

- (a) a person who is interested in the accounts may, within three years of the order, show that there is an error or omission in the accounts; and
- (b) the order should not operate as a release in respect of any material non-disclosure or in respect of any fraudulent entry or omission.¹⁴⁷⁶

See Administration of Estates Bill 2009 cl 429(1), (2), (4).

11-7 The model legislation should include a provision to the effect of section 85(4) of the *Probate and Administration Act 1898* (NSW) and provide that:

- (a) if, in allowing the accounts, the court disallows, wholly or partly, the amount of any disbursement, the court may order the personal representative to refund the amount disallowed to the estate; and
- (b) nothing in the provision that gives effect to Recommendation 11-7(a) limits a right a person may otherwise have to proceed against a personal representative.¹⁴⁷⁷

See Administration of Estates Bill 2009 cl 429(3), (5)

¹⁴⁷⁵ See [11.153] above.

¹⁴⁷⁶ See [11.161]–[11.163] above.

¹⁴⁷⁷ See [11.168] above. *Probate and Administration Act 1898* (NSW) s 85(4) is set out at [11.165] above.

Duty to maintain documents

11-8 The model legislation should provide that a personal representative has a duty to maintain such documents as are necessary to prepare a statement of assets and liabilities of the estate or to render an account of the administration of the estate.¹⁴⁷⁸

11-9 The model legislation should provide that a personal representative must maintain the documents referred to in Recommendation 11-8 for a period of three years after the completion of the administration of the estate.¹⁴⁷⁹

See Administration of Estates Bill 2009 cl 403.

11-10 The model legislation should include a provision to the effect that, if it appears to the court that a personal representative:

- (a) is, or may be, liable for a breach of the statutory duty to maintain documents; but
- (b) has acted honestly and reasonably, and ought fairly to be excused from that breach;

the court may relieve the personal representative either wholly or partly from liability for that breach.¹⁴⁸⁰

See Administration of Estates Bill 2009 cl 405.

Access to information — beneficiaries

11-11 The model legislation should provide that, in relation to the documents that a personal representative is required to maintain under Recommendation 11-8, a beneficiary may, on giving reasonable notice to the personal representative:

- (a) inspect the documents; and
- (b) obtain copies of the documents.¹⁴⁸¹

¹⁴⁷⁸ See [11.181]–[11.182] above.

¹⁴⁷⁹ See [11.183]–[11.188] above.

¹⁴⁸⁰ See [11.189]–[11.192] above.

¹⁴⁸¹ See [11.201]–[11.204] above.

11-12 The model legislation should provide that the personal representative must allow the beneficiary, or the beneficiary's agent:

- (a) to inspect the documents; or
- (b) to obtain copies of the documents on payment of the amount referred to in Recommendation 11-13.¹⁴⁸²

11-13 The model legislation should provide that a beneficiary is required to pay the personal representative's reasonable costs of producing the copies of documents sought under Recommendation 11-11(b).¹⁴⁸³

11-14 The model legislation should provide that, if the personal representative does not allow the inspection of documents or give copies of documents as required, the beneficiary may apply to the court for an order requiring the personal representative to comply with that requirement.¹⁴⁸⁴

See Administration of Estates Bill 2009 cl 615.

Access to information — persons eligible to apply for family provision and creditors

11-15 The model legislation should provide that:¹⁴⁸⁵

- (a) a person who is eligible to apply for family provision out of the estate of a deceased person or a creditor of the estate of a deceased person may apply to the court for access to documents that a personal representative is required to maintain under Recommendation 11-8; and
- (b) the court may order that the personal representative give the applicant access to such of those documents as it considers appropriate, for example, by allowing the inspection of the documents or by providing copies of the documents.

¹⁴⁸² See [11.204]–[11.205] above.

¹⁴⁸³ See [11.206] above.

¹⁴⁸⁴ See [11.207] above.

¹⁴⁸⁵ See [11.211]–[11.212] above.

11-16 The model legislation should provide that, if the court orders that a personal representative give the applicant access to documents, the right to inspect documents or to receive copies of documents (as the case may be) may be exercised by the applicant personally or by an agent.¹⁴⁸⁶

11-17 The model legislation should provide that the applicant is required to pay the cost of producing any copies of documents sought under the provision referred to in Recommendation 11-15.¹⁴⁸⁷

See Administration of Estates Bill 2009 cl 616.

Access to information — enforcement

11-18 Jurisdictions should include in their court rules:

- (a) provisions dealing with the summary enforcement by a beneficiary of his or her right to have access to the relevant documents;¹⁴⁸⁸ and
- (b) provisions dealing with the summary enforcement by a person who is eligible to apply for family provision out of the estate of a deceased person or a creditor of the estate of a deceased person of any right of access to documents that is given by the court.¹⁴⁸⁹

Preservation of any rule or practice deriving from the executor's year

11-19 The model legislation should not include a provision to the effect of section 52(1A) of the *Succession Act 1981* (Qld).¹⁴⁹⁰

Power to authorise postponement of realisation of property and carrying on of business

11-20 The model legislation should include a provision to the effect of section 43(2)(a) of the *Administration and Probate Act 1935* (Tas) and provide that:

¹⁴⁸⁶ See [11.213] above.

¹⁴⁸⁷ Ibid.

¹⁴⁸⁸ See [11.207]–[11.208] above.

¹⁴⁸⁹ See [11.214] above.

¹⁴⁹⁰ See [11.238]–[11.251] above.

- (a) a personal representative may apply to the court for an order to postpone the realisation of any part of the deceased person's estate; and
- (b) the court may, if it considers it appropriate to do so, order that the realisation of any part of the estate be postponed for the period it decides.¹⁴⁹¹

See Administration of Estates Bill 2009 cl 410, sch 3 dictionary (definition of 'estate' (para (a))).

11-21 The model legislation should include provisions to the effect of section 55 of the *Trustees Act 1962 (WA)*, except that:

- (a) the model provision that is based on section 55(1):
 - (i) should omit the expression 'whether alone or in partnership'; and
 - (ii) should refer to the following periods:
 - (A) the period, up to two years, from the person's death, necessary or desirable for the winding up of the business; or
 - (B) the further period or periods that the court approves;
- (b) the model provision that is based on section 55(2)(a) should provide that the personal representative may employ any part of the deceased's estate as is reasonably necessary; and
- (c) the model provisions should be expressed to apply subject to a contrary intention in the deceased's will, if any.¹⁴⁹²

See Administration of Estates Bill 2009 cll 408, 409.

¹⁴⁹¹ See [11.274]–[11.275] above.

¹⁴⁹² See [11.276]–[11.281] above.

No duty to transfer property to public trustee

11-22 The model legislation should not include a provision to the effect of section 65 of the *Administration and Probate Act 1919 (SA)* or any modified form of that provision.¹⁴⁹³

1493

See [11.295]–[11.298] above.

Chapter 12

Powers of a personal representative

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12.1 This chapter examines the powers of personal representatives. Because executors and administrators perform the same functions, the National Committee has taken the approach that the model legislation should have the effect that the powers of executors and administrators are generally assimilated. The National Committee has also endeavoured to ensure that the model legislation gives personal representatives the broad powers they need for the proper administration of estates.

THE POWERS OF A PERSONAL REPRESENTATIVE: A GENERAL PROVISION

Background

12.2 Historically, in relation to the personal property of deceased persons, executors have had ‘extensive powers by virtue of their office for the purpose of performing the duties attaching to it’:¹⁴⁹⁴

Thus they could take possession of all the deceased’s assets, pay or take releases of debts owed by the deceased, and sell any of the deceased’s goods.

12.3 However, as noted earlier in this Report, the real property of a deceased person did not generally vest in his or her personal representative, but vested in the devisee under the will or in the heir-at-law in the case of an intestacy.¹⁴⁹⁵

12.4 The office of administrator had different origins from that of executor, and the powers of an administrator were once considerably more limited than those of an executor, even in relation to personal property. For example, an administrator did not originally have the power to sue on behalf of the estate of a deceased person.¹⁴⁹⁶

Existing legislative provisions

Queensland

12.5 In Queensland, the legislation includes a very broad provision that sets out the powers of personal representatives. Section 49 of the *Succession Act 1981* (Qld) provides, in part:

¹⁴⁹⁴ AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [9.130].

¹⁴⁹⁵ See [10.3] above. All Australian jurisdictions now provide for the real property of a person to vest in the person’s personal representative (either on the deceased’s death or when a grant is made of the deceased’s estate): see [10.9]–[10.10] above.

¹⁴⁹⁶ Sir W Holdsworth, *A History of English Law* (5th ed, 1942) vol III, 568. The power to sue was conferred by statute in 1357: Sir W Holdsworth, *A History of English Law* (5th ed, 1942) vol III, 568–9.

49 Particular powers of personal representatives

(1) Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the powers hitherto exercisable by an executor in relation to personal estate and all the powers conferred on personal representatives by the *Trusts Act 1973*.

...

(3) Subject to the grant, the powers of those personal representatives to whom a grant is made shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the grant.

12.6 Section 49(1) of the *Succession Act 1981* (Qld) serves three purposes.

12.7 First, it ensures that an executor has the same powers with respect to the real estate of a deceased person as an executor has always had with respect to the personal estate of a deceased person. Because an executor has very wide powers in relation to personal property under the general law, section 49(1) avoids the need to include in the legislation a range of specific powers in relation to real property.

12.8 Secondly, it ensures that an administrator has the same powers with respect to the estate of a deceased person that an executor has, both in respect of the real and personal estate of the deceased person.

12.9 Thirdly, it confirms that executors and administrators have the various powers conferred on personal representatives under the *Trusts Act 1973* (Qld). The provision has been said to recognise 'the fact that personal representatives may assume trusteeship of assets upon the completion of the administration'.¹⁴⁹⁷ Although the provision appears to confer very extensive powers on a personal representative, it has been noted that the powers are conferred:¹⁴⁹⁸

for a particular purpose, namely the administration of the estate, and [that] they should not be used, during the administration period, for any other purpose.

12.10 When the Queensland Law Reform Commission recommended the enactment of section 49(1) in its 1978 Report, it expressed the view that, as far

¹⁴⁹⁷ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [9.140].

¹⁴⁹⁸ *Ibid* [9.140]. At [9.160], Lee notes, in relation to the personal representative's power of investment, that:

Although personal representatives have conferred upon them the same investment powers as trustees, the particular duty cast upon them of distributing the estate as soon as may be places their investment powers in a very narrow context with commensurate constraints. Accordingly, personal representatives having liquid funds in hand may, and perhaps should, invest them in an income-producing security, particularly if there is a possibility that there will be a delay in completing the administration. However, they should not invest them in a security which might subsequently impede the distribution of the estate, for example a security which cannot be readily realised. (note omitted)

as may be possible, the powers of administrators should be assimilated with those of executors.¹⁴⁹⁹

12.11 The Commission acknowledged, however, that administrators could not be 'entirely assimilated to the position of executors'.¹⁵⁰⁰ The Commission noted that, unlike an executor, an administrator cannot exercise any powers before the grant. It also noted that, when the person to whom a grant is made is not intended to perform all the functions of a personal representative, a limited grant of administration will be made to that person.¹⁵⁰¹

12.12 Section 49(3) of the *Succession Act 1981* (Qld)¹⁵⁰² applies where a grant has been made, and ensures that the powers of the personal representatives so appointed relate back to the death of the deceased, and are taken to have arisen at that time. The Queensland Law Reform Commission recommended this provision in its 1978 Report for consistency with section 45(4) of the Act,¹⁵⁰³ which provides that an administrator's title to the property that vests in him or her when a grant is made is taken to have arisen on the death of the deceased.¹⁵⁰⁴ In Chapter 10 of this Report, the National Committee has recommended that the model legislation should include a provision to the effect of section 45(4) of the *Succession Act 1981* (Qld).¹⁵⁰⁵

Other Australian jurisdictions

The powers of executors and administrators generally

12.13 The other Australian jurisdictions have similar provisions to section 49(1) of the *Succession Act 1981* (Qld), although they do not assimilate as comprehensively, or at least as clearly, the powers of an administrator with those of an executor.¹⁵⁰⁶

12.14 In the ACT and New South Wales, the legislation provides that an executor to whom probate has been granted has the same rights and is subject to the same duties with respect to the real estate of the testator that executors previously had, or were subject to, in relation to personal assets.¹⁵⁰⁷ However, these provisions do not take the further step of stating expressly that an

1499 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 32.

1500 Ibid.

1501 Ibid 32–3.

1502 This provision was previously numbered as s 49(4) of the *Succession Act 1981* (Qld). It was renumbered by s 7(3) of the *Succession Amendment Act 2006* (Qld).

1503 *Succession Act 1981* (Qld) s 45(4) is set out at [10.24] above.

1504 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 33.

1505 See Recommendation 10-6 above.

1506 As a result, a number of jurisdictions also include specific provisions in relation to the sale of, or dealings with, real property: see note 1778 below.

1507 *Administration and Probate Act 1929* (ACT) s 43; *Probate and Administration Act 1898* (NSW) s 48.

administrator has the same rights and is subject to the same duties in relation to the real estate of a deceased person that executors previously have had, or been subject to, in relation to personal assets.

12.15 The legislation in the Northern Territory, Victoria and Western Australia provides that an executor (in the Northern Territory and Western Australia, an executor to whom probate has been granted) or administrator is to have the same rights and be subject to the same duties in relation to the real estate of the deceased person that executors or administrators had, or were subject to, in relation to personal estate.¹⁵⁰⁸

12.16 Although the provisions in these jurisdictions refer to the 'rights and duties' of executors and administrators, and do not expressly refer to their 'powers', it has been held in relation to the predecessor of the current New South Wales provision¹⁵⁰⁹ that the legislature 'meant those rights and duties to carry with them in each case the same implications of power'.¹⁵¹⁰

12.17 In Tasmania, the legislation provides that a personal representative has, in relation to the real estate vested in him or her, all the powers that a personal representative had before the commencement of the Act in relation to chattels real.¹⁵¹¹

12.18 The South Australian legislation does not have a provision that is similar to any of these provisions.

Relation back

12.19 None of the other Australian jurisdictions has a provision in relation to the relation back of a personal representative's powers.

Discussion Paper

12.20 In the Discussion Paper, the National Committee expressed the view that there was no good reason why the general powers of an administrator should be different from, or more restricted than, those of an executor.¹⁵¹² It therefore recommended that the model legislation should include a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld).¹⁵¹³

1508 *Administration and Probate Act* (NT) s 60; *Administration and Probate Act 1958* (Vic) s 14; *Administration Act 1903* (WA) s 12.

1509 *Probate Act 1890* (NSW) s 20 (which was in the same terms as s 48 of the *Probate and Administration Act 1898* (NSW)).

1510 *Union Bank of Australia Ltd v Harrison, Jones & Devlin Ltd* (1910) 22 CLR 492, 521–2 (Isaacs J).

1511 *Administration and Probate Act 1935* (Tas) s 5(1). See the explanation of chattels real at note 1562 below.

1512 *Administration of Estates Discussion Paper* (1999) QLRC 56; NSWLRC [8.12].

1513 *Ibid*, QLRC 57; NSWLRC 85 (Proposal 23).

12.21 The National Committee considered that, on the making of a grant, the powers of the personal representative should relate back to the death of the deceased,¹⁵¹⁴ and proposed that the model legislation should include a provision to the effect of section 49(4) of the *Succession Act 1981* (Qld), which, as explained above, has since been renumbered as section 49(3) of that Act.¹⁵¹⁵

Submissions

12.22 The majority of submissions that addressed the issue of a personal representative's powers agreed that the model legislation should include a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld). The proposal to include such a provision was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁵¹⁶

12.23 However, that proposal was opposed by three respondents — the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia and Trust Company of Australia Limited.¹⁵¹⁷ Their opposition appeared to be based on a view that section 49(1), by providing that a personal representative has the relevant powers 'from the death of the deceased',¹⁵¹⁸ would allow a person who claimed to be entitled to apply for letters of administration, but who did not yet have a grant, to exercise powers in relation to the property comprising the estate of the deceased person.

12.24 The Trustee Corporations Association of Australia commented:¹⁵¹⁹

The Association strongly disagrees with this proposal, as it believes that it is inappropriate to confer on a personal representative (which term includes a court appointed administrator) from the death of the deceased, the same powers held by an executor.

At the time of death of the testator, the identity of the non-executor personal representative is not certain and there may be competing claims to this role from equally qualified persons.

...

1514 Ibid, QLRC 80; NSWLRC [8.81].

1515 Ibid, QLRC 80; NSWLRC 117 (Proposal 36).

1516 Submissions 1, 3, 8, 11, 12, 14, 15.

1517 Submissions 6, 7, 10.

1518 *Succession Act 1981* (Qld) s 49(1) is set out at [12.5] above.

1519 Submission 6.

... There are many examples of conflict between potential administrators leading up to the application for a grant i.e. is not always clear who will be appointed administrator.

Inclusion of a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld) would remove an important distinction between executors and administrators. Executors obtain their authority from the will, whereas administrators obtain their authority from a grant of administration.

12.25 All the submissions that commented on whether the model legislation should include a provision to the effect of what is now section 49(3) of the *Succession Act 1981* (Qld), to provide for the relation back of personal representatives' powers, agreed with the National Committee's proposal to include a provision to that effect. The proposal was supported by the Bar Association of Queensland, the Queensland Law Society, an academic expert in succession law, the ACT and New South Wales Law Societies, and the Law Institute of Victoria.¹⁵²⁰

The National Committee's view

12.26 The model legislation should include a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld), although the model provision will need to be modified to refer to the powers conferred on personal representatives by the trusts legislation of the enacting jurisdiction instead of the specific reference to the *Trusts Act 1973* (Qld). A provision in these terms ensures that an executor has the same powers in relation to both the personal and real estate of a deceased person, and removes any remaining distinctions between the powers of executors and administrators.

12.27 The model legislation should also include a provision to the effect of section 49(3) of the *Succession Act 1981* (Qld) to ensure that the powers of personal representatives relate back to the death of the deceased.

12.28 The National Committee notes that three respondents were opposed to a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld), apparently on the basis that the section would allow a person who claimed to be entitled to letters of administration to exercise the powers of a personal representative before a grant was made. In the National Committee's view, this objection is misconceived, as a person who is not appointed as an executor under a will cannot be a 'personal representative' unless he or she has been appointed as an administrator under letters of administration. Accordingly, an administrator will not be entitled to exercise any powers until a grant is made.

1520

Submissions 1, 8, 12, 14, 15, 19. This proposal was not addressed by the Trustee Corporations Association of Australia, the Queensland Council of the Trustee Corporations Association of Australia or Trust Company of Australia Limited.

ADDITIONAL POWERS

12.29 It is important for the due and proper administration of an estate that the personal representative has all the powers necessary and appropriate for that purpose.

Existing legislative provisions

12.30 Section 49(5) of the *Succession Act 1981* (Qld) provides expressly that the court may confer additional powers on a personal representative:¹⁵²¹

49 Particular powers of personal representatives

...

- (5) The court may confer on a personal representative such further powers in the administration of the estate as may be convenient.

12.31 The trustee legislation in all Australian jurisdictions also contains quite detailed provisions under which the court may confer additional powers on a 'trustee', which is defined to include a personal representative.¹⁵²²

Discussion Paper

12.32 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the effect of section 49(6) of the *Succession Act 1981* (Qld),¹⁵²³ which, as explained above, has since been renumbered as section 49(5) of that Act.

Submissions

12.33 The National Committee's proposal was generally supported by the submissions. The Bar Association of Queensland, the Public Trustee of New South Wales, an academic expert in succession law, the ACT and New South Wales Law Societies, and the Law Institute of Victoria all agreed that the model legislation should include a provision to the effect of what is now section 49(5) of the *Succession Act 1981* (Qld).¹⁵²⁴

¹⁵²¹ This provision was previously numbered as s 49(6) of the *Succession Act 1981* (Qld). It was renumbered by s 7(3) of the *Succession Amendment Act 2006* (Qld).

¹⁵²² *Trustee Act 1925* (ACT) ss 2, 81, dictionary (definitions of 'trustee' and 'legal representative'); *Trustee Act 1925* (NSW) ss 5 (definitions of 'trustee' and 'legal representative'), 81; *Trustee Act* (NT) ss 50A, 82 (definitions of 'trustee' and 'representative'); *Trusts Act 1973* (Qld) ss 5(1) (definitions of 'trustee' and 'personal representative'), 94; *Trustee Act 1936* (SA) ss 4(1) (definitions of 'trustee' and 'representative'), 59B; *Trustee Act 1898* (Tas) ss 4 (definition of 'trustee' and 'representative'), 47; *Trustee Act 1958* (Vic) ss 3(1) (definition of 'trustee' and 'personal representative'), 63; *Trustees Act 1962* (WA) ss 6(1) (definitions of 'trustee' and 'personal representative'), 89. These provisions are considered at [13.80]–[13.98] below.

¹⁵²³ *Administration of Estates Discussion Paper* (1999) QLRC 97; NSWLRC 139 (Proposal 47).

¹⁵²⁴ Submissions 1, 11, 12, 14, 15, 19.

12.34 The academic expert in succession law commented that the inclusion of the proposed provision was desirable, as it 'can encourage personal representatives to seek the assistance of the court if they wish to do something extraordinary'.¹⁵²⁵

12.35 The Queensland Law Society expressed some support for a provision to the effect of what is now section 49(5) of the *Succession Act 1981* (Qld), but queried whether it would apply so as to enable the court to confer additional powers on a personal representative who had become a testamentary trustee:¹⁵²⁶

This is appropriate for capital gains tax purposes, powers to distribute in specie and to appropriate can be important. However, this section and all other proposed sections have to address the question of whether the expression 'personal representative' is going to be used. If it is, there is at some time going to be an argument as to whether a personal representative who has become a testamentary trustee can make use of this section.

The National Committee's view

12.36 The National Committee considers it desirable for the model legislation to include a provision to the general effect of section 49(5) of the *Succession Act 1981* (Qld), so that the legislation provides specifically that the court may confer on a personal representative such further powers as it considers appropriate for the administration of the estate.

12.37 Given that the purpose of the model provision is to enable powers to be conferred for the administration of an estate, the National Committee considers it appropriate that the model provision should provide that those powers are conferred on a 'personal representative'.

LIMITS TO EXERCISE OF POWERS OF PERSONAL REPRESENTATIVE WHEN A GRANT IS MADE

Existing legislative provision

12.38 Section 49(2) of the *Succession Act 1981* (Qld) provides that, when a grant is made, only those personal representatives to whom the grant has been made may exercise the powers of a personal representative:

1525 Submission 12.

1526 Submission 8.

49 Particular powers of personal representatives

...

- (2) Upon the making of a grant and subject thereto, the powers of personal representatives may be exercised from time to time only by those personal representatives to whom the grant is made; and no other person shall have power to bring actions or otherwise act as personal representative without the consent of the court.

...

12.39 As explained previously, although a will might name several executors, only some of them might apply for a grant of probate. Section 49(2) has the effect that, once a grant is made, a non-proving executor is not entitled to exercise any powers in respect of the estate. It is consistent with section 45(2) of the Act, which provides that, when a grant of probate is made, the property vested in the deceased's executor vests in the person to whom the grant is made.¹⁵²⁷

Discussion Paper

12.40 In the Discussion Paper, the National Committee sought submissions on whether the model legislation should include a provision to the effect of section 49(2) of the *Succession Act 1981* (Qld).¹⁵²⁸

Submissions

12.41 Almost all the submissions that addressed this issue agreed with the National Committee's proposal.¹⁵²⁹ An academic expert in succession law was strongly of the view that, once a grant has been made:¹⁵³⁰

There can be no question of any person other than appointed representatives having authority to act.

12.42 Although the Queensland Law Society generally supported the inclusion of a provision to the effect of section 49(2) of the *Succession Act 1981* (Qld), it suggested that the provision should omit the words 'without the consent of the court', and should provide that the court may excuse a person who has acted honestly and reasonably in relation to the estate.¹⁵³¹

¹⁵²⁷ As explained at [10.67] above, this provision has the effect of divesting property from any non-proving executors and vesting it in those who prove the will.

¹⁵²⁸ *Administration of Estates Discussion Paper* (1999) QLRC 102; NSWLRC 145.

¹⁵²⁹ Submissions 1, 4, 5, 6, 7, 8, 11, 12, 15.

¹⁵³⁰ Submission 12.

¹⁵³¹ Submission 8.

12.43 The ACT Law Society was opposed to the inclusion of a provision to the effect of section 49(2). It commented on the relationship between sections 49(2) and 54 of the *Succession Act 1981* (Qld), and stated that the legislation must protect a person who acts in the administration of an estate in circumstances where the person appointed under a grant has become incapable of acting, but the grant has not been revoked.¹⁵³²

12.44 However, the Law Institute of Victoria commented that, if the model legislation had the effect that the exercise of executorial powers was reserved to personal representatives who had obtained a grant, it was unnecessary to consider whether the provision that is based on section 49(2) of the *Succession Act 1981* (Qld) should be made subject to the provision that is based on section 54(1) of that Act.¹⁵³³

The National Committee's view

12.45 Although executors derive their authority from the will and may therefore exercise powers before a grant of probate is made, it is desirable for the model legislation to include a provision to the effect of section 49(2) of the *Succession Act 1981* (Qld). A provision in these terms makes it clear that, once a grant has been made, any persons who were named as executors, but who did not apply for a grant of probate, are not entitled to exercise any powers with respect to the estate. The provision reflects the fact that a grant 'is the official recognition of the right of the personal representatives named in the grant to administer the deceased's estate'.¹⁵³⁴

12.46 The National Committee notes that two submissions raised concerns about the effect of section 49(2) on persons who act informally or about the relationship between sections 49(2) and 54 of the *Succession Act 1981* (Qld).¹⁵³⁵ In the National Committee's view, however, sections 49(2) and 54 deal with separate issues. Section 49(2) is specifically concerned with the issue of who is entitled to exercise the powers of a personal representative once a grant has been made. Section 54 is concerned with the issue of the degree of protection to be afforded to persons who act without authority, and is considered separately in this Report.¹⁵³⁶

1532 Submission 14.

1533 Submission 19.

1534 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.20].

1535 See [12.43]–[12.44] above.

1536 *Succession Act 1981* (Qld) s 54(1) is considered at [29.241]–[29.245] in vol 3 of this Report.

EXERCISE OF POWERS WHERE MORE THAN ONE PERSONAL REPRESENTATIVE

Background

12.47 Under the general law, most powers of executors may be exercised by them severally — that is, an individual executor may act independently of his or her co-executors and bind the estate.¹⁵³⁷

At common law co-executors were regarded as one person, and each of them could bind the others by disposition of the assets, by assent to legacies, and in other ways.

12.48 There has been some doubt, however, as to whether one of several executors may make a valid contract binding the property of the testator, as distinct from a transfer of that property.¹⁵³⁸

12.49 The position in relation to the exercise of powers by administrators is less clear. For a long time it was considered that administrators were required to exercise their powers jointly.¹⁵³⁹ More recently, it has been suggested that 'there is no decisive authority which answers the question whether one administrator, acting without his co-administrator, has the same power of disposition as an executor acting without the concurrence of his co-executor'.¹⁵⁴⁰

Existing legislative provisions

12.50 Under the Queensland legislation, personal representatives are required to act jointly.¹⁵⁴¹ Section 49(4) of the *Succession Act 1981* (Qld) provides:¹⁵⁴²

¹⁵³⁷ *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 499 (Griffith CJ); *Attenborough v Solomon* [1913] AC 76, 81 (Viscount Haldane LC). See also the discussion in RA Sundberg, 'Powers of One of Several Personal Representatives' (1985) 59 *Australian Law Journal* 649.

¹⁵³⁸ *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 507 (Griffith CJ). Note, however, the contrary view expressed in RA Sundberg, 'Powers of One of Several Personal Representatives' (1985) 59 *Australian Law Journal* 649, 652–8.

¹⁵³⁹ *Hudson v Hudson* (1737) 1 Atk 460; 26 ER 292; *Stanley v Bernes* (1828) 1 Hagg Ecc 221; 162 ER 564.

¹⁵⁴⁰ *Fountain Forestry Ltd v Edwards* [1975] 1 Ch 1, 14 (Brightman J). Sundberg has suggested that, in Australia, executors and administrators are in the same position with respect to the exercise of their powers, relying on the reference by Barton J in *Union Bank of Australia v Harrison, Jones and Devlin Ltd* (1910) 11 CLR 492, 508 to the decision in *Jacomb v Harwood* (1751) 2 Ves Sen 266; 28 ER 172: see RA Sundberg, 'Powers of One of Several Personal Representatives' (1985) 59 *Australian Law Journal* 649, 650–1.

¹⁵⁴¹ Note also that s 179 of the *Real Property Act 1886* (SA) provides that, where probate or letters of administration shall be granted to more persons than one, all of them for the time being shall concur in every instrument relating to the real estate of the deceased registered proprietor.

¹⁵⁴² This provision was previously numbered as s 49(5) of the *Succession Act 1981* (Qld). It was renumbered by s 7(3) of the *Succession Amendment Act 2006* (Qld).

49 Particular powers of personal representatives

...

- (4) The powers of personal representatives shall be exercised by them jointly.

12.51 When the Queensland Law Reform Commission recommended this provision in its 1978 Report, it noted that third parties were 'rightly reluctant to deal with only one executor where probate is granted to more than one executor'.¹⁵⁴³ The Commission commented, however, that the provision would not mean that, in practice, every act must be performed by every executor, since personal representatives 'can easily authorise one of their number to act as their agent'.¹⁵⁴⁴

12.52 The Commission also expressed the view that the position of personal representatives should be assimilated with that of trustees, who are generally required to act jointly.¹⁵⁴⁵

Discussion Paper

12.53 In the Discussion Paper, the National Committee noted that trustees are generally required to act jointly, and considered it desirable, in this respect, to assimilate the position of personal representatives with that of trustees. The National Committee made the observation that executors were often appointed as testamentary trustees. It expressed the view that it was anomalous that executors should be able to exercise their powers severally while they acted in that capacity, given that they would be required to act jointly once they assumed the role of trustees.¹⁵⁴⁶

12.54 The National Committee therefore proposed that the model legislation should include a provision to the effect of section 49(5) of the *Succession Act 1981* (Qld), which, as explained above, has since been renumbered as section 49(4) of that Act.¹⁵⁴⁷

Submissions

12.55 The submissions that addressed this issue were divided about whether all personal representatives should be required to exercise their powers jointly.

¹⁵⁴³ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 33.

¹⁵⁴⁴ Ibid. For a similar comment see AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.150].

¹⁵⁴⁵ Ibid. As to the requirement for trustees to act jointly, see *Luke v South Kensington Hotel Co* (1879) 11 Ch D 122, 125–6 (Jessel MR); *Re Billington* [1949] St R Qd 102, 115 (Macrossan CJ).

¹⁵⁴⁶ *Administration of Estates Discussion Paper* (1999) QLRC 81; NSWLRC [8.86].

¹⁵⁴⁷ Ibid, QLRC 81; NSWLRC 118 (Proposal 37).

12.56 The National Committee's proposal that personal representatives should be required to exercise their powers jointly was supported by the Bar Association of Queensland, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁵⁴⁸

12.57 The Public Trustee of New South Wales also agreed with the National Committee's proposal, but noted that section 12(1A) of the *Public Trustee Act 1913* (NSW) is also relevant to this issue.¹⁵⁴⁹ That section provides:

12 General powers and duties

...

- (1A) Where the Public Trustee is appointed and acts jointly with any other person in any such capacity as is mentioned in subsection (1) [which includes being appointed as an executor or administrator] the following provisions shall have effect:
- (a) the Public Trustee and such other person jointly shall have and may exercise and discharge all or any of the powers, authorities, duties and functions which the Public Trustee, if acting alone, would have had or might have exercised and discharged,
 - (b) all moneys under the control of the Public Trustee and such other person jointly shall be dealt with in the same manner as moneys under the control of the Public Trustee alone,
 - (c) the receipt in writing of the Public Trustee alone for any money, securities, or other personal property or effects payable, transferable or deliverable to the Public Trustee and such other person jointly shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

This subsection shall apply to all cases in which the Public Trustee is appointed and acts jointly with any other person whether such appointment was made before or after the commencement of the *Public Trustee (Amendment) Act 1942*.

12.58 The National Committee's proposal was also supported by the New South Wales Council of the Trustee Corporations Association of Australia, although subject to the proviso that, 'where a Public Trustee or a statutory trustee company is a co-trustee, a provision be retained along the lines of section 14(4) of the South Australian *Public Trustee Act*'.¹⁵⁵⁰ That section gives the Public Trustee of South Australia the sole authority to exercise certain powers, notwithstanding that the Public Trustee has been appointed jointly as

1548 Submissions 1, 12, 14, 15.

1549 Submission 11.

1550 Submission 20.

executor with another person.¹⁵⁵¹ This respondent also suggested that, where a trustee company is a co-trustee, it should generally have the same power to act alone as is conferred on the South Australian Public Trustee.¹⁵⁵²

12.59 However, the National Committee's proposal was opposed by the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia and the Law Institute of Victoria.¹⁵⁵³

12.60 The Public Trustee of South Australia noted that the proposal that personal representatives exercise their powers jointly would be in conflict with section 14(4) of the *Public Trustee Act 1995 (SA)*.¹⁵⁵⁴ She stated that she wished to retain section 14(4) of the *Public Trustee Act 1995 (SA)*, which, in her view:¹⁵⁵⁵

causes no difficulties with co-executors and greatly enhances the efficiency and effectiveness of administration and ensures the security of assets. Such a provision as section 14 would be of great benefit to other corporate executors, but should be enacted in the relevant legislation and not the uniform legislation.

12.61 This view was shared by the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia.¹⁵⁵⁶

12.62 The Law Institute of Victoria suggested that the requirement for personal representatives to act jointly could in some circumstances act to the detriment of the estate, particularly where one of the executors was not contactable and immediate action was required:¹⁵⁵⁷

The LIV does not agree with this proposal and recommends maintaining the status quo. Situations may arise where an executor is not contactable, particularly immediately after death. The executor may be: in a war zone or trouble spot overseas, in central Australia where there is no mobile telephone

¹⁵⁵¹ *Public Trustee Act 1995 (SA)* s 14(4) provides:

14 Appointment as executor or trustee

...

- (4) If the Public Trustee is appointed executor or trustee jointly with another person, the Public Trustee has sole authority—
- (a) to receive money and hold money on account of the estate or trust; and
 - (b) to give valid receipts for money paid to the estate or trust; and
 - (c) to make payments from the estate or trust.

¹⁵⁵² Submission 20.

¹⁵⁵³ Submissions 4, 6, 7, 19.

¹⁵⁵⁴ Submission 4.

¹⁵⁵⁵ *Ibid.*

¹⁵⁵⁶ Submissions 6, 7.

¹⁵⁵⁷ Submission 19.

coverage, travelling overseas, or suffering a sudden illness, to give just a few examples. Under these circumstances, it may be critical to make some immediate decisions or arrangements, such as funeral arrangements, property insurance, attending to a needy beneficiary, wasting assets or dealing with a company takeover. If such matters are not attended to, the estate assets or beneficiary could be in jeopardy or the estate could be placed in the position of having to make an application to the Court.

The National Committee's view

12.63 The National Committee notes the comments of the Law Institute of Victoria about the potential for practical difficulties if personal representatives are required to act jointly.¹⁵⁵⁸ However, the National Committee considers that that risk is outweighed by the certainty created by a provision to the effect of section 49(4) of the *Succession Act 1981* (Qld), especially about the manner in which administrators are required to exercise their powers.¹⁵⁵⁹ It may also provide some additional protection for beneficiaries. A requirement for personal representatives to act jointly is also consistent with the requirement that trustees must exercise their powers jointly.¹⁵⁶⁰ Given that personal representatives will very often continue to act as trustees, the National Committee considers it desirable for there to be consistency in relation to this requirement. The model legislation should therefore include a provision to the effect of section 49(4) of the *Succession Act 1981* (Qld), so that personal representatives are required to exercise their powers jointly.

12.64 As noted above, some jurisdictions have legislative provisions that specifically enable the public trustee of the particular jurisdiction to exercise certain powers on his or her own, notwithstanding that the public trustee has been appointed as personal representative with another person.¹⁵⁶¹ Those jurisdictions may wish to review their provisions dealing with the powers of the public trustee, and consider whether the provisions should be amended so that they will continue to apply notwithstanding any provision that may be enacted to implement the model provision.

1558 See, however, the discussion at [12.51] above in relation to appointment of one of a number of personal representatives to be the agent of the others, which may alleviate some of the practical problems that have been raised.

1559 See [12.49] above.

1560 See note 1545 above.

1561 See [12.57], [12.58] above.

ASSENT

Assent at common law

12.65 At common law, an executor has the power to assent to a disposition of personalty¹⁵⁶² contained in a will.¹⁵⁶³ The assent of an executor means that he or she 'no longer requires the chattel real or personal for payment of the debts, funeral expenses, or general pecuniary legacies',¹⁵⁶⁴ and that those assets may pass under the testator's will.¹⁵⁶⁵

12.66 It is said that an administrator does not have a similar power,¹⁵⁶⁶ although there is some debate as to whether an administrator appointed under letters of administration with the will annexed may assent to the dispositions of personalty contained in the will.¹⁵⁶⁷

Effect of assent

12.67 During the administration of an estate, the property that vests in an executor by virtue of that office is held by the executor 'in full ownership, without distinction between legal and equitable interests'.¹⁵⁶⁸ The property is held 'for the purpose of carrying out the functions and duties of administration'.¹⁵⁶⁹ The beneficiaries under the will do not have any beneficial interest in the property during this time,¹⁵⁷⁰ although they do have a chose in action — that is, 'a right to require the deceased's estate to be duly administered'.¹⁵⁷¹

-
- 1562 Personalty consists of 'chattels personal' (sometimes referred to as 'pure personalty') and 'chattels real'. Chattels real consist largely of leasehold interests of land. They are described in this way because they are interests 'concerning or savouring of realty': *Halsbury's Laws of England* (4th ed) vol 35, [1203]. Chattels personal 'are, strictly speaking, things movable, but in modern times the expression is used to denote any kind of property other than real property and chattels real': *Halsbury's Laws of England* (4th ed) vol 35, [1204].
- 1563 JB Clark, *Parry and Clark: The Law of Succession* (9th ed, 1988) 370. See also RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [18.8.3].
- 1564 *Kemp v Commissioners of Inland Revenue* [1905] 1 KB 581, 585 (Phillimore J).
- 1565 JB Clark, *Parry and Clark: The Law of Succession* (9th ed, 1988) 370.
- 1566 *Re McPhail* [1971] VR 534, 544 (Gowans J). See also *Bryen v Reus* (1960) 61 SR (NSW) 396, 399 (Owen, Collins and Jacobs JJ).
- 1567 Williams acknowledges that there is some support in *Gundry v Brown* (1678) Rep Temp Finch 371; 23 ER 203 for the proposition that an administrator with the will annexed can assent. However, he suggests that, 'in the absence of some more definite authority it would seem the better course to assume that the power to assent is not open to any administrator in the case of pure personalty': WJ Williams, *The Law Relating to Assents* (1947) 96. Parry and Clark suggest that it is probable that an administrator with the will annexed can assent to a disposition of pure personalty: JB Clark, *Parry and Clark: The Law of Succession* (9th ed, 1988) 370.
- 1568 *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12, 17 (PC).
- 1569 *Ibid.*
- 1570 *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306, 312 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).
- 1571 *Re Leigh's Will Trusts* [1970] Ch 277, 281–2 (Buckley J). See also *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306, 313 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

12.68 An executor's assent brings about a change in the title to property that is disposed of by will. It does this by activating the dispositions in the will, so that the property becomes vested in the beneficiary.¹⁵⁷²

The will becomes operative so far as its dispositions of personalty are concerned only if and when the executor assents to those dispositions.

...

So soon as he has assented ... the dispositions of the will become operative, and then the beneficiaries have vested in them the property in those chattels. The transfer is made not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of this assent.

12.69 This will occur regardless of whether the legacy is specific or merely residuary.¹⁵⁷³

12.70 However, the manner in which property vests on assent depends on the nature of the interest left to the beneficiary.

12.71 When an executor assents to a specific bequest of a chattel or a specific devise of a chattel real, the effect is to vest that property in the beneficiary.¹⁵⁷⁴ In the case of a chattel (or pure personalty), the property 'vests both at law and in equity in the beneficiary without the necessity of any conveyance or assignment'.¹⁵⁷⁵ As a result the beneficiary of a specific bequest can, after assent, maintain an action at law to recover the property.¹⁵⁷⁶

12.72 Where property is left on trust for the beneficiary, the effect of assent is to vest the beneficial interest in the property in the beneficiary and, where the executor is also the trustee, to constitute the executor as trustee.¹⁵⁷⁷

If the chattel or chattel real is bequeathed or devised to him as a trustee, he may do some act showing an unequivocal intention to separate it from the assets he has been administering as executor and thereafter to hold it as trustee upon the trusts specifically declared by the provisions of the will relating thereto. If so, he ceases to hold it as executor.

12.73 In these circumstances, the effect of assent is to 'strip the executors of their title as executors and to clothe them with a title as trustees'.¹⁵⁷⁸

1572 *Attenborough v Solomon* [1913] AC 76, 82–3 (Viscount Haldane LC).

1573 *Ex part Kenzler* [1983] 2 Qd R 281, 287 (McPherson J).

1574 *Burke v Dawes* (1938) 59 CLR 1, 19 (Dixon J).

1575 WJ Williams, *The Law Relating to Assents* (1947) 101.

1576 *Re West* [1909] 180, 185 (Swinfen Eady J). See also WJ Williams, *The Law Relating to Assents* (1947) 98–9.

1577 *Burke v Dawes* (1938) 59 CLR 1, 19 (Dixon J).

1578 *Wise v Whitburn* [1924] 1 Ch 460, 468 (Eve J). See also *Commissioners of Inland Revenue v Smith* [1930] 1 KB 713, 736 (Lawrence LJ).

Consequently, in *Attenborough v Solomon*,¹⁵⁷⁹ where a testator appointed persons as executors and trustees and left his residuary estate to the trustees on trust for sale and distribution, the House of Lords held that the effect of the executors' assent was that their title to the residuary estate as executors ceased and the property became vested in them as trustees.¹⁵⁸⁰

12.74 Some forms of personal property, such as shares, may require a formal act before the legal title to that property can vest in a beneficiary. For example, the *Corporations Act 2001* (Cth) provides that the legal title to shares does not pass until the transfer to the person is registered. Until that time, the person transferring the shares remains the holder of the shares.¹⁵⁸¹ However, it has been held that, once an executor assents to a disposition of shares, he or she then holds the shares as a trustee for the beneficiary.¹⁵⁸²

12.75 At common law, 'the assent of an executor to a specific devise or bequest relates back to the time of the testator's death'.¹⁵⁸³ This is so even where the property the subject of the bequest was initially distributed to the wrong person.¹⁵⁸⁴ Because the assent vests property in the beneficiary as from the testator's death, the beneficiary is entitled to any income arising from the property as from the date of the testator's death. However, there is no relation back when an executor assents to a disposition of the residuary estate, as the residue does not come into actual existence until all claims on the testator's estate have been satisfied.¹⁵⁸⁵

Requirements for assent

12.76 At common law, there is no requirement that an assent be made in writing.¹⁵⁸⁶ In fact, it has been suggested that a written assent in respect of pure personalty is unusual for the reason that 'property of this nature can be

1579 [1913] AC 76.

1580 Ibid 84. As a result, the trustees could no longer validly exercise the power to pledge property included in the residuary estate: at 85.

1581 Registration of a share transfer with the company is required before legal title will pass: *Corporations Act 2001* (Cth) s 1072F(1).

1582 *Re Grosvenor* [1916] 2 Ch 375, 378 (Astbury J).

1583 JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [78–23].

1584 *Re West* [1909] 2 Ch 180. In that case, the executor caused a parcel of shares to be transferred to persons who were considered to be entitled as beneficiaries under the will. It was later discovered that a codicil revoked that bequest and left the parcel of shares to another beneficiary. The original probate was revoked and a new grant, including the codicil, was made. Swinfen Eady J held (at 186):

The executor can only assent to the legacy in favour of the legatee to whom it is given, not in favour of a stranger, and the only person to whom these shares that I have to deal with were given was the plaintiff.

1585 *Barnardo's Homes National Incorporated Association v Commissioners for Special Purposes of the Income Tax Acts* [1921] AC 1, 11 (Lord Atkinson).

1586 JB Clark, *Parry and Clark: The Law of Succession* (9th ed, 1988) 370.

vested in a beneficiary by delivery or must be transferred to him by a prescribed form of transfer'.¹⁵⁸⁷

12.77 Assent may be made expressly or may be inferred from the testator's conduct.¹⁵⁸⁸ Whether or not an executor has assented to a disposition will be a question of fact.¹⁵⁸⁹ Certain factors may be relevant in determining whether an executor has assented to a disposition of personalty, or may indicate that an estate is still being administered. However, these factors are not of themselves determinative of the issue.

12.78 The fact that executors have passed their accounts and that a long period of time has since elapsed are factors that suggest that assent has been given.¹⁵⁹⁰ The fact that the income arising from the residuary estate has been treated as income of the residuary beneficiaries, instead of income of the executor, has also been held to be strong evidence of assent.¹⁵⁹¹ The existence of a mortgage debt or other liability, although a relevant factor, will not necessarily mean that the residuary estate cannot be ascertained and that assent may not otherwise be inferred from the personal representatives' conduct.¹⁵⁹² Similarly, the requirement to pay an annuity out of the residuary estate does not mean that it cannot be inferred that the residuary estate has been ascertained and that the executors have assented to the dispositions of the will.¹⁵⁹³

Assent where executor is also a beneficiary

12.79 At common law, an executor who is also a beneficiary can assent to the vesting of that property in himself or herself as a beneficiary. Such an assent can be implied from conduct.¹⁵⁹⁴

1587 WJ Williams, *The Law Relating to Assents* (1947) 95.

1588 *Attenborough v Solomon* [1913] AC 76, 83 (Viscount Haldane LC). See also JB Clark, *Parry and Clark: The Law of Succession* (9th ed, 1988) 370.

1589 *Inland Revenue Commissioners v Smith* [1930] 1 KB 713, 731, 733 (Lord Hanworth MR), 736 (Lawrence LJ), 738 (Greer LJ). See also *Wise v Whitburn* [1924] 1 Ch 460, 467 (Eve J); *Re Donkin* [1966] Qd R 96, 118 (Gibbs J).

1590 *Attenborough v Solomon* [1913] AC 76, 83 (Viscount Haldane LC).

1591 *Re Donkin* [1966] Qd R 96, 119 (Gibbs J).

1592 *Inland Revenue Commissioners v Smith* [1930] 1 KB 713, 730–1 (Lord Hanworth MR). See also *Partridge v Equity Trustees Executors & Agency Co Ltd* (1947) 75 CLR 149, 166 (Starke, Dixon and Williams JJ), where it was held that the existence of outstanding debts was insufficient to 'negative the inference that the defendant had assented to the estate which had vested in it as executor being divested and becoming vested in it as trustee'.

1593 *Re Donkin* [1966] Qd R 96, 123 (Gibbs J).

1594 JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [78–06]; *Fenton v Clegg* (1854) 9 Ex 680; 156 ER 292.

Conditional assent

12.80 An assent may be given on a condition precedent — for example, where an executor tells a beneficiary that the legacy will be paid, ‘provided the assets are sufficient to answer all demands’.¹⁵⁹⁵

Existing Australian legislative provisions

Queensland: Extension of assent generally to personal representatives in respect of real and personal property

12.81 As explained earlier in this chapter, section 49(1) of the *Succession Act 1981* (Qld) provides that a personal representative has, in relation to all the real and personal estate of a deceased person, ‘all the powers hitherto exercisable by an executor in relation to personal estate’.¹⁵⁹⁶

12.82 Because an executor has a power to assent to the vesting of a disposition of personal property, section 49(1) has the effect of impliedly conferring on administrators the power to assent to a disposition of personal property, and of conferring on both executors and administrators the power to assent to a disposition of real property.

12.83 However, because the effect of an executor’s assent is to activate the dispositions in a will, it appears that, although an administrator appointed on intestacy has, as a result of section 49(1), the power to assent, the power is illusory, as there are no testamentary dispositions that can be activated by the administrator’s assent.¹⁵⁹⁷

12.84 Further, although section 49(1) appears to enable a personal representative to assent to the vesting of real property, in relation to real property that is subject to the provisions of the *Land Title Act 1994* (Qld), the manner in which the power of assent may be exercised will necessarily be limited by the requirements of that Act.

Extension of assent to real property: Tasmania, Victoria

12.85 The Tasmanian and Victorian administration legislation includes a provision, based on section 36 of the *Administration of Estates Act 1925* (UK), that deals with assent. As explained earlier, at common law, assent is a device by which an executor can assent to the vesting of a disposition of personalty. The Tasmanian and Victorian provisions create a statutory means by which

¹⁵⁹⁵ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [78–20].

¹⁵⁹⁶ *Succession Act 1981* (Qld) s 49(1) is set out at [12.5] above.

¹⁵⁹⁷ Note the comment of Viscount Haldane LC in *Attenborough v Solomon* [1913] AC 76, 82–3, referred to at [12.68] above, that the property is not transferred by the assent alone, ‘but by virtue of the dispositions of the will which have become operative because of this assent’. This limitation does not apply to administrators appointed under letters of administration with the will annexed as, in that situation, there are testamentary dispositions that can be activated by the administrator’s assent.

‘personal representatives’ (that is, both executors and administrators) can assent to the disposition of ‘any estate or interest in real estate ... to which the testator or intestate was entitled’ or over which the testator ‘exercised a general power of appointment ... and which devolved upon the personal representative’.¹⁵⁹⁸

12.86 Because these provisions are confined to ‘real estate’, they do not confer on an administrator a power to assent to a disposition of pure personal property.¹⁵⁹⁹ It has been suggested, however, that ‘[t]his is generally immaterial, because a transfer is necessary for stocks, shares and debentures (not being bearer securities), and delivery is sufficient for personal chattels and securities’.¹⁶⁰⁰

12.87 Section 36 of the *Administration and Probate Act 1935* (Tas) provides:

36 Effect of assent or conveyance by personal representative

- (1) A personal representative may—
- (a) in relation to real estate that is not subject to the *Land Titles Act 1980*, assent in the form set out in Schedule IV; and
 - (b) in relation to real estate that is subject to that Act, assent in the prescribed form—

to the vesting in any person who, whether by devise, bequest, devolution, or appropriation, may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, and which devolved upon the personal representative.

- (2) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased.
- (3) The statement in an assent that a person assents as personal representative shall have the like effect as regards implied covenants as would follow from the like statement in a deed of conveyance.

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Administration and Probate Act 1935 (Tas) s 36(1); *Administration and Probate Act 1958* (Vic) s 41(1), (10). As explained at [10.149]–[10.151] property the subject of a general power of appointment that is exercised by will does not ordinarily vest in the appointor’s personal representative. However, in Tasmania and Victoria, the administration legislation provides that a testator is deemed to have been entitled at his death to any interest in real estate passing under any gift contained in his will that operates as an appointment under a general power to appoint by will. As a result, real estate appointed by a testator’s will vests in the testator’s personal representative: see *Administration and Probate Act 1935* (Tas) s 6(2) and *Administration and Probate Act 1958* (Vic) s 13(2)(a), which are discussed at [10.19]–[10.20] above.

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RA Sundberg ‘Assents by Personal Representative to the Vesting of Real Estate’ (1975) 49 *Australian Law Journal* 678, 678; K Collins, R Phillips and C Sparke, *Wills Probate & Administration Vic* (LexisNexis online service) [s 41.1] (at 21 February 2009).

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JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [78–13].

- (4) An assent to the vesting of any estate or interest shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given, and shall operate to vest in that person the estate to which it relates.
- (5) An assent to the vesting in a named person of a partial interest in property shall operate as an assent in favour of the remaindermen.
- (5A) An assent by a personal representative in respect of a legal estate shall, in favour of a purchaser from the person in whose favour the assent is made or his successor in title, be taken as sufficient evidence that that person is entitled to have the legal estate vested in him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or any charge thereon.
- (5B) Subsection (5A) applies whether the assent was made before or after the commencement of that subsection.
- (5C) Nothing in subsection (5A) prejudices the rights of any person under the *Registration of Deeds Act 1935* in priority to the conveyance to a purchaser.
- (6) A conveyance of an estate or interest by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have been discharged or provided for.
- (7) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of an estate or interest, prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates, or to be indemnified out of such estate or interest against any duty, debt, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.
- (8) A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duty, debt, or liability, but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duty, debt, or liability, if reasonable arrangements can be made for discharging the same; and an assent may be given subject to any estate or charge by way of mortgage.
- (9) In this section
“**purchaser**” means a purchaser for money or money’s worth.

12.88 Section 41 of the *Administration and Probate Act 1958* (Vic) is a similar provision. It provides:

41 Effect of assent or conveyance by personal representative

- (1) A personal representative may assent to the vesting in any person who (whether by devise bequest devolution appropriation or otherwise) is

entitled thereto either beneficially or as a trustee or personal representative of any estate or interest in real estate (including chattels real) to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will including the statutory power to dispose of entailed interests and which devolved upon the personal representative.

- (2) The assent shall operate to vest in that person the estate or interest to which the assent relates and unless a contrary intention appears the assent shall relate back to the death of the deceased.
- (3) The statutory covenants implied by a person being expressed to convey as personal representative, may be implied in an assent in like manner as in a conveyance by deed.
- (4) An assent to the vesting of a legal estate shall be in writing signed by the personal representative and shall name the person in whose favour it is given and shall operate to vest in that person the legal estate to which it relates; and an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate.
- (5) A conveyance of a legal estate by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts liabilities funeral and testamentary or administration expenses duties and legacies of the deceased have been discharged or provided for.
- (6) An assent or conveyance given or made by a personal representative shall not except in favour of a purchaser of a legal estate prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates or to be indemnified out of such estate or interest against any duties debt or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.
- (7) A personal representative may as a condition of giving an assent or making a conveyance require security for the discharge of any such duties debt or liability but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duties debt or liability if reasonable arrangements have been made for discharging the same; and an assent may be given subject to any estate by way of mortgage.
- (8) In this section **purchaser** means a purchaser for money or money's worth.
- (9) This section shall apply to assents and conveyances made after the eighteenth day of December One thousand nine hundred and twenty-nine whether the testator or intestate died before on or after such date.
- (10) In the case of land under the *Transfer of Land Act 1958* an assent may be given or made by the personal representative registered as proprietor by a transfer in the form prescribed under that Act with such necessary modifications as the case requires.

12.89 In Tasmania, a personal representative may assent to the vesting of the relevant estate or interest in ‘any person who, whether by devise, bequest, devolution, or appropriation, may be entitled thereto ...’.¹⁶⁰¹ In Victoria, a personal representative may assent to the vesting of the relevant estate or interest in ‘any person who (whether by devise bequest devolution appropriation or otherwise) is entitled thereto ...’. It has been suggested, in relation to the similar expression used in the equivalent English provision,¹⁶⁰² that the reference to a person who is ‘otherwise entitled’ authorises an assent in favour of a purchaser, at least where ‘the assent carries out a contract for sale made by the deceased in his lifetime’.¹⁶⁰³

12.90 Both the Tasmanian and Victorian provisions provide that the assent has the effect of vesting in the relevant person the estate or interest to which the assent relates, and relates back to the death of the deceased.¹⁶⁰⁴ The Tasmanian provision also provides that an assent to the vesting in a person of a partial interest in property operates as an assent in favour of the remaindermen.¹⁶⁰⁵

12.91 The provisions enable an assent in relation to real estate under the Torrens system in each jurisdiction (that is, land under the *Land Titles Act 1980* (Tas) and the *Land Transfer Act 1958* (Vic)), as well as ‘old system land’ (that is, land that is not subject to either of those Acts).

12.92 Regardless of the type of real estate involved, an assent to ‘the vesting of any estate or interest’ (in Tasmania¹⁶⁰⁶) or to ‘the vesting of a legal estate’ (in Victoria¹⁶⁰⁷) must be in writing and signed by the personal representative. The Victorian provision further provides in section 41(4) that ‘an assent not in writing or not in favour of a named person shall not be effectual to pass a legal estate’. These provisions differ from assent at common law, where the assent (which

1601 *Administration and Probate Act 1935* (Tas) s 36(1).

1602 *Administration of Estates Act 1925* (UK) s 36(1).

1603 JB Clark, *Parry and Clark the Law of Succession* (9th ed, 1988) 373, referring to *GHR Co Ltd v Inland Revenue Commissioners* [1943] 1 KB 303. In that case, the deceased had, before his death, agreed to sell certain freehold properties to a purchaser, but had not conveyed them. Macnaghten J held (at 304–5) that the company was entitled to ‘to the legal estate in those properties otherwise than by devise, bequest, devolution or appropriation’, and that the assent therefore vested the legal estate in the properties in the company. However, as vesting occurred in this case by the assent, and not by operation of the testator’s will, the document constituting the assent was subject to stamp duty on the basis that it was a conveyance or transfer on sale. Williams has suggested that the use of an assent in this case was not open to objection, as the properties, though previously sold, devolved upon the personal representative. However, he considers that it would be undesirable for the provision to be construed to authorise assent in relation to other transactions, such as a sale by a beneficiary of devised property: WJ Williams, *The Law Relating to Assents* (1947) 14.

1604 *Administration and Probate Act 1935* (Tas) s 36(2); *Administration and Probate Act 1958* (Vic) s 41(2).

1605 *Administration and Probate Act 1935* (Tas) s 36(5). This is consistent with the effect of assent at common law, where assent to the vesting of a life interest in leasehold property had the effect of vesting the remainder: *Doe v Sturges* (1816) 7 Taunt 217; 129 ER 87, 89 (Gibbs CJ); WJ Williams, *The Law Relating to Assents* (1947) 110.

1606 *Administration and Probate Act 1935* (Tas) s 36(4).

1607 *Administration and Probate Act 1958* (Vic) s 41(4).

can be made only in relation to personalty) can be inferred from the executor's conduct.¹⁶⁰⁸

12.93 In relation to old system land, the Tasmanian legislation requires the assent to be made in the form set out in schedule IV to the Act.¹⁶⁰⁹ In Victoria, there is no specific requirement in relation to assent in relation to old system land, other than the general requirement that an assent in relation to real estate must be in writing.¹⁶¹⁰

12.94 In relation to Torrens system land, it is not sufficient that the assent is made in writing; the assent must also be made in the form prescribed by, respectively, the *Land Titles Act 1980* (Tas) or the *Transfer of Land Act 1958* (Vic).¹⁶¹¹ In *Burke v Dawes*,¹⁶¹² Dixon J commented, referring to the predecessor of section 41 of the *Administration and Probate Act 1958* (Vic):¹⁶¹³

If an estate or interest in land under the *Transfer of Land Act* is devised, the assent of the executor can be given effectively only by a transfer under that Act (See sec 36(10) of the *Administration and Probate Act 1928*). It is by that means alone that the legal title can be divested from the executor and invested in the devisee.

12.95 Both the Tasmanian and Victorian provisions include several subsections that offer purchasers for value protection with respect to the conveyance of, and title to, real property.¹⁶¹⁴

12.96 Both provisions also enable a personal representative to impose certain specified requirements as a condition of giving an assent.¹⁶¹⁵

12.97 An issue that has arisen in relation to section 41(4) of the *Administration and Probate Act 1958* (Vic), and the English provision on which it is based, is whether it is necessary for an assent to the vesting of a legal estate to be made in writing where a personal representative is entitled to real property in another capacity (either as trustee or absolutely as a beneficiary).

¹⁶⁰⁸ See [12.77]–[12.78] above.

¹⁶⁰⁹ *Administration and Probate Act 1935* (Tas) s 36(1)(a). See *Administration and Probate Act 1935* (Tas) sch IV, Form 1 (Land not subject to *Land Titles Act 1980*—Assent by personal representative in favour of a person absolutely entitled free from encumbrances).

¹⁶¹⁰ *Administration and Probate Act 1958* (Vic) s 41(4).

¹⁶¹¹ *Administration and Probate Act 1935* (Tas) s 36(1)(b); *Administration and Probate Act 1958* (Vic) s 41(10).

¹⁶¹² (1938) 59 CLR 1.

¹⁶¹³ *Ibid* 21.

¹⁶¹⁴ *Administration and Probate Act 1935* (Tas) s 36(5A), (6), (7); *Administration and Probate Act 1958* (Vic) s 41(5), (6).

¹⁶¹⁵ *Administration and Probate Act 1935* (Tas) s 36(8); *Administration and Probate Act 1958* (Vic) s 41(7). Although both provisions provide that an assent may be given subject to any estate or charge by way of mortgage, the House of Lords has held in relation to the equivalent English provision that the section confers a *power* to make an assent of property subject to a mortgage, and that no beneficiary can compel the personal representative to make an assent subject to a mortgage rather than sell the property if the executor prefers: *Williams v Holland* [1965] 1 WLR 739, 743–4 (Lord Upjohn).

12.98 Although section 41(4) of the *Administration and Probate Act 1958* (Vic) provides that assent must be in writing to vest a legal estate, where the personal representative is entitled in another capacity, 'there is no actual passing of the estate, but merely a change in the character in which it is held'.¹⁶¹⁶

12.99 In *King's Will Trusts*,¹⁶¹⁷ Pennycuik J held that section 36(4) of the *Administration of Estates Act 1925* (UK), which is in identical terms to section 41(4) of the *Administration and Probate Act 1958* (Vic), contemplates that a personal representative may assent to the vesting in himself or herself in another capacity. However, his Honour held that vesting would not occur without a written assent in accordance with the requirements of the section.¹⁶¹⁸

The first sentence of subsection (4), accordingly, contemplates that for this purpose a person may by assent vest in himself in another capacity, and such vesting, of course, necessarily implies he is divesting himself of the estate in his original capacity. It seems to me impossible to regard the same operation as lying outside the negative provision contained in the second sentence of the subsection. To do so involves making a distinction between the operation of divesting and vesting a legal estate and that of passing the legal estate. I do not think this highly artificial distinction is legitimate. On the contrary, the second sentence appears to me to be intended as an exact counterpart to the first.

12.100 The decision in *King's Will Trusts* was accepted as being correct in *Re Edwards' Will Trusts*.¹⁶¹⁹ However, the correctness of the decision has been doubted by several commentators.¹⁶²⁰ Writing before the decision in *King's Will Trusts*, Williams preferred the view that written assent is not necessary in order for a personal representative to hold the legal estate to property in another character.¹⁶²¹ In particular, he referred to the situation where a personal representative was also entitled absolutely to property as a beneficiary. He noted the line of authority for the proposition that an executor or administrator who had cleared the estate, but had not distributed it, held the estate as a

¹⁶¹⁶ WJ Williams, *The Law Relating to Assents* (1947) 116.

¹⁶¹⁷ [1964] 1 Ch 542.

¹⁶¹⁸ *Ibid* 548.

¹⁶¹⁹ *Re Edwards' Will Trusts* [1982] 1 Ch 30, 33, 40 (Buckley J). In this case, however, Buckley J made the observation (at 33) that:

until the decision in *In re King's Will Trusts* ... , it was fairly generally thought by conveyancers that, where the legal estate in land had become vested in a person beneficially entitled to that land but had become so vested in some capacity (eg as the executor of the previous owner) other than the capacity of beneficial owner, no assent in writing was necessary to clothe that person with the legal estate in his capacity as beneficial owner.

¹⁶²⁰ See JF Garner, 'Assents Today' (1964) 28 *The Conveyancer* 298; JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [78–15].

¹⁶²¹ WJ Williams, *The Law Relating to Assents* (1947) 122–3.

trustee for the beneficiaries,¹⁶²² and stated what he considered to be the implications of holding property on trust for the beneficiaries:¹⁶²³

The result in a case where the personal representative is absolutely entitled to land seems to be that the holding as trustee and the beneficial interest in the property will merge and the property will vest in him at law and in equity.

12.101 A further issue that has arisen in relation to the Victorian provision and its English counterpart is whether a personal representative can, in the absence of a written assent, nevertheless assent to the vesting of an equitable interest in property. This would not seem to be an issue under the Tasmanian provision, as section 36(4) of the *Administration and Probate Act 1935 (Tas)* is worded slightly differently, and provides that '[a]n assent to the vesting of any estate or interest shall be in writing'.

12.102 In England, it has been held that section 36(4) of the *Administration of Estates Act 1925 (UK)* does not prevent a personal representative's conduct from amounting to an assent to the vesting of the beneficial interest in property:¹⁶²⁴

The assent may have been ineffective to vest the legal estate, but this does not deprive it of significance as evidence of the executors' views as to where the beneficial interest was when the testator died. An assent to the vesting of an equitable interest need not be in writing. It may be inferred from conduct. In my judgment there are ample grounds for inferring that the testator assented in his lifetime to the vesting in himself of the full beneficial interest in the property.

12.103 However, the Supreme Court of Victoria has taken a more restrictive view in relation to the vesting of equitable interests in land. In *Re Campbell*,¹⁶²⁵ Menhennitt J stated that an assent 'does not ... create the estate or interest to which the assent is given' — that is, that assent cannot create an equitable interest in property where the testator also held the legal interest in the property in question.¹⁶²⁶ In support of this view, his Honour referred to section 41(2) of the Victorian legislation, which provides that: 'The assent shall operate to vest in that person the estate or interest to which the assent relates ...'.¹⁶²⁷ Menhennitt J therefore held that a personal representative could not assent to the vesting of an equitable interest in a beneficiary where the testator had also held the legal estate in the property and had left that legal estate to the beneficiary:¹⁶²⁸

1622 Ibid.

1623 Ibid 123.

1624 *Re Edwards' Will Trusts* [1982] 1 Ch 30, 40 (Buckley J).

1625 [1968] VR 46.

1626 Ibid 57.

1627 Ibid 58.

1628 Ibid.

If the deceased had a legal estate that is what the assent vests in the residuary beneficiary and if the deceased had an equitable estate then the assent vests that equitable estate in the beneficiary In this situation created by s 41 of the *Administration and Probate Act* the terms of sub-section (4) are then mandatory and, if there is to be an assent, as the only estate or interest as to which there can be an assent is the legal estate, the only form such an assent can take is in writing.

12.104 Williams has also expressed a similar view, arguing that section 36(1) of the *Administration of Estates Act 1925* (UK) 'gives no power to the personal representative to assent separately to the legal estate and the equitable interest'.¹⁶²⁹ In his view:¹⁶³⁰

The power as given is to assent to the vesting in the beneficiary of the estate or interest vested in the deceased at the time of his death and not then ceasing, and the standard wording of an assent is to the vesting of the property in the beneficiary for all the estate and interest vested in the deceased at his death.

12.105 However, Sundberg has suggested that the issue 'is not as straightforward as a reading of *Re Campbell* might suggest'.¹⁶³¹ In his view, there are three possible readings of section 41(1) of the *Administration and Probate Act 1958* (Vic):¹⁶³²

It may mean: (1) a personal representative may assent to the vesting in any person of 'the estate or interest (legal or equitable) in real estate to which the testator or intestate was entitled'; or (2) a personal representative may assent to the vesting in any person of any estate or interest in *the* real estate to which the testator or intestate was entitled; or (3) a personal representative may assent to the vesting in any person of 'the estate or interest in real estate (fee simple, fee tail, life estate, etc) to which the testator or intestate was entitled'.

12.106 Sundberg observes in relation to the first two possibilities that 'in the former the assent is to whatever interest the deceased held; in the latter it is to any part of or interest in the entirety of that which the deceased held'.¹⁶³³ He notes that, in *Re Campbell*, Menhennitt J chose the former interpretation.¹⁶³⁴

However, it is thought that it is only by changing the words of the subsection that this reading becomes acceptable. If the words were 'a personal representative may assent to the vesting in any person of the estate or interest to which the testator or intestate was entitled' it would not be easy to quarrel with his Honour's view as between possibilities (1) and (2). His Honour says: 'Likewise s 41(1) provides that what an assent does is to vest in the person in whose favour it is given *the* 'estate or interest in real estate ... to which the

¹⁶²⁹ WJ Williams, *The Law Relating to Assents* (1947) 17.

¹⁶³⁰ Ibid.

¹⁶³¹ RA Sundberg, 'Assents by Personal Representatives to the Vesting of Real Estate' (1975) 49 *Australian Law Journal* 678, 684.

¹⁶³² Ibid 681.

¹⁶³³ Ibid.

¹⁶³⁴ Ibid.

testator ... was entitled.’ But the section reads: ‘A personal representative may assent to the vesting in any person ... of *any* estate or interest in real estate ... to which the testator ... was entitled.’ (emphasis in original)

12.107 Sundberg further notes that section 41(2) provides that: ‘The assent shall operate to vest in that person the estate or interest *to which the assent relates*’.¹⁶³⁵ In his view, these words ‘lend support to the view that the personal representative may specify in his assent if it be in writing, or by his and the beneficiaries’ intentions if it be by conduct, the interest to the vesting of which he is assenting’.¹⁶³⁶

Implied restrictions on executor’s power to assent: New South Wales

12.108 The *Probate and Administration Act 1898* (NSW) does not have any provisions that deal expressly with a personal representative’s power to assent,¹⁶³⁷ and it has been held that, in New South Wales, an administrator has no power to assent.¹⁶³⁸ Moreover, section 46E of the *Probate and Administration Act 1898* (NSW) ‘specifies the only permissible ways of divesting realty from a personal representative’.¹⁶³⁹ Section 46E provides:

46E Mode of divesting land from an executor or administrator

- (1) (a) Real estate vested in an executor or administrator shall not be divested from the executor or administrator and vested in another person who may be entitled thereto either beneficially or as a trustee, or an executor or administrator, otherwise than by a registered conveyance, or by an acknowledgment operating under section 83, or by registration under the provisions of the *Real Property Act 1900*.
- (b) This subsection extends to real estate vested in an executor or administrator at the commencement of the *Conveyancing (Amendment) Act 1930* or thereafter becoming so vested.
- (2) (a) Real estate mentioned in section 83 shall not, as against a purchaser in good faith from an executor or administrator, be held to have been divested from the executor or administrator and vested in another person entitled thereto, except by a registered conveyance, or by an acknowledgment operating under that section.

1635 Ibid 682.

1636 Ibid.

1637 The New South Wales trustee legislation includes a provision that, although not strictly speaking about assent, enables a person who is the executor of a will under which he or she is the trustee or is a beneficiary to register a declaration in writing to clarify the capacity in which the property is held. Such a person may declare in writing ‘that he or she has ceased to hold the property as executor and that he or she holds the same as trustee or as beneficiary, as the case may be’: *Trustee Act 1925* (NSW) s 11(1). The section includes specific requirements in relation to land that is subject to the provisions of the *Real Property Act 1900* (NSW): *Trustee Act 1925* (NSW) s 11(3).

1638 *Bryen v Reus* (1960) 61 SR (NSW) 396, 399 (Owen, Collins and Jacobs JJ).

1639 *Halsbury’s Laws of Australia*, 395 Succession, ‘4 Administration of Estates’ [395-4915] (at 21 February 2009).

- (b) This subsection applies to purchases made on or after the fifteenth day of December, one thousand eight hundred and ninety (being the day of the passing of the *Probate Act of 1890*).

12.109 As noted earlier in this chapter, at common law, an executor may assent to a disposition of personalty, which includes a disposition of leasehold interests in land.¹⁶⁴⁰ For the purposes of section 46E, real estate is defined to include 'lands held under building leases or any lease for twenty-one years and upwards'.¹⁶⁴¹ The effect of section 46E is therefore to restrict an executor's power to assent to a disposition of such leasehold interests.¹⁶⁴²

Prior to the enactment of this section, such leases, in common with all leaseholds, would vest absolutely in the legatee upon the assent express or implied, of the personal representative, without any deed or assignment.

Legislative provisions in overseas jurisdictions

12.110 As explained earlier in this chapter, section 36 of the *Administration of Estates Act 1925* (UK) deals with assent in relation to dispositions of realty and has formed the basis for the Tasmanian and Victorian provisions dealing with assent.¹⁶⁴³

12.111 The *Indian Succession Act 1925* also contains extensive provisions in relation to assent. These provisions are in the following terms:¹⁶⁴⁴

332. Assent necessary to complete legatee's title

The assent of the executor or administrator is necessary to complete a legatee's title to his legacy.

Illustrations

- (i) A by his will bequeaths to B his Government paper which is in deposit with the Imperial Bank of India. The Bank has no authority to deliver the securities, nor B a right to take possession of them, without the assent of the executor.
- (ii) A by his will has bequeathed to C his house in Calcutta in the tenancy of B. C is not entitled to receive the rents without the assent of the executor or administrator.

1640 See [12.65] and note 1562 above.

1641 *Probate and Administration Act 1898* (NSW) s 3 (definition of 'real estate').

1642 RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [46E.01].

1643 See [12.85] above.

1644 These provisions are reproduced from the version of this Act available at <www.commonlii.org/in/legis/num_act/isa1925183/> at 22 March 2009.

333. Effect of executor's assent to specific legacy.

- (1) The assent of the executor or administrator to a specific bequest shall be sufficient to divest his interest as executor or administrator therein, and to transfer the subject of the bequest of the legatee, unless the nature or the circumstances of the property require that it shall be transferred in a particular way.
- (2) This assent may be verbal, and it may be either express or implied from the conduct of the executor or administrator.

Illustrations

- (i) A horse is bequeathed. The executor requests the legatee to dispose of it, or a third party proposes to purchase the horse from the executor, and he directs him to apply to the legatee. Assent to the legacy is implied.
- (ii) The interest of a fund is directed by the will to be applied for the maintenance of the legatee during his minority. The executor commences so to apply it. This is an assent to the whole of the bequest.
- (iii) A bequest is made of a fund to A and after him to B. The executor pays the interest of the fund to A. This is an implied assent to the bequest to B.
- (iv) Executors die after paying all the debts of the testator, but before satisfaction of specific legacies. Assent to the legacies may be presumed.
- (v) A person to whom a specific article has been bequeathed takes possession of it and retains it without any objection on the part of the executor. His assent may be presumed.

334. Conditional assent

The assent of an executor or administrator to a legacy may be conditional, and if the condition is one which he has a right to enforce, and it is not performed, there is no assent.

Illustrations

- (i) A bequeaths to B his lands of Sultanpur, which at the date of the will, and at the death of A, were subject to a mortgage for 10,000 rupees. The executor assents to the bequest, on condition that B shall within a limited time pay the amount due on the mortgage at the testator's death. The amount is not paid. There is no assent.
- (ii) The executor assents to a bequest on condition that the legatee shall pay him a sum of money. The payment is not made. The assent is nevertheless valid.

335. Assent of executor to his own legacy

- (1) When the executor or administrator is a legatee, his assent to his own legacy is necessary to complete his title to it, in the same way as it is required when the bequest is to another person, and his assent may, in like manner, be expressed or implied.
- (2) Assent shall be implied if in his manner of administering the property he does any act which is referable to his character of legatee and is not referable to his character of executor or administrator.

Illustration

An executor takes the rent of a house or the interest of Government securities bequeathed to him, and applies it to his own use. This is assent.

336. Effect of executor's assent

The assent of the executor or administrator to a legacy gives effect to it from the death of the testator.

Illustrations

- (i) A legatee sells his legacy before it is assented to by the executor. The executor's subsequent assent operates for the benefit of the purchaser and completes his title to the legacy.
- (ii) A bequeaths 1,000 rupees to B with interest from his death. The executor does not assent to his legacy until the expiration of a year from A's death. B is entitled to interest from the death of A.

12.112 The *Indian Succession Act 1925* extends the doctrine of assent to administrators. Section 332, which provides that the assent of the executor or administrator is necessary to complete a legacy's title to his or her legacy is consistent with the statement in *Attenborough v Solomon*¹⁶⁴⁵ that '[t]he will becomes operative so far as its dispositions of personalty are concerned only if and when the executor assents to those dispositions'. Although section 333(1) states the effect of assent, it does so only in relation to a specific disposition and is silent as to the effect of assent in relation to a residuary disposition.

Discussion Paper

12.113 In the Discussion Paper, the National Committee's preliminary view was that the model legislation should not include a provision relating to assent.¹⁶⁴⁶ It commented that there was no longer any need for assent provisions, and considered that the principles of assent were difficult to apply in practice.¹⁶⁴⁷

12.114 The National Committee also sought submissions on the following issues:¹⁶⁴⁸

- How often, and in what circumstances, is the power to assent exercised in the various Australian jurisdictions?
- Should the model legislation abolish the doctrine of assent?
- If the model legislation is to include a provision in relation to assent, should that provision apply to administrators?

¹⁶⁴⁵ [1913] AC 76, 82–3 (Viscount Haldane LC), which is set out at [12.68] above.

¹⁶⁴⁶ *Administration of Estates Discussion Paper* (1999) QLRC 93; NSWLRC 134 (Proposal 44).

¹⁶⁴⁷ *Ibid.*, QLRC 93; NSWLRC [8.114].

¹⁶⁴⁸ *Ibid.*

- If the model legislation is to include a provision in relation to assent, should that provision deal with assent in relation to the vesting of real property?

Submissions

12.115 Several submissions commented on the question of how often assents are made. These responses, which must necessarily be taken to refer to the express exercise of the power, suggested that the power to assent is rarely used.¹⁶⁴⁹

12.116 The Bar Association of Queensland stated:¹⁶⁵⁰

The process of assent is virtually unknown, and unused, and no longer necessary; and, it is difficult to apply its principles in practice.

The model legislation should, therefore, abolish the doctrine.

12.117 The ACT Law Society expressed a similar view.¹⁶⁵¹

12.118 An academic expert in succession law commented:¹⁶⁵²

I would suspect that personal representatives rarely give assents consciously, although they may by conduct, for instance if they write a letter to a beneficiary stating that a legacy is available for transmission. The effect of the letter is that the personal representatives become ... trustees of the legacy with certain practical consequences — for instance they can retire as trustees and others [can be appointed] to act.

12.119 The National Committee's preliminary view that the model legislation should not include a provision relating to assent was supported by the Public Trustee of New South Wales, the New South Wales Law Society and the Law Institute of Victoria.¹⁶⁵³

12.120 The Bar Association of Queensland and the ACT Law Society went further in their submissions, and suggested that the model legislation should abolish the doctrine of assent.¹⁶⁵⁴

12.121 The Trustee Corporations Association of Australia expressed a contrary view, suggesting that assent provisions should be included in the model legislation and should apply in respect of both personal and real

1649 Submissions 1, 12, 14, 15.

1650 Submission 1.

1651 Submission 14.

1652 Submission 12.

1653 Submissions 11, 15, 19.

1654 Submissions 1, 14.

property. The Association considered that this approach would minimise the need to execute a formal conveyance of the property that was the subject of the disposition.¹⁶⁵⁵

The Association disagrees with this proposal and believes that assent provisions should be included in the model legislation. Such provisions should specifically extend the doctrine of assent so that assent may be given by administrators as well as executors and given in respect of real as well as personal property (as in UK and Tasmanian legislation).

An assent based on section 36 of the *Administration of Estates Act 1925* (UK) or its Victorian and Tasmanian derivatives is a useful alternative means by which personal representatives may vest legal interests in realty without the need to execute a formal conveyance.

12.122 The Queensland Law Society was of the view that there are arguments in favour of, and against, including a provision relating to assent in the model legislation.¹⁶⁵⁶

There are arguments both ways. Where you have an honest personal representative who does not know all of the fine legal implications of his actions, having some declared law can sometimes persuade him to do what he should do without having to go to court. However, it cuts the other way. The same personal representative might, by a casual statement, suggest that a legacy be paid before he has accurately quantified all the remaining liabilities and therefore be caught. In Queensland, the law of assent is formally recognised at least in relation to real property by the consent section in a Form 6 Transmission by Death.

12.123 An academic expert in succession law explained how the doctrine of assent was of vital importance as a conveyancing mechanism for old system land:¹⁶⁵⁷

When I was in a conveyancing practice in England in the 1950s the law of assents was of very great importance in the law of the private conveyancing of land. A deed of conveyance of land to the *testator* would have endorsed on it an assent, signed by the personal representative, assenting to the vesting of the estate the subject matter of the conveyance in the *devisee* of it under the will of the testator. So the law of assents is still vital wherever *old system conveyancing* subsists, because it is a conveyancing mechanism. The assent transfers the title. (emphasis in original)

12.124 He suggested that the law in relation to assent should be reformed in several respects:¹⁶⁵⁸

¹⁶⁵⁵ Submission 6. This view was supported by the Queensland State Council of the Trustee Corporations Association of Australia: Submission 7.

¹⁶⁵⁶ Submission 8.

¹⁶⁵⁷ Submission 12.

¹⁶⁵⁸ *Ibid.*

- First, the law of implied assent should be abolished, and the law should be reformed to provide that the only form an assent can take is the actual transfer of the legal title, or a means of obtaining it, to either the beneficiary or, where the will creates a trust or the beneficiary lacks capacity, to a trustee.
- Secondly, the law should state that ‘property not so transferred remains part of the estate of the deceased person and within the course of administration of that estate. In other words, there could not be an implied assent or an admission of assets’.
- Thirdly, it was suggested that:

A personal representative should be able to declare himself or herself to be trustee of a legacy for a beneficiary (or charitable purpose) of a trust created by the will, or for a beneficiary who is incapacitated.

Since the title to the property would already be in the personal representative a transfer of title could not happen. The declaration should be in writing and identify the property and the trusts upon which or the person for whom it is held in trust; and its effect would be to remove the property from the estate of the deceased and to constitute a trust of the property upon the trusts contained in the will or for the incapacitated person.

12.125 It was further suggested that the proposed provisions should apply to assent in relation to both realty and personalty. However, as far as Torrens land is concerned, the assent must be subsumed into the requirements as to form for transmission of interests in real property under Torrens legislation:¹⁶⁵⁹

Suppose a personal representative were to execute an instrument purporting to ‘assent to the vesting’ in a devisee of Torrens system realty but without complying with the statutory requirements as to form for transmission of estates. Might the devisee be able to claim that the law of assents gives him or her some sort of right to require transmission? One would not really wish the law of assents to perform such a function. The Real Property Acts should cover the field and the law of assents should not be able to function separately in relation to devises of Torrens system land. In this context the law of assents should not be abolished but should only be allowed to operate within the mechanism provided for transmissions by the relevant legislation.

12.126 This respondent considered that, if the model legislation were to include a provision in relation to assent, it should be extended to apply to administrators.

12.127 The Queensland Law Society also considered that any assent provision should extend to administrators and should apply in respect of real property.¹⁶⁶⁰

1659 Ibid.

1660 Submission 8.

The National Committee's view

Assent in relation to personal property

12.128 As mentioned previously, there has been some uncertainty about whether an administrator appointed under letters of administration with the will annexed is capable of assenting to a disposition of personal property contained in the will.¹⁶⁶¹ Earlier in this chapter, the National Committee has recommended the inclusion in the model legislation of a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld). Because that provision confers on an administrator the powers exercisable by an executor in relation to personal property, the model provision based on section 49(1) will ensure that an administrator appointed under letters of administration with the will annexed may assent to a disposition of personal property contained in the will.

12.129 Where, however, an administrator is appointed on the intestacy of the deceased person, there are no testamentary dispositions that can be activated by the administrator's assent. For an administrator appointed on intestacy to have a meaningful power to assent, it would be necessary for the model legislation to include a provision that dealt expressly with how a personal representative may assent and what the effect of assent is in terms of vesting title (or legal title) to personal property (as the Tasmanian and Victorian assent provisions do in relation to title to real property). The National Committee is not aware of any difficulties with the transfer of personal property by personal representatives (in particular in relation to intestate estates) that would suggest that it is desirable to create a statutory framework for assent for all personal representatives in relation to personal property. In addition, the National Committee has concerns that any statutory provisions dealing with the effect of assent on the vesting of personal property may create uncertainty and lead to litigation, as has been the experience with the Victorian and English provisions dealing with assent in relation to real property.

12.130 Although this constitutes a departure from the National Committee's expressed view that the powers of administrators should generally be assimilated with those of executors, in this case, the departure is justified on the basis that assent is a doctrine that relates only to dispositions contained in a will.

12.131 Further, even if the model legislation were to include a provision dealing with assent in relation to personal property, it would be impractical to require assent to be made in writing or to abolish implied assent. Formalities of that kind could, in fact, impede the transfer of title to personal property where the personal representative, whether through oversight or otherwise, failed to comply with the statutory requirements.

1661

See [12.66] above.

12.132 The National Committee is therefore of the view that the model legislation should not include an express provision dealing with assent in relation to personal property.

Assent in relation to real property

12.133 Assent is primarily concerned with the vesting of title to the dispositions contained in a will.¹⁶⁶² In the National Committee's view, it is not appropriate for the model legislation to prescribe the steps necessary to vest title to Torrens system land in a beneficiary. Each Australian jurisdiction has specific legislation dealing with the requirements for registering transfers of interests in Torrens system land, and real property that is subject to that legislation can be transferred only in accordance with those requirements.¹⁶⁶³ Although the Administration Acts in Tasmania and Victoria include provisions that give executors and administrators the power to assent to the vesting of real property in a beneficiary (whether under a will or under the intestacy rules) or in a person entitled under a power of appointment exercised by a testator's will, the provisions in both jurisdictions provide that, in the case of land under, respectively, the *Land Titles Act 1980* (Tas) or the *Land Transfer Act 1958* (Vic), the assent must comply with the requirements of the relevant Act.

12.134 The National Committee sees little point in including an express power dealing with assent in relation to real property, merely to say that the assent must be in the form prescribed by the Act that deals with the registration of Torrens system land. Further, in so far as the Tasmanian and Victorian provisions deal with assent in relation to old system land, the National Committee does not consider the model legislation to be the appropriate place to deal, in effect, with the conveyancing requirements for old system land.

12.135 For these reasons, the model legislation should not include an express provision dealing with assent in relation to real property.

No abolition of assent

12.136 The National Committee notes that two respondents were of the view that the model legislation should abolish the power to assent. Although it is undoubtedly true, as the submissions have suggested, that it is rare for executors to exercise the power to assent expressly, assent (which is most likely to be implied from the executor's conduct) nevertheless constitutes an important step in the vesting of personal property that is disposed of by will. Because the vesting of such property has been said to depend on the

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Note, however, that in some of the cases that have considered whether assent had occurred (including *Attenborough v Solomon* [1913] AC 76), the relevance of that finding was to determine whether the personal representative could still exercise the powers of a personal representative in relation to particular property, or whether the personal representative had, by reason of his or her assent, become a trustee.

¹⁶⁶³

See *Land Titles Act 1925* (ACT); *Real Property Act 1900* (NSW); *Land Title Act* (NT); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Land Titles Act 1980* (Tas); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA).

executor's assent,¹⁶⁶⁴ the National Committee is concerned that the abolition of the power to assent may require the inclusion in the model legislation of a provision to ensure the vesting in a beneficiary of personal property that is left by will to that beneficiary. For that reason, the National Committee's preferred approach is to leave the power to assent unaffected by the model legislation.

EXECUTOR MAY SIGN ACKNOWLEDGMENT IN LIEU OF CONVEYANCE

Existing legislative provisions

12.137 The legislation in the ACT and New South Wales contains a provision to facilitate the conveyance of old system land. In both jurisdictions, an executor or an administrator with the will annexed may, instead of executing a conveyance of such land, simply sign an acknowledgment in the form provided for in the rules.¹⁶⁶⁵

12.138 Section 83 of *Probate and Administration Act 1898* (NSW) provides:

83 Executor may sign acknowledgment in lieu of conveyance

- (1) When any real estate not under the provisions of the *Real Property Act 1900* is devised to any person by a will duly proved under the provisions of this Part, the executor of the will or the administrator with the will annexed may, as such executor or administrator, instead of executing a conveyance to such person, sign an acknowledgment in the form prescribed by the rules that the devisee is entitled to such real estate for the estate for which the same is devised for the devisee.
- (2) Such acknowledgment may be registered under the Acts in force regulating the registration of deeds; and upon registration thereof such real estate shall vest in the devisee for such estate as aforesaid in the same way and subject to the same trusts and liabilities as if the executor or administrator had executed a conveyance of the same.

Discussion Paper

12.139 In the Discussion Paper, the National Committee proposed that a provision to the effect of section 83 of the *Probate and Administration Act 1898* (NSW) should not be included in the model legislation.¹⁶⁶⁶ The National Committee did not see the need for such a provision in the model legislation, but suggested that individual jurisdictions should consider the relevance of the provision in the context of their legislation relating to old system land.¹⁶⁶⁷

¹⁶⁶⁴ See [12.68] above.

¹⁶⁶⁵ *Administration and Probate Act 1929* (ACT) s 56; *Probate and Administration Act 1898* (NSW) s 83.

¹⁶⁶⁶ *Administration of Estates Discussion Paper* (1999) QLRC 94; NSWLRC 136 (Proposal 45).

¹⁶⁶⁷ *Ibid*, QLRC 94; NSWLRC [8.117].

Submissions

12.140 All the respondents who addressed this issue — namely, the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, the ACT and New South Wales Law Societies, and the Law Institute of Victoria — agreed that the model legislation should not include a provision to the effect of section 83 of the *Probate and Administration Act 1898* (NSW).¹⁶⁶⁸

The National Committee's view

12.141 In the National Committee's view, the model legislation should not include a provision to the effect of section 83 of the *Probate and Administration Act 1898* (NSW). The provision and its counterpart in the ACT deal with the conveyance of old system land. They are not concerned with the general issues of administration, which should be the primary concern of the model legislation.

POWER OF PUBLIC TRUSTEE TO REMIT ASSETS TO, AND TO RECEIVE ASSETS FROM, A PUBLIC TRUSTEE IN ANOTHER JURISDICTION

Background

12.142 Where a person dies leaving property in more than one jurisdiction, it is necessary for the deceased's estate to be administered in each of those jurisdictions. Depending on the circumstances, it may be possible for a grant made in one jurisdiction to be resealed in another jurisdiction, in which case the resealed grant takes effect as an original grant made in that jurisdiction.¹⁶⁶⁹ If resealing is not possible, it may be necessary for an original grant to be obtained in each jurisdiction. Although it is common for the same person to be appointed as personal representative in each jurisdiction, it is nevertheless possible that different personal representatives will be appointed.¹⁶⁷⁰ The administration undertaken in the jurisdiction in which the deceased was not domiciled at the time of death is often described as being 'ancillary' to the administration being undertaken in the jurisdiction in which the deceased was domiciled at the time of death.

¹⁶⁶⁸ Submissions 1, 8, 11, 12, 14, 15, 19.

¹⁶⁶⁹ The resealing of grants is considered in Chapters 30–35 of this Report. In Chapters 37–39, the National Committee has recommended a scheme of automatic recognition of certain Australian grants to avoid the need for resealing where a person dies leaving property in more than one Australian jurisdiction.

¹⁶⁷⁰ This may arise where a testator appointed different persons to be the executor in the different jurisdictions. It may also arise as a result of the application of the choice of law rules, which are considered in Chapter 36 of this Report.

12.143 Ordinarily, a personal representative will be personally bound to see to the administration (including the distribution) of an estate, even though his or her administration is ancillary to the administration in another jurisdiction.¹⁶⁷¹

Statutory powers granted to public trustees

12.144 In all Australian jurisdictions except Victoria there are statutory provisions that deal with the public trustee's power to remit the balance of the proceeds of an estate out of the jurisdiction to another public trustee (or like official). In the ACT, New South Wales, Queensland, South Australia and Western Australia there are also provisions that deal with the public trustee's power to receive and deal with part of an estate that is outside the jurisdiction of that public trustee. Some variation exists between the jurisdictions as to the scope of these powers.

12.145 In all jurisdictions except Western Australia, the provisions are located in public trustee legislation. In contrast, the Western Australian provision is located in the *Administration Act 1903* (WA).

Northern Territory, Tasmania

12.146 The Northern Territory and Tasmanian provisions have a narrower scope than those in the other jurisdictions.¹⁶⁷² Where the public trustee is administering the estate of a person who died domiciled outside that jurisdiction, the public trustee may pay the proceeds of the estate in his or her own jurisdiction to the public trustee (or a similar official) in the place in which the deceased died domiciled, and is not obliged to see to the application of the proceeds.

12.147 Section 95 of the *Public Trustee Act* (NT), which is similar to section 67 of the *Public Trustee Act 1930* (Tas),¹⁶⁷³ provides:

95 Dealings with other Public Trustees, &c

Where the Public Trustee is administering the estate in the Territory of a person who, at the time of his or her death was domiciled outside the Territory and whose estate, in the place of domicile of the deceased, is being administered by the Public Trustee or other like official of the state of domicile, the Public Trustee may pay the proceeds of the estate in the Territory to the Public Trustee or other like official of the state of domicile without incurring any liability

¹⁶⁷¹ *Permezel v Hollingworth* [1905] VLR 321. Note, however, that the National Committee has recommended in Chapter 34 of this Report that the model legislation should include a provision to the effect of s 86 of the *Administration and Probate Act 1958* (Vic). That section provides that, where a person appointed under power of attorney obtains the resealing of a grant made in another jurisdiction, the attorney may, in the circumstances prescribed by that section, pay over or transfer the balance of the estate to the donor of the power of attorney, and thereby be protected from liability in respect of that payment or transfer.

¹⁶⁷² *Public Trustee Act* (NT) s 95; *Public Trustee Act 1930* (Tas) s 67.

¹⁶⁷³ *Public Trustee Act 1930* (Tas) s 67 applies where the person, at the time of death, was domiciled in 'one of the States of the Commonwealth or in the Dominion of New Zealand or in England' and the person's estate is there being administered by the public trustee or a similar officer.

in regard to a claimant of the balance and without any obligation to see to the application thereof.

12.148 The provisions do not deal with the public trustee's power to receive funds from a public trustee in another jurisdiction in which the deceased left property.

Australian Capital Territory, New South Wales, Western Australia

12.149 The public trustee legislation in the ACT¹⁶⁷⁴ and New South Wales¹⁶⁷⁵ and the administration legislation in Western Australia¹⁶⁷⁶ allow the public trustee of each of these jurisdictions to pay the balance of the proceeds of the administration of an estate in that jurisdiction to the public trustee (or a similar official) who is administering the estate of the deceased in the place in which the deceased was domiciled at the time of death.

12.150 In addition, the legislation in the ACT and New South Wales provides expressly that, when the public trustee remits funds out of the jurisdiction to the public trustee (or similar official) in the other place, he or she does not incur any liability in relation to the payment and is not obliged to see to the application of those funds.¹⁶⁷⁷ Section 142(1) of the *Administration Act 1903* (WA) does not include an express provision to that effect.

12.151 Section 142 of the *Administration Act 1903* (WA) provides:

142 Payment of balance of Estate to Curator or Public Trustee of State or Colony where deceased was domiciled

- (1) Where the Public Trustee of Western Australia is administering the estate of any person who at the time of his death was domiciled in any other part of the Commonwealth or in New Zealand, and whose estate is being administered by the Curator or Public Trustee of the State or Colony in which the deceased was domiciled, the balance of the estate, after payment of local creditors, commission fees, and expenses, may be paid over to such last named Curator or Public Trustee.
- (2) Where any part of the estate of a deceased person, whose estate is being administered by the Public Trustee of Western Australia, is situated outside the limits of Western Australia, such Public Trustee may receive any part of such estate so situated, and, when received, the same shall be dealt with according to the law of Western Australia.

¹⁶⁷⁴ *Public Trustee Act 1985* (ACT) s 30(1).

¹⁶⁷⁵ *Public Trustee Act 1913* (NSW) s 55. This provision applies only where the deceased died domiciled in another State or in New Zealand, and where the Supreme Court of New South Wales has ordered the public trustee in New South Wales 'to collect' the estate of a person. This would seem to be a reference to s 23(1) of the *Public Trustee Act 1913* (NSW), which provides that, where it appears to the court that there is reasonable ground to suppose that any person has died intestate, leaving property within New South Wales, the court may order and empower the public trustee to administer the estate of the person. Section 23(2) provides that such an order empowers the public trustee, among other things, to 'collect' the personal estate of the deceased person.

¹⁶⁷⁶ *Administration Act 1903* (WA) s 142(1).

¹⁶⁷⁷ *Public Trustee Act 1985* (ACT) s 30(1); *Public Trustee Act 1913* (NSW) s 55.

12.152 The legislation in all three jurisdictions also deals with the situation where the public trustee in the particular jurisdiction is administering the estate of a person who died domiciled in that jurisdiction, but left property in another place that is being administered by the public trustee (or similar official) in that place. The legislation provides that the public trustee may receive from the public trustee (or similar official) in the other place the balance of the proceeds of the deceased's estate in the other place.¹⁶⁷⁸

12.153 Commentators on the Western Australian legislation have suggested that, if section 142 of the *Administration Act 1903* (WA) is still needed, it would be more appropriately located in the *Public Trustee Act 1941* (WA).¹⁶⁷⁹

South Australia

12.154 The provision in South Australia applies where the public trustee has obtained an order to administer¹⁶⁸⁰ the estate in South Australia of a person who, at the time of death, was domiciled in another State or Territory or in New Zealand.¹⁶⁸¹ It enables the public trustee to pay over to 'the executor of the will or administrator of the estate in the place of domicile' the balance of the estate in South Australia after the payment of debts and charges, and does not limit payment to another public trustee. When the public trustee pays over the balance to such a personal representative, he or she is not required to see to the application of the money and does not incur any liability in relation to the payment.

12.155 The South Australian public trustee's power to receive funds is more limited. Where the deceased died domiciled in another State or Territory or in New Zealand and his or her estate is being administered in that place by the public trustee (or by a similar official), the South Australian public trustee may receive the balance of the deceased's estate from the public trustee in the other place.¹⁶⁸²

Queensland

12.156 The provisions in the *Public Trustee Act 1978* (Qld) have the widest application. The Queensland public trustee:

- may pay the balance of the proceeds of an estate being administered by it in Queensland to anyone administering the estate of the deceased in

¹⁶⁷⁸ *Public Trustee Act 1985* (ACT) s 30(2); *Public Trustee Act 1913* (NSW) s 56; *Administration Act 1903* (WA) s 142(2).

¹⁶⁷⁹ JJ Hockley, PR Macmillan and JC Curthoys, *Wills Probate & Administration WA* (LexisNexis online service) [1870.10] (at 21 February 2009).

¹⁶⁸⁰ Orders to administer are made under s 9 of the *Public Trustee Act 1995* (SA) and are discussed at [31.40]–[31.41] in vol 3 of this Report.

¹⁶⁸¹ *Public Trustee Act 1995* (SA) s 19(1).

¹⁶⁸² *Public Trustee Act 1995* (SA) s 19(2).

the jurisdiction where the deceased was domiciled at the time of death;
and

- when administering the estate of a person who died domiciled in Queensland but who left property in another place, may receive the balance of the proceeds of the estate in the other place from any person administering the estate in that place.

12.157 Section 55 of the *Public Trustee Act 1978* (Qld) provides:

55 Public trustee may pay over to principal administrator and receive property from ancillary administrator

- (1) Where the public trustee is administering the estate in Queensland of a deceased person who at the time of the person's death appears to the public trustee to have been domiciled in some other place and whose estate in that place is being administered by some person (the ***administrator in the domicile***), the public trustee may pay over, transfer or deliver to the administrator in the domicile the balance of the estate in Queensland, after any proper distribution thereof, without being under any obligation to see to the application of such balance and without incurring any liability in regard to such payment, transfer or delivery, and may certify to the correctness of any account supplied to that administrator in the domicile accordingly.
- (2) Where the public trustee is administering the estate of a deceased person who appears to the public trustee to have died domiciled in Queensland leaving assets in some other place, and under the authority of the law of that place some person (the ***ancillary administrator***) is administering such assets therein, the public trustee may receive from that ancillary administrator the balance of the proceeds of such assets, and such balance, when so received, shall be dealt with according to the law of Queensland, and shall form part of the estate of the deceased person, and the public trustee may act on the faith of any account supplied to the public trustee by the ancillary administrator and shall not be obliged to inquire into the administration of the assets of the deceased in such other place.
- (3) The public trustee may appoint any person (including the public trustee or curator or other like official for another place) to act as the public trustee's agent or attorney for the purpose of obtaining or confirming authority to act in relation to an estate in any place outside the State, and for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing, or cultivating, or otherwise administering any property real or personal, movable or immovable, forming part of the estate in any place outside the State, or executing or exercising any discretion or trust or power vested in the public trustee in relation to any such property, with such ancillary powers, and with and subject to such provisions and restrictions, as the public trustee may think fit, including a power to appoint substitutes, and shall not, by reason only of the public trustee having made any such appointment, be responsible for any loss arising thereby.

Discussion Paper

12.158 In the Discussion Paper, the National Committee considered whether a provision to the effect of section 142 of the *Administration Act 1903* (WA) should be included in the model legislation, or whether such a provision would be more appropriately located in the public trustee legislation, given that it deals only with estates being administered by the public trustee.¹⁶⁸³

12.159 The National Committee proposed that this matter should be considered in that part of the Uniform Succession Laws Project dealing with the recognition of interstate and foreign grants of probate and reseals.¹⁶⁸⁴

Submissions

12.160 The submissions that examined this issue agreed with the proposal of the National Committee.¹⁶⁸⁵

The National Committee's view

12.161 The National Committee notes that Western Australia is the only Australian jurisdiction to include in its administration legislation a provision that deals with the circumstances in which the public trustee may remit assets to, or receive assets from, the public trustee of another jurisdiction. In its view, this is a matter that is more appropriately addressed in public trustee legislation. Accordingly, the model legislation should not include a provision to the effect of section 142 of the *Administration Act 1903* (WA).

RECOMMENDATIONS

General powers of executors and administrators

12-1 The model legislation should include a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld), so that a personal representative:

- (a) represents the deceased person in relation to his or her real and personal estate; and**

¹⁶⁸³ *Administration of Estates Discussion Paper* (1999) QLRC 115; NSWLRC [8.177]. *Administration Act 1903* (WA) s 142 is set out at [12.150] above.

¹⁶⁸⁴ *Administration of Estates Discussion Paper* (1999) QLRC 115; NSWLRC 163 (Proposal 54).

¹⁶⁸⁵ Submissions 1, 8, 11, 12, 14, 15.

- (b) has, in relation to the real and personal estate, from the deceased's death:
- (i) all the powers in relation to the deceased person's estate that an executor has in relation to personal estate; and
 - (ii) all the powers conferred on personal representatives by the trustee legislation of the particular jurisdiction.¹⁶⁸⁶

See Administration of Estates Bill 2009 cl 406(1).

Relation back of powers

12-2 The model legislation should include a provision to the effect of section 49(3) of the *Succession Act 1981* (Qld), so that, subject to the terms of the grant, the powers of those personal representatives to whom a grant is made relate back to, and are taken to have arisen on, the death of the deceased person as if there had been no interval of time between the death and the grant.¹⁶⁸⁷

See Administration of Estates Bill 2009 cl 407(2), (3).

Additional powers

12-3 The model legislation should include a provision to the effect of section 49(5) of the *Succession Act 1981* (Qld), so that the court may confer on a personal representative such further powers for the administration of the estate that it considers appropriate.¹⁶⁸⁸

See Administration of Estates Bill 2009 cl 406(2).

Limits to exercise of powers of personal representative when a grant is made

12-4 The model legislation should include a provision to the effect of section 49(2) of the *Succession Act 1981* (Qld), to confirm that, on the making of a grant and subject to the terms of the grant:¹⁶⁸⁹

1686 See [12.26] above.

1687 See [12.27]–[12.28] above.

1688 See [12.36]–[12.37] above.

1689 See [12.38]–[12.46] above.

- (a) the powers of the personal representatives may be exercised only by those personal representatives to whom the grant is made; and
- (b) no other person has the power to bring actions or otherwise act as personal representative without the consent of the court.

See Administration of Estates Bill 2009 cl 407(1), (3).

Personal representatives to exercise their powers jointly

12-5 The model legislation should include a provision to the effect of section 49(4) of the *Succession Act 1981* (Qld), so that personal representatives are required to exercise their powers jointly.¹⁶⁹⁰

See Administration of Estates Bill 2009 cl 406(3).

Specific powers not included

12-6 The model legislation should not include a specific provision dealing with assent.¹⁶⁹¹

12-7 The model legislation should not include a provision to the effect of section 83 of the *Probate and Administration Act 1898* (NSW).¹⁶⁹²

12-8 The model legislation should not include a provision to the effect of section 142 of the *Administration Act 1903* (WA).¹⁶⁹³

1690 See [12.63] above.

1691 See [12.128]–[12.135] above.

1692 See [12.141] above.

1693 See [12.161] above.

Chapter 13

Personal representatives as trustees

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INTRODUCTION

13.1 Sometimes, a personal representative will be appointed as the trustee of a testamentary trust — that is, of a trust created by the will. However, even in the absence of such an appointment, the role of personal representative will inevitably change to that of trustee.¹⁶⁹⁴ Under the general law, once a personal representative has completed his or her executorial duties (but before distributing the assets), the personal representative holds any assets of the estate as a trustee for the beneficiaries.¹⁶⁹⁵

13.2 In addition, the trustee legislation of all Australian jurisdictions defines ‘trustee’ to include a ‘personal representative’, so that a personal representative may generally exercise a power that is conferred by statute on a trustee.¹⁶⁹⁶ To emphasise this point, the National Committee has recommended in Chapter 12 of this Report that the model legislation should include a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld),¹⁶⁹⁷ which states expressly that a personal representative has all the powers conferred on a trustee under the *Trusts Act 1973* (Qld).¹⁶⁹⁸

13.3 In some Australian jurisdictions, the administration legislation includes provisions that confer powers that, in the other jurisdictions, are addressed by either similar or more general provisions in the trustee legislation of those jurisdictions. This raises the issue of whether it is necessary for the model legislation to include any of these specific powers to enable personal representatives who have become trustees to fulfil that role.

13.4 In the Discussion Paper, the National Committee commented that ‘[s]ome of those provisions may be better placed in trustee legislation — particularly if their primary focus is concerned with the role of trustee and not with the role of executor or administrator of an estate’.¹⁶⁹⁹ The National Committee noted that, elsewhere in this project, it had adopted the policy that ‘provisions should be located in the legislation that is most relevant to the focus

¹⁶⁹⁴ See AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [9.30].

¹⁶⁹⁵ *Re Davis’ Trusts* (1871) LR 12 Eq 214, 216 (Malins VC); *Re Ponder* [1921] 2 Ch 59, 61 (Sargent J); *Pagels v MacDonald* (1936) 54 CLR 519, 526 (Latham CJ); *In the Estate of Dunn* [1963] VR 165. See also RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [48.08].

¹⁶⁹⁶ *Trustee Act 1925* (ACT) s 2, dictionary (definitions of ‘trustee’ and ‘legal representative’); *Trustee Act 1925* (NSW) s 5 (definitions of ‘trustee’ and ‘legal representative’); *Trustee Act* (NT) s 82 (definitions of ‘trustee’ and ‘representative’); *Trusts Act 1973* (Qld) s 5(1) (definitions of ‘trustee’ and ‘personal representative’); *Trustee Act 1936* (SA) s 4(1) (definitions of ‘trustee’ and ‘representative’); *Trustee Act 1898* (Tas) s 4 (definitions of ‘trustee’ and ‘representative’); *Trustee Act 1958* (Vic) s 3(1) (definitions of ‘trustee’ and ‘personal representative’); *Trustees Act 1962* (WA) s 6(1) (definitions of ‘trustee’ and ‘personal representative’). However, as explained at [12.9] above, while an estate is being administered, a personal representative should exercise those powers only for the purpose of the administration of the estate and not for any other purpose.

¹⁶⁹⁷ See Recommendation 12-1 above.

¹⁶⁹⁸ *Succession Act 1981* (Qld) s 49(1) is set out at [12.5] above.

¹⁶⁹⁹ *Administration of Estates Discussion Paper* (1999) QLRC 102; NSWLRC [8.141].

of those provisions'.¹⁷⁰⁰ This approach was expressly endorsed by the Law Institute of Victoria in its submission.¹⁷⁰¹

13.5 This section of the chapter considers whether the model legislation should include a number of specific provisions that are found in the administration legislation of individual Australian jurisdictions and that were canvassed in the Discussion Paper. As a general proposition, however, the National Committee is of the view that:

- the powers of personal representatives should be assimilated with those of trustees (although the National Committee acknowledges that, during the administration stage of an estate, those powers must be exercised for the purpose of the administration of the estate); and
- the powers of personal representatives who have become trustees should be addressed in the trustee legislation of the individual jurisdictions, and should not be duplicated in the model administration legislation.

13.6 Given that the model legislation provides expressly that a personal representative may exercise all the powers conferred on a trustee by the trustee legislation of the relevant jurisdiction, the National Committee considers that there would need to be a compelling reason for the model legislation to include specific provisions that deal primarily with trustee powers.

POWER TO APPROPRIATE TO BENEFICIARIES

Background

13.7 Under the general law, a personal representative, acting in the capacity of a trustee, may appropriate to a beneficiary a particular asset forming part of the trust estate, instead of distributing to the beneficiary an equivalent sum of money.

13.8 The power to appropriate an asset is particularly important where a trustee is under a duty to convert trust assets and distribute the proceeds of sale among the beneficiaries, as it provides a mechanism for a beneficiary who would prefer to receive an asset in specie to do so:¹⁷⁰²

where the trustee is directed to convert and to pay the beneficiary money, it must be competent for him to agree with the beneficiary that he will sell the beneficiary the property against the money which otherwise he would have to pay to him; but it is not necessary to go through the form of first converting the

1700 *Ibid.*

1701 Submission 19.

1702 *Re Beverly; Watson v Watson* [1901] 1 Ch 681, 685 (Buckley J), followed in *Wigley v Crozier* (1909) 9 CLR 425, 438 (Griffith CJ endorsing the statement of the principle from the headnote of *Re Beverly*).

property and then giving the beneficiary the money which the beneficiary may be desirous immediately to reinvest in the property which has just been sold.

13.9 The recipient beneficiary must consent to the appropriation,¹⁷⁰³ but as long as the trustee considers the interests of the other beneficiaries and the appropriation does not prejudice the interests of those other beneficiaries,¹⁷⁰⁴ no consent need generally be obtained from them.¹⁷⁰⁵

13.10 The asset must be valued, at the date of the appropriation, to allow it to be accounted for. Where the appropriation constitutes only part of the beneficiary's entitlement, that appropriation is treated as being the payment of the cash equivalent of the asset at that date.¹⁷⁰⁶ Changes in the value of the rest of the estate after appropriation will not affect the propriety of the appropriation.¹⁷⁰⁷

13.11 Where a beneficiary is entitled to an annuity, a fund may be appropriated from the estate to compound the annuity.¹⁷⁰⁸

13.12 However, the power of a trustee to appropriate assets to beneficiaries may be denied where there is a contrary intention expressed in a will.¹⁷⁰⁹

Statutory powers of appropriation

13.13 All jurisdictions in Australia, except South Australia,¹⁷¹⁰ have legislation that gives personal representatives, or trustees generally, the power to appropriate assets to beneficiaries. The principles discussed above are generally reflected in the legislation.

13.14 In the Northern Territory and Tasmania, the power to appropriate is limited to a personal representative and is found in the administration legislation of these jurisdictions.¹⁷¹¹ In the ACT, New South Wales, Queensland, Victoria

1703 *Re Salomons* [1920] 1 Ch 290, 295 (Eve J).

1704 *Wigley v Crozier* (1909) 9 CLR 425.

1705 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16200] (at 24 February 2009), citing *Wigley v Crozier* (1909) 9 CLR 425, 432 (Griffith CJ).

1706 *Re Gollin's Declaration of Trust* [1969] 1 WLR 1858.

1707 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16210] (at 24 February 2009).

1708 *Harbin v Masterman* [1896] 1 Ch 351, 355–6 (Stirling J) aff'd on appeal at 362 (Lindley LJ); *Re the Will of De Baun* (1922) 25 WAR 80.

1709 *Wallace v Love* (1922) 31 CLR 156, 165 (Knox CJ and Starke J), 167 (Higgins J).

1710 In South Australia, a trustee must rely on the power to appropriate that applies under the general law.

1711 *Administration and Probate Act* (NT) s 81; *Administration and Probate Act 1935* (Tas) s 40.

and Western Australia, the power to appropriate is given to trustees generally and is found in the trustee legislation of these jurisdictions.¹⁷¹²

Appropriation powers in trustee legislation

13.15 The provisions in the trustee legislation confer broad powers of appropriation on trustees. Although variations do exist from jurisdiction to jurisdiction, the provisions have a number of common features:¹⁷¹³

All the statutes:

- (a) enable the trustee to appropriate any part of the trust property in or towards satisfaction of a legacy or of any share of the trust property;
- (b) require the trustee, in making any appropriation, to have regard to the rights of other beneficiaries;
- (c) enable the trustee to appropriate, to satisfy an annuity, property sufficient at the time of the appropriation to provide out of the income thereof the annuity given; and
- (d) enable the trustee to make valuations of the trust property for the purpose of making the appropriation.

Australian Capital Territory, New South Wales, Victoria

13.16 The ACT, New South Wales and Victorian provisions are similar.¹⁷¹⁴ Section 46 of the *Trustee Act 1925* (NSW) provides:

46 Appropriation

- (1) A trustee may appropriate any part of the property subject to the trust or of the real or personal estate of a testator or intestate in the actual condition or state of investment thereof in or towards satisfaction of a legacy or of any share or interest in the property or estate, whether settled or not, as to the trustee may seem just and reasonable, according to the respective rights of the persons interested in the property or estate, provided that:
 - (a) the appropriation shall not be made so as to affect prejudicially any specific gift devise or bequest,
 - (b) the appropriation shall be made with the consent, if any, required by this section,

¹⁷¹² *Trustee Act 1925* (ACT) s 46; *Trustee Act 1925* (NSW) s 46; *Trusts Act 1973* (Qld) s 33(1)(l), (m); *Trustee Act 1958* (Vic) s 31; *Trustees Act 1962* (WA) s 30(1)(k), (l). As explained previously, the trustee legislation of all Australian jurisdictions defines 'trustee' to include a personal representative, with the result that the power of appropriation is also conferred on a personal representative: see [13.2] above.

¹⁷¹³ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16220] (at 24 February 2009).

¹⁷¹⁴ *Trustee Act 1925* (ACT) s 46; *Trustee Act 1925* (NSW) s 46; *Trustee Act 1958* (Vic) s 31.

- (c) in making the appropriation the trustee shall have regard to the rights of any person who may thereafter come into existence or who cannot be found or ascertained at the time of the appropriation or as to whom it is uncertain at that time whether he or she is living or dead, and of any other person whose consent is not required by this section.
- (2) The power of appropriation conferred by this section shall extend and apply to:
 - (a) property over which a testator exercises a general power of appointment,¹⁷¹⁵
 - (b) setting apart a fund to answer an annuity by means of the income of the fund or otherwise, provided that at the time of appropriation the fund would be sufficient, if it were invested in Government securities of the Commonwealth of Australia at par, to provide an income exceeding the annuity by at least fifteen per centum thereof,
 - (c) setting apart a sum of money in or towards the satisfaction of a legacy share or interest.
- (3) For the purpose of an appropriation under this section the trustee may ascertain and fix the value of the respective parts of the property or estate and the liabilities to which the property or estate is subject as the trustee may think fit, and shall for that purpose employ a duly qualified valuer in any case where such employment may be necessary.
- (4) An appropriation made pursuant to this section shall bind all persons interested in the property or estate, including the persons whose consent is not required, and to the extent to which the appropriation is made in or towards satisfaction of the legacy share or interest, the rights to which any person is entitled in virtue of the legacy share or interest shall be restricted to the part of the property or estate so appropriated and shall not extend to any other part thereof which may be dealt with or disposed of freed from any such rights.
- (5) An appropriation of property whether it is or is not an investment authorised by law or by the instrument, if any, creating the trust for the investment of money subject thereto, shall not, except as otherwise provided by this section, be made thereunder for the benefit of a person absolutely and beneficially entitled in possession, unless the person is of the age of eighteen years or upwards and of full capacity and the person consents in writing.
- (6) An appropriation shall not, except as otherwise provided in this section, be made thereunder in respect of any settled legacy share or interest, unless either the trustee thereof, if any, not being also the trustee making the appropriation, or the person who may for the time being be entitled to the income, consents in writing.

1715

See the explanation of general powers of appointment at [10.148] above.

- (7) If the person whose consent is required under subsection (5) or subsection (6), not being the trustee of a settled legacy share or interest:
- (a) is a minor, the consent may be given on the person's behalf by the person's parents or parent with whom the person resides or in whose custody the person is, as the case may be, or by the person's testamentary or other guardian, or if there is no such parent or guardian, by the Court,
 - (b) is an insane or incapable person, the consent may be given on the person's behalf by the person's committee or manager, or if there is no such committee or manager, by the Court,
 - (c) is an insane patient, the consent may be given on the person's behalf either by the Master in Lunacy or by the Court,
 - (d) is a person who cannot be found or ascertained, or as to whom it is uncertain whether he or she is living or dead, the consent may be given on the person's behalf by the Court.
- (8) If the appropriation is of an investment authorised by law or by the instrument, if any, creating the trust for the investment of money subject thereto no consent save of the trustee, if any, of a settled legacy share or interest shall be required on behalf of:
- (a) a minor, where there is no parent or guardian,
 - (b) an insane or incapable person or an insane patient, where there is no committee or manager,
 - (c) a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time, or as to whom it is uncertain at that time whether he or she is living or dead.
- (8A) Notwithstanding anything contained in paragraph (b) of subsection (1) or in subsection (5) or subsection (7) the consent of the annuitant shall not be necessary in any case in which the trustee, after having set apart a fund to answer the annuity, which fund at the time of appropriation would be sufficient, if it were invested in Government securities of the Commonwealth of Australia at par, to provide an income exceeding the annuity by at least twenty per centum thereof, has actually invested the fund in such securities.
- (9) Where an appropriation is made under this section in respect of a settled legacy share or interest, the property appropriated shall be subject to all trusts for sale and powers of leasing disposition management and varying investments which would have been applicable thereto or to the legacy share or interest in respect of which the appropriation is made, if no such appropriation had been made, provided that nothing in this section shall relieve the trustee of the settled legacy share or interest, where the trustee is not the trustee making the appropriation, from the obligation to obtain payment or transfer of the property appropriated, if or when the same is so payable or transferable.

- (10) Where the exercise of any power of sale conferred on a legal representative by section 153 of the *Conveyancing Act 1919* is subject to any condition or to the leave of the Court being obtained, the legal representative shall not be entitled to appropriate any part of the real estate under the powers conferred by this section, except with the leave of the Court.
- (11) The trustee may make any conveyance or assent which may be necessary for giving effect to an appropriation under this section.
- (12) Any appropriation or disposition of property made in purported exercise of the powers conferred by this section shall, in favour of a purchaser in good faith, be deemed to have been made in accordance with the requirements of this section, and after all requisite consents, if any, have been given.
- The protection afforded by this subsection shall extend to the Registrar-General Crown Solicitor or other person registering or certifying title.
- (13) In this section a settled legacy share or interest means a legacy share or interest settled by the trust instrument, if any, or by any other instrument, and includes any legacy share or interest to which a person is not absolutely entitled in possession at the date of the appropriation.
- (14) In this section a manager means the person appointed under the *Lunacy Act 1898* to undertake the care and management of the property of an incapable person, and an insane patient means an insane patient within the meaning of that Act.
- (15) This section shall not prejudice any other power of appropriation conferred by law or by the instrument, if any, creating the trust, and the powers conferred by this section shall be in addition to any such power.
- (16) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (17) This section applies to trusts created either before or after the commencement of this Act. (note added)

13.17 Section 46(16) and the equivalent provisions in the other jurisdictions¹⁷¹⁶ provide that the statutory power applies only if, and as far as, a contrary intention is not expressed in the instrument creating the trust. This means that, in the case of a will, there is no power to make an appropriation if the will shows an intention that the fund be kept together until the time specified for division.¹⁷¹⁷

¹⁷¹⁶ *Trustee Act 1925* (ACT) s 46(16); *Trustee Act 1958* (Vic) s 2(3).

¹⁷¹⁷ *Wallace v Love* (1922) 31 CLR 156; JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [2071].

13.18 It has been suggested that parts of these provisions are declaratory, for example, the provisions that provide that ‘an appropriation made in pursuance of the statutory power is binding upon all persons interested in the estate’.¹⁷¹⁸

13.19 In *Carr v Carr*,¹⁷¹⁹ the purpose of the New South Wales provision was described in the following terms:¹⁷²⁰

It is, however, important to realise when one is looking at s 46 that its aim is not so much to change the previous law, but rather to set it out in a plain fashion and that it does not differ in any material degree from the power of appropriation which existed before the *Trustee Act* ...

13.20 The provisions in the ACT, New South Wales and Victoria require consent to be obtained from, or on behalf of, the beneficiaries in whose favour the appropriation is being made.

Queensland, Western Australia

13.21 In Queensland and Western Australia, the provisions in the trustee legislation are more concise than the provisions discussed above. Section 33 of the *Trusts Act 1973* (Qld), which is in substantially the same terms as section 30 of the *Trustees Act 1962* (WA), provides:

33 Miscellaneous powers in respect of property

(1) Every trustee, in respect of any trust property, may—

...

- (l) appropriate any part of the property in or towards satisfaction of any legacy payable thereout or in or towards satisfaction of any share of the trust property (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole or any part of the property in accordance with section 51; but—
 - (i) the appropriation shall not be made so as to affect adversely any specific gift; and
 - (ii) before any such appropriation is effectual, notice thereof shall be given to all persons not under a disability who are interested in the appropriation, and to the parent or guardian of any infant who is interested in the appropriation, and to the person having the care and management of the estate of any person who is not of full mental capacity, and any such person may within 1 month after receipt of the notice or, upon the person’s application to the court within that month,

¹⁷¹⁸ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16220] (at 24 February 2009).

¹⁷¹⁹ (1987) 8 NSWLR 492.

¹⁷²⁰ Ibid 495 (Young J).

within such extended period as the court may allow, apply to the court to vary the appropriation, and the appropriation shall be conclusive save as varied by the court; and

- (m) where provision is made in any instrument creating a trust for payment of an annuity or other periodic payment, and notwithstanding that the annuity or payment may by the instrument be charged upon the trust property or upon any part thereof—set aside and appropriate out of property available for payment of the annuity and invest a sum sufficient in the opinion of the trustee at the time of appropriation to provide out of the income thereof the amount required to pay the annuity or periodic payment, and so that after the appropriation shall have been made—
- (i) the annuitant shall have the same right of recourse to the capital and income of the appropriated sum as the annuitant would have had against the trust property if no appropriation had been made; and
 - (ii) the trustee may forthwith distribute the residue of the trust property and the income thereof (which residue and income shall no longer be liable for the annuity) in accordance with the trusts declared of and concerning the same;

13.22 Unlike the ACT, New South Wales and Victorian provisions, the Queensland and Western Australian provisions do not restrict the power to appropriate assets to those situations where the intended beneficiary consents to the appropriation. Instead, these provisions require the trustee to give notice to persons ‘interested in the appropriation’. The recipients of the notice are then able to apply to the court for a variation of the appropriation.¹⁷²¹

13.23 In Queensland, the provision applies whether or not a contrary intention is expressed in the instrument creating the trust.¹⁷²² In Western Australia, however, the exercise of the statutory power of appropriation is subject to a contrary intention in the trust instrument.¹⁷²³

Appropriation powers in administration legislation

Northern Territory, Tasmania

13.24 Unlike the other jurisdictions discussed above, the provisions in the Northern Territory and Tasmania are contained in each jurisdiction’s administration legislation.

¹⁷²¹ *Trusts Act 1973* (Qld) s 33(1)(l)(ii); *Trustees Act 1962* (WA) s 30(1)(k)(ii).

¹⁷²² *Trusts Act 1973* (Qld) s 31(1).

¹⁷²³ *Trustees Act 1962* (WA) s 5(2), (3).

13.25 Section 40 of the *Administration and Probate Act 1935* (Tas), which is almost identical to section 81 of the *Administration and Probate Act* (NT), provides:

40 Powers of personal representative as to appropriation

- (1) The personal representative may appropriate any part of the real or personal estate, including things in action, of the deceased in the actual condition or state of investment thereof at the time of appropriation, in or towards satisfaction of any legacy bequeathed by the deceased, or of any other interest or share in his property, whether settled or not, as to the personal representative may seem just and reasonable, according to the respective rights of the persons interested in the property of the deceased: Provided that—
- (a) an appropriation shall not be made under this section so as to affect prejudicially any specific devise or bequest;
 - (b) an appropriation of property, whether or not being an investment authorized by law or by the will, if any, of the deceased for the investment of money subject to a trust, shall not, save as hereinafter mentioned, be made under this section except with the following consents:
 - (i) when made for the benefit of a person absolutely and beneficially entitled in possession, the consent of that person;
 - (ii) when made in respect of any settled legacy, share, or interest, the consent of either the trustee thereof, if any (not being also the personal representative), or the person who for the time being may be entitled to the income;

If the person whose consent is so required as aforesaid is an infant or an involuntary patient within the meaning of the *Mental Health Act 1996*, the consent shall be given on his behalf by his parents or parent, testamentary or other guardian, or the committee of his estate, or if, in the case of an infant, there is no such parent or guardian, by the Court on the application of his next friend;

- (c) no consent, save of such trustee as aforesaid, shall be required on behalf of a person who may come into existence after the time of appropriation, or who cannot be found or ascertained at that time;
- (d) where a person is, by reason of mental disorder, incapable of managing his property and affairs and no committee of his estate has been appointed, then, if the appropriation is of an investment authorized by law or by the will, if any, of the deceased for the investment of money subject to the trust, no consent shall be required on behalf of that person; and
- (e) if, independently of the personal representative, there is no trustee of a settled legacy, share, or interest, and no person of

full age and capacity entitled to the income thereof, no consent shall be required to an appropriation in respect of such legacy, share, or interest, provided that the appropriation is of an investment authorized as aforesaid.

- (2) Any property duly appropriated under the powers conferred by this section shall thereafter be treated as an authorized investment, and may be retained or dealt with accordingly.
- (3) For the purposes of such appropriation, the personal representative may ascertain and fix the value of the respective parts of the real and personal estate and the liabilities of the deceased as he may think fit, and shall for that purpose employ a qualified valuer, in any case where such employment may be necessary; and may make any conveyance, including an assent, which may be requisite for giving effect to the appropriation.
- (4) An appropriation made pursuant to this section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite.
- (5) The personal representative shall, in making the appropriation, have regard to the rights of any person who may thereafter come into existence, or who cannot be found or ascertained at the time of the appropriation, and of any other person whose consent is not required by this section.
- (6) This section does not prejudice any other power of appropriation conferred by law or by the will, if any, of the deceased, and takes effect with any extended powers conferred by the will, if any, of the deceased, and, where an appropriation is made under this section in respect of a settled legacy, share, or interest, the property appropriated shall remain subject to all trusts for sale and powers of leasing, disposition, and management, or varying investments, which would have been applicable thereto or to the legacy, share, or interest in respect of which the appropriation is made, if no such appropriation had been made.
- (7) If, after any real estate has been appropriated in purported exercise of the powers conferred by this section, the person to whom it was conveyed disposes of it or any interest therein, then, in favour of a purchaser, the appropriation shall be deemed to have been made in accordance with the requirements of this section and after all requisite consents, if any, had been given.
- (8) In this section, a settled legacy, share, or interest includes any legacy, share, or interest to which a person is not absolutely entitled in possession at the date of the appropriation, also an annuity, and

“**purchaser**” means a purchaser for money or money's worth.
- (9) This section applies whether the deceased died intestate or not, and whether before or after the commencement of this Act, and extends to property over which a testator exercises a general power of appointment, and authorizes the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise.

Discussion Paper

13.26 In the Discussion Paper, the National Committee considered whether the model legislation should include provisions dealing with a personal representative's power to appropriate assets to a beneficiary or whether the power to appropriate assets should be dealt with in the trustee legislation of each State and Territory.¹⁷²⁴ The National Committee considered that the rules allowing appropriation should be common to both trustees and personal representatives, and that they were more appropriately located in each jurisdiction's trustee legislation.¹⁷²⁵

13.27 It therefore proposed that the model legislation should not include a provision dealing with the appropriation of assets by trustees to beneficiaries.¹⁷²⁶

Submissions

13.28 The National Committee's proposal was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, the ACT and New South Wales Law Societies, and the Law Institute of Victoria.¹⁷²⁷

13.29 However, the support of the Queensland Law Society was made in the context of a suggestion that the National Committee should consider abolishing the distinction between personal representatives and testamentary trustees.

13.30 An academic expert in succession law was strongly of the view that provisions dealing with the power to appropriate should be located in trustee legislation rather than in the model administration legislation.¹⁷²⁸

The correct place for appropriation provisions is in trustee legislation. A personal representative should only be able to appropriate by way of assent, vesting appropriated shares in consenting beneficiaries or trustees for beneficiaries. As far as that property is concerned the personal representative is trustee.

The National Committee's view

13.31 The National Committee remains of the view, which has been supported by the submissions, that the power to appropriate assets should be the same for personal representatives as for trustees and is more appropriately

¹⁷²⁴ *Administration of Estates Discussion Paper* (1999) QLRC 106; NSWLRC [8.154].

¹⁷²⁵ *Ibid*, QLRC 106; NSWLRC [8.155]–[8.156].

¹⁷²⁶ *Ibid*, QLRC 106–7; NSWLRC 152 (Proposal 49).

¹⁷²⁷ Submissions 1, 8, 11, 12, 14, 15, 19.

¹⁷²⁸ Submission 12.

located in trustee legislation. Accordingly, the model legislation should not include a provision dealing with the appropriation of assets.

POWER TO APPOINT TRUSTEES OF A MINOR'S PROPERTY

Background

13.32 Where a minor is a beneficiary under a will, or is entitled to part of the estate of an intestate under the intestacy rules, the minor is unable to give a valid receipt or a good discharge to the personal representative.¹⁷²⁹ As a result, the property to which the minor is entitled must be held on trust for the minor until he or she attains the age of 18 years.¹⁷³⁰

13.33 There are several options open to a personal representative who wishes to retire as trustee, and to discharge his or her liability with respect to the future administration of the trust property.

13.34 Originally, the only way in which an executor intending to distribute the estate could protect himself or herself was to pay into court the money held on trust for a minor.¹⁷³¹ The rationale for this practice was to allow a trustee to be relieved of the responsibility of administering an estate and to protect the legacy for the benefit of the minor:¹⁷³²

there have been ... many instances where it would have been far better for a legatee, ... if the executor had recognized the propriety of paying the legacy into Court, so freeing himself and the estate from any liability in respect thereof and securing to the legatee the ultimate payment of that which the testator intended him to have.

1729 *Re Wilks* [1935] 1 Ch 645, 650 (Farwell J); *Re Kehr* [1952] 1 Ch 26, 29 (Danckwerts J). See also HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.800] (at 24 February 2009).

1730 There are a number of exceptions to this rule, including:

- In some jurisdictions, where a minor is married or in a domestic relationship, the minor is able to give valid receipts for income received: see *Civil Law (Property) Act 2006* (ACT) s 254; *Property Law Act 1958* (Vic) s 29; *Property Law Act 1969* (WA) s 30.
- In New South Wales, certain civil acts are deemed to be presumptively binding on a minor when they are for the minor's benefit: *Minors (Property and Contracts) Act 1970* (NSW) s 19.
- In Queensland and Western Australia, a trustee may deliver chattels to which a minor is beneficially entitled to the minor or the minor's guardian, in which case the receipt of the minor or the minor's guardian is a complete discharge to the trustee: see *Trusts Act 1973* (Qld) s 74 and AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [9.210]; *Trustees Act 1962* (WA) s 73.
- In Victoria, if 'the estate of any intestate in respect of which administration has been granted does not exceed \$1000 after payment of debts and such intestate has left no partner but a child or children under age, the administrator may pay ... the distributive share or shares to which the said child or children is or are entitled in such estate ... to any person having the care and control of such child or children without seeing to the application thereof and without incurring any liability in respect of such payment': *Administration and Probate Act 1958* (Vic) s 54.

1731 *Re Salomons* [1920] 1 Ch 290, 295 (Eve J). See also G Fricke and OK Strauss, *The Law of Trusts in Victoria* (1964) 400.

1732 *Re Salomons* [1920] 1 Ch 290, 297 (Eve J). See also the general comments in *Kirk v Kirk* [2002] QSC 310, [15]–[18] (White J).

13.35 However, all Australian jurisdictions now have a range of legislative provisions that enable a personal representative who has assumed the role of trustee to be discharged from further liability in respect of the trust property.

13.36 Some of these provisions are of general application and apply whether or not the beneficiary in question is a minor. Other provisions deal specifically with the situation of a personal representative who holds property on trust for a beneficiary who is a minor.

13.37 This section of the chapter examines the various means by which a personal representative who has assumed the role of trustee may retire from that role and be discharged from further liability. In particular, it considers whether the model legislation should include a specific provision to facilitate the discharge of a personal representative who holds property on trust for a minor beneficiary.

Provisions of general application

Provisions for the discharge and appointment of trustees

13.38 The trustee legislation in all Australian jurisdictions includes a provision that enables a trustee who wishes to retire from that office to be discharged from further liability, and to appoint a new trustee in his or her place.¹⁷³³ It has been held that these provisions apply to a personal representative who, having completed the administration of the estate, holds property in the estate on trust for the beneficiaries.¹⁷³⁴

13.39 These provisions are of general application and are not restricted to trusts for a particular kind of beneficiary, such as a minor. It has been suggested that the provisions can be used by a personal representative, acting as a trustee, who holds a disposition of property on behalf of a beneficiary who is a minor.¹⁷³⁵

13.40 The various provisions provide that, except where only one trustee was originally appointed or the trust instrument allows it, a trustee may not be discharged from the trust unless:

1733 *Trustee Act 1925 (ACT) s 6; Trustee Act 1925 (NSW) s 6; Trustee Act (NT) s 11; Trusts Act 1973 (Qld) s 12; Trustee Act 1936 (SA) s 14; Trustee Act 1898 (Tas) s 13; Trustee Act 1958 (Vic) s 41; Trustees Act 1962 (WA) s 7.* These provisions are based on s 36 of the *Trustee Act 1925 (UK)*. Where a trustee retires pursuant to these provisions, the trustee is not relieved from liability for breaches of trust that occurred before retirement: *Custodial Limited v Cardinal Financial Services Limited* [2004] QSC 452, [46] (Atkinson J).

1734 *Re Cockburn's Will Trusts* [1957] 1 Ch 438, 439–40 (Danckwerts J), which concerned the equivalent English provision, s 36 of the *Trustee Act 1925 (UK)*.

1735 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [2075].

- in the ACT, New South Wales and South Australia — two trustees, the public trustee or a trustee company will remain to perform the trust;¹⁷³⁶
- in the Northern Territory and Tasmania — at least two trustees will remain to perform the trust;¹⁷³⁷
- in Queensland, Victoria and Western Australia — either a trustee company or at least two individuals will remain to act as trustees.¹⁷³⁸

13.41 The rationale for having a trustee company or at least two individuals acting as trustee is twofold:¹⁷³⁹

it is unsuitable that the assets of a trust should be committed to the care of only one person because it is a position of great temptation to commit fraud; and in the second place the functioning of a trust can be seriously impaired by the death of a sole trustee because of the disruption of affairs that must inevitably follow that event.

13.42 Although a trustee company or at least two individuals will usually take over as trustees when the existing trustee or trustees are discharged, there are two circumstances in which a sole trustee may be appointed in the place of the existing trustee or trustees:

- where there was originally a sole trustee; or
- where the trust instrument provides for a sole trustee.

13.43 The effect of these exceptions is that, where there is originally a sole executor or a sole administrator who becomes a trustee, or where the will appoints a sole trustee of a testamentary trust, that person may appoint a sole individual to be a trustee in his or her place.

Payment into court

13.44 The trustee legislation in all Australian jurisdictions provides that a trustee (including a personal representative who has assumed the role of trustee) who pays money or securities into court is to be discharged in respect

¹⁷³⁶ *Trustee Act 1925* (ACT) s 6(7), (15); *Trustee Act 1925* (NSW) s 6(6), (13); *Trustee Act 1936* (SA) s 14(2)(c), (5).

¹⁷³⁷ *Trustee Act* (NT) s 11(2)(c), (5); *Trustee Act 1898* (Tas) s 13(2)(c), (5).

¹⁷³⁸ *Trusts Act 1973* (Qld) s 12(2)(c)(i); *Trustee Act 1958* (Vic) ss 2(3), 42(1)(c); *Trustees Act 1962* (WA) ss 5(2), 7(2)(c). See also *Trusts Act 1973* (Qld) s 12(2)(c)(ii) which provides a further exception in the case of a trust for a charitable or public purpose or for any purpose of recreation or other leisure time use or occupation, where there will remain a local government to act as trustee of the trust.

¹⁷³⁹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [8210] (at 24 February 2009).

of the money or securities so paid.¹⁷⁴⁰ Section 102 of the *Trusts Act 1973* (Qld), which is typical of these provisions, is in the following terms:

102 Payment into court by trustee

- (1) A trustee or trustees, or the majority of trustees, having in his, her or their hands or under his, her or their control money or securities¹⁷⁴¹ belonging to a trust, may pay the same into court; and the same shall, subject to rules of court, be dealt with according to the orders of the court.
- (2) The receipt or certificate of the proper officer shall be a sufficient discharge to the trustee or trustees for the money or securities so paid into court.
- (3) Where money or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others can not be obtained, the court may order the payment into court to be made by the majority without the concurrence of the other or others.
- (4) Where any money or securities ordered to be paid into court under subsection (3), are deposited with any financial institution, broker, or other depository, the court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into court.
- (5) Every transfer payment and delivery made in pursuance of any order under this section shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid, or delivered. (note added)

13.45 Payment of a trust fund into court effectively constitutes a retirement from the trust by the trustee.¹⁷⁴² The trustee cannot be liable in respect of the money or securities paid into court,¹⁷⁴³ although the trustee will still be liable for any breaches that occurred before the payment of the money or securities into court.¹⁷⁴⁴

¹⁷⁴⁰ *Trustee Act 1925* (ACT) s 95; *Trustee Act 1925* (NSW) s 95; *Trustee Act* (NT) s 44; *Trusts Act 1973* (Qld) s 102; *Trustee Act 1936* (SA) s 47; *Trustee Act 1898* (Tas) ss 48, 49; *Trustee Act 1958* (Vic) s 69; *Trustees Act 1962* (WA) s 99.

¹⁷⁴¹ *Trusts Act 1973* (Qld) s 5(1), has a definition of securities, which is similar to the definitions in all other States and Territories:

securities includes debentures, stock and shares; and **securities payable to bearer** includes securities transferable by delivery or by delivery and endorsement.

¹⁷⁴² *Re William's Settlement* (1858) 4 K & J 87; 70 ER 37 (Sir W Page Wood VC). See also HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.800] (at 24 February 2009).

¹⁷⁴³ *Re Tegg's Trusts* (1866) 15 LT 236 (Kindersley VC); *Re Nettlefold's Trusts* (1888) 59 LT 315, 317 (North J).

¹⁷⁴⁴ *Barker v Peile* (1865) 2 Dr & Sm 340; 62 ER 651. See also HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.800] (at 24 February 2009).

13.46 These provisions allow a trustee to pay into court money and securities that would otherwise have to be held on trust for a minor.¹⁷⁴⁵ However, payment into court is not generally considered to be the most efficient method of discharging a trustee who holds property on trust for a minor:¹⁷⁴⁶

a personal representative holding a legacy for an infant (who is unable to give a receipt) who wishes to be discharged may pay the legacy into court ... , although it would be less costly for the representative, the administration of the estate being complete, to appoint new trustees of the legacy and transfer the legacy to them.

13.47 The original statutory provisions dealing with payment into court were enacted at a time when it was not common for trust instruments to include provisions dealing with the retirement of trustees.¹⁷⁴⁷ However, that is no longer the case:¹⁷⁴⁸

Now that it is comparatively simple for trustees to retire and appoint new trustees, ... payment into court is a course of last resort where a trustee desires to be discharged of the burdens of trusteeship but cannot arrange to retire and appoint new trustees, perhaps because of difficulties with co-trustees or an inability to find a new trustee willing and able to act.

Specific provisions for dealing with a minor's property

Appointment of trustees of minors' property

13.48 Legislation in the ACT, New South Wales, Tasmania, Victoria, and Western Australia provides a specific mechanism for a personal representative, in certain circumstances, to appoint trustees of property to which a minor is entitled under a will or on the intestacy of a person.¹⁷⁴⁹

13.49 There are two conditions for the application of the various provisions. First, the minor must be absolutely entitled, under a will, to a devise or legacy, or to the residue of the estate of the deceased person, or to a share of the estate of a person who has died intestate. Secondly, the devise, legacy, residue or share to which the minor is absolutely entitled must not have been devised or bequeathed to trustees for the minor.¹⁷⁵⁰ Accordingly, the provisions

1745 G Fricke and OK Strauss, *The Law of Trusts in Victoria* (1964) 421.

1746 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.800] (at 24 February 2009).

1747 Ibid.

1748 Ibid.

1749 *Civil Law (Property) Act 2006* (ACT) s 256; *Conveyancing Act 1919* (NSW) s 151D; *Administration and Probate Act 1935* (Tas) s 41; *Administration and Probate Act 1958* (Vic) s 47; *Administration Act 1903* (WA) s 17A.

1750 *Civil Law (Property) Act 2006* (ACT) s 256(1); *Conveyancing Act 1919* (NSW) s 151D(1)(a); *Administration and Probate Act 1935* (Tas) s 41(1); *Administration and Probate Act 1958* (Vic) s 47(1); *Administration Act 1903* (WA) s 17A(1).

will apply where a testator leaves property directly to a minor, but not where the testator leaves property to a trustee to hold it on trust for the minor.

13.50 Section 17A of the *Administration Act 1903 (WA)*, which is similar to the provisions in the other jurisdictions, provides:

17A Power to appoint trustees of infant's property

- (1) Subject to subsection (5), where an infant is absolutely entitled under the will or on the intestacy of a person (in this section called "the deceased") to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and that devise, legacy, residue or share is not, under the will (if any) of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trustee corporation (including the Public Trustee) or 2 or more individuals not exceeding 4 (whether or not including the personal representatives or one or more of them) to be the trustee or trustees of that devise, legacy, residue or share for the infant, and may execute or do any assurance, act or thing requisite for vesting that devise, legacy, residue or share in the trustee or trustees so appointed.
- (2) On the vesting of the devise, legacy, residue or share mentioned in subsection (1) in the trustee or trustees appointed under this section, the personal representatives as such are discharged from all further liability in respect of that devise, legacy, residue or share.
- (3) Trustees appointed under this section may retain any property transferred to them pursuant to the provisions of this section in its existing condition or state of investment, or may convert it into money, and upon conversion shall invest the money as trust funds may be invested under Part III of the *Trustees Act 1962*.
- (4) Where a personal representative has, before 1 January 1963, retained or sold any such devise, legacy, residue or share as is mentioned in subsection (1), and has invested it or the proceeds thereof (as the case may be) in any investments in which he was authorised to invest money subject to the trust, then, subject to any order of the Court made before that date, he shall be deemed not to have incurred any liability on that account or by reason of not having paid or transferred the money or property into Court.
- (5) The power of appointing trustees conferred upon personal representatives by this section is subject to any direction or restriction contained in the will of the deceased.

13.51 Under these provisions, a personal representative may appoint a trustee company (including the public trustee), or two or more individuals, to be the trustee or trustees of the relevant property. On the vesting of the property in the new trustee or trustees, the personal representative is discharged from all further liability in respect of the devise, legacy, residue or share.

13.52 The Australian provisions are based on section 42 of the *Administration of Estates Act 1925* (UK). The object of that section was said to be:¹⁷⁵¹

to enable personal representatives to get a good discharge from all further liability in respect of a legacy or share of an estate to which an infant beneficiary was entitled, having regard to the fact that the infant could not legally give a discharge while he was still under the age of 21 years.

13.53 It has been suggested that the inclusion of these provisions has been ‘based upon the view that executors as such do not, after completing their executorial duties, hold the property upon trust for the minor unless they are appointed trustees by the will’,¹⁷⁵² a view that ‘does not appear to accord with the view expressed ... in *Pagels v MacDonald*¹⁷⁵³ that the executor becomes a trustee by merely continuing to hold property after his functions as executor have been performed’.¹⁷⁵⁴ The view that these provisions are based on a misunderstanding of the change in role from personal representative to trustee would appear to be supported by the fact that the provisions do not apply where the relevant property has been left to a trustee to hold the property on trust for a minor, presumably because it is thought that the trustee so appointed can simply retire by appointing another trustee or trustees under the general provisions contained in the trustee legislation that deal with the discharge and appointment of trustees.

13.54 The authors of *Jacobs’ Law of Trusts in Australia* suggest that the ‘infrequency of appointments’ under the specific provisions dealing with the appointment of trustees for minors’ property may be thought to be ‘an indication that the view expressed in *Pagels v MacDonald* is that most widely acted upon’.¹⁷⁵⁵

13.55 The various provisions all deal with the powers of the new trustees in relation to the property that is the subject of the devise, legacy, residue or share, and provide specifically that property may be retained in ‘its existing condition’ or may be converted into money, in which case it is to be invested in an authorised investment¹⁷⁵⁶ (in New South Wales, Tasmania and Victoria) or in accordance with the relevant trustee legislation (in the ACT and Western Australia).¹⁷⁵⁷ As explained later in this chapter,¹⁷⁵⁸ the Western Australian

¹⁷⁵¹ *Re Kehr* [1952] 1 Ch 26, 29 (Danckwerts J).

¹⁷⁵² JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (7th ed, 2006) [2075]. See also G Fricke and OK Strauss, *The Law of Trusts in Victoria* (1964) 400 for a similar view.

¹⁷⁵³ *Pagels v MacDonald* (1936) 54 CLR 519, 526 (Latham CJ).

¹⁷⁵⁴ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (7th ed, 2006) [2075]. See also G Fricke and OK Strauss, *The Law of Trusts in Victoria* (1964) 400.

¹⁷⁵⁵ JD Heydon and MJ Leeming, *Jacobs’ Law of Trusts in Australia* (7th ed, 2006) [2075].

¹⁷⁵⁶ As explained at [11.229] above, the trustee legislation of the Australian States and Territories no longer distinguishes between authorised and unauthorised investments.

¹⁷⁵⁷ *Civil Law (Property) Act 2006* (ACT) s 256(5)(d); *Conveyancing Act 1919* (NSW) s 151D(1)(d)(iii); *Administration and Probate Act 1935* (Tas) s 41(2); *Administration and Probate Act 1958* (Vic) s 47(1); *Administration Act 1903* (WA) s 17A(3).

trustee legislation already gives a broad statutory power to trustees, which means that an express provision enabling the conversion and subsequent investment of property held on trust for a minor appears to be unnecessary in that jurisdiction.¹⁷⁵⁹ Some commentators have also suggested that the general powers of investment that are now contained in the trustee legislation of all Australian jurisdictions are broad enough to give trustees the power to sell and invest trust property.¹⁷⁶⁰

13.56 The ACT and New South Wales provisions, unlike those in the other jurisdictions, provide that the trustee or trustees must be appointed by a registered deed.¹⁷⁶¹

13.57 It is unclear whether, in the jurisdictions that have a specific provision for the appointment of trustees for the property of a minor, a personal representative who wishes to retire as trustee must use the specific provisions that require at least two individual trustees or a trustee company to be appointed, or whether the general provisions contained in the trustee legislation for the appointment of new trustees may be used as an alternative.¹⁷⁶² Both sections are expressed to permit, rather than require, a course of conduct. However, the specific provisions have generally been enacted later in time than the trustee legislation provisions.

13.58 The authors of *Jacobs' Law of Trusts in Australia* suggest that the specific power for a personal representative to appoint a trustee or trustees and the general powers for the discharge and appointment of trustees under the trustee legislation are open as alternatives to a trustee in that position.¹⁷⁶³ However, other commentators would seem to take a different view.¹⁷⁶⁴

1758 See [13.77]–[13.78] below.

1759 *Trustees Act 1962* (WA) s 27. There is also a similar provision in the Queensland trustee legislation: see *Trusts Act 1973* (Qld) s 32.

1760 See [13.109] below.

1761 *Civil Law (Property) Act 2006* (ACT) s 256(2), (3); *Conveyancing Act 1919* (NSW) s 151D(1)(a).

1762 The practical difference between the two sets of provisions is that the latter provisions will not require the appointment of at least two individuals if only one personal representative was originally appointed.

1763 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [2075].

1764 See RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 86:

Apart from this section [*Administration and Probate Act 1958* (Vic) s 47] the only way a personal representative could free himself from liability was by payment into Court under the provisions now contained in the *Trustee Act 1958*, s 63. (emphasis added)

Note also that the general provisions for appointment of trustees under the *Trustee Act 1958* (Vic) are not included as an alternative to s 47 of the *Administration and Probate Act 1958* (Vic) in K Collins, R Phillips and C Sparke, *Wills Probate & Administration Vic* (LexisNexis online service) [s 47.1] (at 21 February 2009).

Power to transfer property to public trustee or trustee company

13.59 In the ACT,¹⁷⁶⁵ New South Wales,¹⁷⁶⁶ Queensland¹⁷⁶⁷ and Tasmania,¹⁷⁶⁸ legislative provisions enable a trustee to pay money (and in Queensland, with respect to the public trustee, any 'investment'),¹⁷⁶⁹ held on trust for a minor, to the public trustee (in the ACT and Tasmania) or to the public trustee or a trustee company (in New South Wales and Queensland).

13.60 Section 47 of the *Trustee Act 1925* (NSW), which achieves substantially the same result as the Queensland provisions, provides:

47 Payment to the public trustee or a trustee company

- (1) Where any money is held in trust for a minor, or for a person who is unable to give a good discharge or cannot be found, the trustee may pay the money to the public trustee or, except where the money is held in trust for a person who cannot be found, a trustee company, and on such payment shall furnish the public trustee or trustee company, as the case may be, with a copy of the trust instrument, or where there is no such instrument, then with a statutory declaration setting forth the trusts on which the money is held and shall also furnish such information as to the disability or identity of the person for whom such money is held in trust as the public trustee or trustee company, as the case may be, may require.
- (2) The public trustee or trustee company shall hold the money in trust for the minor or for such other person in accordance with the trusts affecting the same.
- (3) Where the money is held in trust for a minor or an insane or incapable person, the public trustee or trustee company may at the public trustee's or the trustee company's discretion exercise in respect of such money the powers conferred upon the public trustee or trustee company, as the case may be, by this or any other Act in respect of money held in trust for a minor.
- (4) This section applies to trusts created either before or after the commencement of this Act.

Mandatory transfer of property to the public trustee

13.61 In South Australia, an administrator who holds property for a person 'who is not *sui juris*' (which would include a minor) must transfer the property to

¹⁷⁶⁵ *Trustee Act 1925* (ACT) s 47.

¹⁷⁶⁶ *Trustee Act 1925* (NSW) s 47.

¹⁷⁶⁷ *Public Trustee Act 1978* (Qld) s 43, *Trustee Companies Act 1968* (Qld) s 26.

¹⁷⁶⁸ *Public Trustee Act 1930* (Tas) s 16. There does not appear to be an equivalent section in Tasmania allowing money due to a minor to be payable to trustee companies generally.

¹⁷⁶⁹ *Public Trustee Act 1978* (Qld) s 43. 'Investment' is not defined in this Act.

the public trustee within one year from the date of the death of the testator or intestate.¹⁷⁷⁰

Discussion Paper

13.62 In the Discussion Paper, the National Committee considered whether the model legislation should include a provision to the effect of section 17A of the *Administration Act 1903* (WA).¹⁷⁷¹ Although the National Committee acknowledged that section 17A has limited application (by reason of the fact that it does not apply where the will leaves property to a trustee to be held on trust for a minor), the National Committee considered that ‘it would be helpful to at least cross-refer to the relevant provisions of trustee legislation in the administration and probate legislation to lessen the confusion between the administration powers and the trustee powers of personal representatives’.¹⁷⁷²

13.63 The National Committee therefore proposed that the model legislation should include a provision to the general effect of section 17A of the *Administration Act 1903* (WA), but that ‘rather than set out the trustee powers referred to in that section, the model provision should cross-refer to the relevant powers in the trustee legislation of the particular jurisdiction’.¹⁷⁷³

Submissions

13.64 The National Committee’s proposal to include a provision to the effect of section 17A of the *Administration Act 1903* (WA) was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, the ACT and New South Wales Law Societies, and the Law Institute of Victoria.¹⁷⁷⁴

13.65 An academic expert expressed support for the adoption of a provision to the effect of section 17A(1), (3) and (5) of *Administration Act 1903* (WA).¹⁷⁷⁵ Generally, however, he considered that whether or not a minor’s property should be managed by a sole trustee was a question for the law of trusts.

1770 *Administration and Probate Act 1919* (SA) s 65, which is discussed at [11.282]–[11.286] above. The National Committee has recommended that the model legislation should not include a provision to the effect of s 65 of the *Administration and Probate Act 1919* (SA): see Recommendation 11-22 above.

1771 *Administration of Estates Discussion Paper* (1999) QLRC 108; NSWLRC [8.159]. *Administration Act 1903* (WA) s 17A is set out at [13.50] above.

1772 Ibid, QLRC 108–9; NSWLRC [8.160]–[8.161].

1773 Ibid, QLRC 109; NSWLRC 155 (Proposal 50). As explained at [13.55] above, s 17A of the *Administration Act 1903* (WA) and its counterparts in the other Australian jurisdictions set out the powers of the newly appointed trustee or trustees to retain or convert the trust property.

1774 Submissions 1, 8, 11, 12, 14, 15, 19.

1775 Submission 12.

The National Committee's view

13.66 As explained above, all jurisdictions already include in their trustee legislation a range of provisions that enable a personal representative who has assumed the role of trustee to be discharged from that office. These include a provision of general application that enables a trustee who wishes to retire to appoint new trustees or, in certain circumstances, a sole trustee, in his or her place. The issue, in terms of whether the model legislation should include a provision to the effect of section 17A of the *Administration Act 1903* (WA), is whether it should be necessary for two or more individuals to be appointed as trustees where there is a minor beneficiary.

13.67 In the National Committee's view, the issue of how many trustees there should be where there is a minor beneficiary is a question of trusts law, rather than of succession law. Further, the National Committee considers that the requirements for the discharge and appointment of trustees should be the same, regardless of whether the trust arises under the will, or on the intestacy, of a person or whether it is created during the lifetime of the settlor of the trust. In this respect, the National Committee notes that the general provisions in the trustee legislation of the various jurisdictions do not require two individuals to be appointed as trustees where there was originally a sole trustee or where the trust instrument provides for a sole trustee.

13.68 Accordingly, the National Committee is of the view that the model legislation should not include a provision to the effect of section 17A of the *Administration Act 1903* (WA).¹⁷⁷⁶

SALE OF PROPERTY HELD ON TRUST FOR A MINOR

Background

13.69 During the course of administering an estate, it may be necessary for a personal representative to exercise a power of sale in relation to estate assets in order to pay the debts of the estate. As explained earlier in this chapter, personal representatives have always had a power of sale in relation to personal property.¹⁷⁷⁷ In all Australian jurisdictions, that power also extends to the sale of real property.¹⁷⁷⁸ Moreover, the National Committee has

¹⁷⁷⁶ This view is consistent with the National Committee's earlier proposals in this Report that the model legislation should not require a grant to be made to two individuals where there is a minor beneficiary (see [4.303]–[4.307] and Recommendation 4-20 above) and that the model legislation should not include a provision to the effect of s 65 of the *Administration and Probate Act 1919* (SA), which generally requires an administrator who holds property belonging to a beneficiary who lacks capacity to transfer that property to the public trustee within one year of the death of the intestate or testator (see [11.295]–[11.298] and Recommendation 11-22 above).

¹⁷⁷⁷ See [12.2] above.

¹⁷⁷⁸ *Administration and Probate Act 1929* (ACT) ss 41(2), 50; *Probate and Administration Act 1898* (NSW) s 46(2), *Conveyancing Act 1919* (NSW) s 153; *Administration and Probate Act* (NT) ss 54(2), 80; *Succession Act 1981* (Qld) s 49(1); *Administration and Probate Act 1919* (SA) ss 46(2), 51; *Administration and Probate Act 1935* (Tas) s 5; *Administration and Probate Act 1958* (Vic) s 14; *Administration Act 1903* (WA) s 10(3).

recommended in this Report that the model legislation should include a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld), which gives a personal representative the same powers in relation to real property as he or she has in relation to personal property, which clearly includes a power of sale.¹⁷⁷⁹

13.70 Once the administration of the estate has reached the stage where the personal representative has assumed the role of trustee, it is necessary to find another basis to support the power of sale (assuming that the will does not either expressly or impliedly confer such a power).

13.71 This section of the chapter examines the various means by which a personal representative who has assumed the role of trustee may exercise a power of sale in relation to property held on trust for a minor. These include:

- application to the court for the authorisation of the sale of trust property held by a minor;
- the general power of sale conferred on trustees by trustee legislation;
- the power of sale conferred on trustees by trustee legislation where capital is to be raised for an authorised purpose;
- the court's power under trustee legislation to authorise dealings with trust property;
- the court's power under trustee legislation to vary a trust; and
- trustees' general powers of investment.

13.72 In particular, the National Committee considers whether the model legislation should include a provision to the effect of section 63 of the *Administration and Probate Act 1919* (SA).¹⁷⁸⁰

Specific power to apply for court authorisation of sale

13.73 Statutory provisions in the ACT, New South Wales and South Australia provide that the court may authorise the sale of property held on trust for a child.

Australian Capital Territory, New South Wales

13.74 The ACT and New South Wales provisions, which are found in the trustee legislation of those jurisdictions, are very similar.¹⁷⁸¹ Section 84 of the

¹⁷⁷⁹ See [12.26] and Recommendation 12-1 above.

¹⁷⁸⁰ *Administration and Probate Act 1919* (SA) s 63 is set out at [13.75] below.

¹⁷⁸¹ *Trustee Act 1925* (ACT) s 84; *Trustee Act 1925* (NSW) s 84.

Trustee Act 1925 (ACT) provides:

84 Sale of child's property

- (1) Where any property is held in trust for a child, the Supreme Court may authorise the trustee to sell the whole or any part of the property.
- (2) The authority shall be given on such terms and subject to such provisions and conditions as the Supreme Court may think fit.
- (3) The Supreme Court may confer upon the trustee such powers as appear necessary or proper for the purpose, including power to concur with any other person.
- (4) This section applies whether the trust is for the child solely or together with any other person, and whether the interest of the child is or is not in possession.

South Australia

13.75 Section 63 of the *Administration and Probate Act 1919* (SA) has a similar effect to the ACT and New South Wales provisions. It provides:

63 Court may order sale of infant's property

The Court may, on the application of any executor, administrator, or trustee in whom any real or personal property, whether specifically devised or bequeathed or not, belonging to any infant is vested, on the like application of the guardian of the estate or the next friend of any infant beneficially entitled to any real or personal property, whether specifically devised, or bequeathed or not, order that such property, or any part thereof, be sold in any case in which the Court considers it for the benefit of the infant that such sale should be effected.

13.76 In the remaining jurisdictions, there are no specific provisions enabling the court to authorise the sale of property held on trust for a minor. However, the same result may be achieved by using the different provisions considered below.

Trustees' general power of sale

Queensland, Western Australia

13.77 In Queensland and Western Australia, the trustee legislation gives trustees a broad power of sale in relation to trust property. Section 32(1)(a) and (b) of the *Trusts Act 1973* (Qld), which is similar to section 27(1)(a) and (b) of the *Trustees Act 1962* (WA), provides:

32 Powers to sell, exchange, partition, postpone, lease etc.

- (1) Subject to the provision of this section, every trustee, in respect of any trust property, may—
 - (a) sell the property or any part of the property;

- (b) dispose of the property by way of exchange for other property in the State of a like nature and like or better tenure, or whether the property consists of an undivided share, concur in the partition of the property in which the share is held, and give or take any property by way of equality of exchange or partition.

13.78 The effect of these provisions is that a trustee does not need court authorisation to sell trust property, even where it is held on trust for a minor. In Western Australia, these powers will apply only if no contrary intention is expressed in the trust instrument.¹⁷⁸² In Queensland, these powers apply whether or not a contrary intention is expressed in the trust instrument.¹⁷⁸³

Trustees' power of sale to raise capital for an authorised purpose

13.79 Although only the Queensland and Western Australian trustee legislation confers a very broad power of sale on trustees, in most other jurisdictions the trustee legislation nevertheless provides that, if a trustee has the power under the trust instrument or under the legislation itself to apply capital money for any purpose, the trustee is deemed to have a statutory power of sale in order to raise the money required.¹⁷⁸⁴

The court's power to authorise dealings or enlarge trustees' powers

13.80 The trustee legislation in all Australian jurisdictions includes a provision under which the court may enlarge a trustee's powers or authorise particular dealings with trust property. Provided that the relevant requirements are met, the court may authorise a trustee to sell trust property.¹⁷⁸⁵

13.81 In the Northern Territory, Queensland, Tasmania, Victoria and Western Australia, the legislation provides expressly that beneficiaries, as well as trustees, may make an application to the court under these provisions.¹⁷⁸⁶ In the ACT, New South Wales and South Australia, the legislation does not state who may make the relevant application,¹⁷⁸⁷ and it has been suggested that the right to apply to the court is restricted to trustees.¹⁷⁸⁸

1782 *Trustees Act 1962* (WA) s 5(2), (3).

1783 *Trusts Act 1973* (Qld) s 31(1).

1784 *Trustee Act 1925* (ACT) s 38; *Trustee Act 1925* (NSW) s 38; *Trusts Act 1973* (Qld) s 45; *Trustee Act 1936* (SA) s 28B; *Trustee Act 1958* (Vic) s 20; *Trustees Act 1962* (WA) s 43.

1785 See *Stevenson v McPhillamy* (1949) 23 ALJR 649; *Community Welfare Foundation v Attorney-General for Victoria* [1976] VR 186; *Nevin v Beneficiaries of the Peppermint Beach Estate Trust* [2002] WASC 300.

1786 *Trustee Act* (NT) s 50A; *Trusts Act 1973* (Qld) s 94(3); *Trustee Act 1898* (Tas) s 47(3); *Trustee Act 1958* (Vic) s 63(3); *Trustees Act 1962* (WA) s 89(4).

1787 *Trustee Act 1925* (ACT) s 81; *Trustee Act 1925* (NSW) s 81; *Trustee Act 1936* (SA) s 59B.

1788 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [12.070] (at 24 February 2009), citing *Re Barton* [1968] SASR 242 (Mitchell J).

Australian Capital Territory, New South Wales, South Australia

13.82 In the ACT, New South Wales and South Australia, the court may make an order conferring on a trustee a power, for particular transactions or generally, and authorising transactions where, in the opinion of the court, it is 'expedient' to do so.¹⁷⁸⁹

13.83 Section 81 of the *Trustee Act 1925* (NSW), which is based on section 57 of the *Trustee Act 1925* (UK), is similar to the provisions in the ACT and South Australia. It provides:

81 Advantageous dealings

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or disposition, or any purchase, investment, acquisition, expenditure, or transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by law, the Court:
 - (a) may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, including adjustment of the respective rights of the beneficiaries, as the Court may think fit, and
 - (b) may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.
- (2) The provisions of subsection (1) shall be deemed to empower the Court, where it is satisfied that an alteration whether by extension or otherwise of the trusts or powers conferred on the trustees by the trust instrument, if any, creating the trust, or by law is expedient, to authorise the trustees to do or abstain from doing any act or thing which if done or omitted by them without the authorisation of the Court or the consent of the beneficiaries would be a breach of trust, and in particular the Court may authorise the trustees:
 - (a) to sell trust property, notwithstanding that the terms or consideration for the sale may not be within any statutory powers of the trustees, or within the terms of the instrument, if any, creating the trust, or may be forbidden by that instrument,
 - (b) to postpone the sale of trust property,
 - (c) to carry on any business forming part of the trust property during any period for which a sale may be postponed,
 - (d) to employ capital money subject to the trust in any business which the trustees are authorised by the instrument, if any, creating the trust or by law to carry on.

1789

Trustee Act 1925 (ACT) s 81; *Trustee Act 1925* (NSW) s 81; *Trustee Act 1936* (SA) s 59B.

- (3) The Court may from time to time rescind or vary any order made under this section, or may make any new or further order.
- (4) The powers of the Court under this section shall be in addition to the powers of the Court under its general administrative jurisdiction and under this or any other Act.
- (5) This section applies to trusts created either before or after the commencement of this Act.

13.84 The court's discretion under these provisions is very broad. It allows the court to:¹⁷⁹⁰

step in whenever it is of opinion that sound practical business considerations make it expedient that trustees should have administrative powers in addition to or overriding the powers derived from the trust instrument or the general law.

13.85 The relevant question that a court must consider is whether it is expedient in the interest of the trust property as a whole that the order sought should be made.¹⁷⁹¹

13.86 Section 81 enables the court to make orders even if the order will authorise a 'fundamental reorganisation of the trust'.¹⁷⁹² Although the court's power cannot be used to 'subvert the beneficial disposition in the trust instrument', the court may accommodate the beneficial interest to the new situation created by the order.¹⁷⁹³

Tasmania, Victoria

13.87 In Tasmania and Victoria, the trustee legislation confers similar powers on the court.¹⁷⁹⁴ Section 47 of the *Trustee Act 1898* (Tas), which is almost identical to the Victorian provision, provides:

47 Power of Court to make orders in certain cases not provided for by trust instruments, &c

- (1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure, or other transaction is, in the opinion of the Court, expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, upon such terms, and subject to such provisions and conditions, if any, as

¹⁷⁹⁰ *Riddle v Riddle* (1952) 85 CLR 202, 223 (Williams J).

¹⁷⁹¹ *Ibid* 220 (Williams J). See [13.93] below.

¹⁷⁹² *Arakella v Paton* (2004) 60 NSWLR 334, 353 (Austin J).

¹⁷⁹³ *Ibid* 360 (Austin J).

¹⁷⁹⁴ *Trustee Act 1898* (Tas) s 47; *Trustee Act 1958* (Vic) s 63.

the Court may think fit, and may direct in what manner any money authorized to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

- (2) The Court may rescind or vary any order made under this section, or may make any new or further order.
- (3) An application to the Court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.
- (4) This section does not apply to trustees of a settlement for the purposes of the *Settled Land Act 1884*.
- (5) The powers conferred on the Court by this section shall extend to all property vested in trustees for charitable, religious, or public trusts or purposes, whether by or under any Act or otherwise, and notwithstanding any provision to the contrary in the Act or the trust instrument.

Queensland, Western Australia

13.88 In Queensland and Western Australia, the trustee legislation enables the court to make orders conferring powers on trustees where a transaction would be expedient in the management or administration of the trust property. However, the provisions in these States also allow such orders to be made where it would be in the best interest of the persons, or the majority of persons, beneficially interested under the trust and it is inexpedient or impracticable to effect the transaction without the assistance of the court.¹⁷⁹⁵

13.89 Section 94 of the *Trusts Act 1973* (Qld) provides:

94 Court's jurisdiction to make other orders

- (1) Where in the opinion of the court any sale, lease, mortgage, surrender, release or other disposition, or any purchase, investment, acquisition, retention, expenditure or other transaction is expedient in the management or administration of any property vested in a trustee, or would be in the best interests of the persons, or the majority of the persons, beneficially interested under the trust, but it is inexpedient or difficult or impracticable to effect the disposition or transaction without the assistance of the court, or it or they can not be effected by reason of the absence of any power for that purpose vested in the trustee by the trust instrument (if any) or by law, the court may by order confer upon the trustee, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions (if any) as the court may think fit, and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne, and as to the incidence thereof between capital and income.

¹⁷⁹⁵

Trusts Act 1973 (Qld) s 94; *Trustees Act 1962* (WA) s 89.

- (2) The court may from time to time rescind or vary any order made under this section, or may make any new or further order; but such a rescission or variation of any order shall not affect any act or thing done in reliance on the order before the person doing the act or thing became aware of the application to the court to rescind or vary the order.
- (3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.

13.90 This provision was recommended by the Queensland Law Reform Commission in its 1971 Report on the law of trusts. The Commission recommended that a provision to the effect of section 89 of the *Trustees Act 1962* (WA) be adopted, as it did not have the same limitations as the other Australian provisions and the English provision on which they were based.¹⁷⁹⁶

13.91 In *Re Nilant*,¹⁷⁹⁷ the Supreme Court of Western Australia held that it did not have the power to make an order for the payment of trust moneys under section 89 of the *Trustees Act 1962* (WA), as the proposed payment was to be made to a creditor of the beneficiary and was not, therefore, considered to be in the 'best interests of the persons, or the majority of persons, beneficially interested under the trust'.¹⁷⁹⁸

Northern Territory

13.92 In the Northern Territory, the court may, on application by the trustee or a beneficiary, authorise a trustee's dealings with trust property. Section 50A provides:¹⁷⁹⁹

50A Power of Court to authorize dealings with trust property

- (1) The Court may by order, on application by the trustee or a beneficiary, authorize a trustee either generally or in a particular case—
 - (a) to execute a sale, lease, mortgage, surrender, release or other disposition;

¹⁷⁹⁶ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 64–5. In particular, the Commission noted that, under the other provisions, the court has no jurisdiction if the transaction can be carried out under the trustee's existing powers. The Commission noted (at 65):

Whist this is a desirable restriction where the trustee has a clear power which can easily be exercised it may work hardship if there is no clear power or there are difficulties of exercise. Cf *In Re Pratt's Will Trusts* [1943] Ch 326. It is understandable, therefore, that the Western Australian section has extended the Court's jurisdiction to make orders where it is 'expedient or difficult or impracticable' to effect the transaction.

¹⁷⁹⁷ (2004) 28 WAR 81.

¹⁷⁹⁸ Ibid 86 (Barker J). See, however, the comment about this decision in HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [12.070] (at 24 February 2009).

¹⁷⁹⁹ *Trustee Act* (NT) s 50A.

(b) to make a purchase, acquisition, or investment; or

(c) to undertake expenditure,

as the Court thinks fit and for which the trustee has no power under the trust instrument or a law in force in the Territory.

- (2) The Court may make an order referred to in subsection (1) subject to such terms or conditions as it thinks fit and may direct whether and how any expenditure or costs are to be paid out of capital or income of the trust.
- (3) The Court may make an order referred to subsection (1) in relation to property despite that the property is the subject of a life interest in the whole of the property or any estate or interest in the property.
- (4) An application to the Court for an order relating to property referred to in subsection (3) is to be made with the consent of all persons having a beneficial interest in the property, and all trustees having an estate or interest on behalf of an unborn child.
- (5) Despite subsection (4) the Court may dispense with the requirement for consent of a person if that person has been served with a notice that the application will be made, and the person has made no response.
- (6) A person who has been served with a notice that the application will be made may appear in Court to consent or dissent to the making of the order sought.
- (7) The Court may make an order in relation to the property despite dissent by some interested parties.
- (8) In deciding whether to make an order despite the dissent of some parties the Court must have regard to the number and interests of the parties.
- (9) If the property to which the order relates is land, the order is to be produced to the Registrar-General who must give effect to the order by registering any transfer, lease or other document effected pursuant to the order on the land register under the *Land Title Act*.

Meaning of 'expedient' and 'management or administration'

13.93 With the exception of the Northern Territory provision, the provisions outlined above require the court to find that the conferral of the power to the trustee is 'expedient' in the 'management or administration' of the trust property.

13.94 The management or administration of trust property has been held to encompass a wide scope of activities, including questions of investment that arise in the administration of trust funds.¹⁸⁰⁰ In discussing the application of

¹⁸⁰⁰

Riddle v Riddle (1952) 85 CLR 202, 214 (Dixon J).

section 81 of the *Trustee Act 1925* (NSW), Austin J stated:¹⁸⁰¹

The words 'management or administration', in a context such as appears in s 81, refer to both the manner in which trust property is managed, administered, handled, directed or controlled and the actual carrying out of those functions.

13.95 In *Stevenson v McPhillamy*,¹⁸⁰² the Supreme Court of New South Wales suggested that the scope was even wider, stating:¹⁸⁰³

I think when one finds a property vested in trustees, that any proposed dealing with it is a dealing with the management and administration of the property.

13.96 In *Riddle v Riddle*,¹⁸⁰⁴ Williams J held that the only limiting effect of the words 'management or administration' is 'to limit the jurisdiction of the Court to administrative orders'.¹⁸⁰⁵ It has been suggested that, with the exception of the New South Wales provision, these provisions cannot be used to change beneficiaries' interests under a trust.¹⁸⁰⁶

13.97 The reference to 'expedient' has been held to refer to 'expediency in the interests of the beneficiaries',¹⁸⁰⁷ and 'expedient for the trust as a whole'.¹⁸⁰⁸ In considering the interests of the beneficiaries trustees must:¹⁸⁰⁹

take into account the effect of what is proposed upon the several individual interests of the beneficiaries and hold the scale fairly between them.

13.98 Apart from that consideration, however, the court has a broad discretion in relation to what may be regarded as expedient:¹⁸¹⁰

Section 81 is a provision conferring very large and important powers upon the Court which depend upon the Court's opinion of what is expedient, a criterion of the widest and most flexible kind. ...

I do not think that the powers given by s 81 were intended to be restricted by any implications.

1801 *Arakella v Paton* (2004) 60 NSWLR 334, 354.

1802 (1949) 23 ALJR 649.

1803 Ibid 649–50 (Roper CJ in Eq).

1804 (1952) 85 CLR 202.

1805 Ibid 222.

1806 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [12.110] (at 24 February 2009), where it is suggested that persons wishing to vary beneficiaries' interests should use the statutory provisions for variation of trusts. See [13.99] below.

1807 *Riddle v Riddle* (1952) 85 CLR 202, 214 (Dixon J); *Re Earl of Strafford (decd)* [1980] Ch 28, 45 (Buckley LJ).

1808 *Re Craven's Estate* [1937] Ch 431, 436 (Farwell J).

1809 *Re Earl of Strafford (decd)* [1980] Ch 28, 45 (Buckley LJ).

1810 *Riddle v Riddle* (1952) 85 CLR 202, 214 (Dixon J). Williams J (at 220) also stated, 'The section is couched in the widest possible terms'. See also *Arakella v Paton* (2004) 60 NSWLR 334, 352 (Austin J).

The court's power to vary a trust

13.99 In most Australian jurisdictions, the trustee legislation enables a court, on application, to approve the variation of a trust where one of the beneficiaries is a minor and is incapable of assenting to the proposed variation.¹⁸¹¹

13.100 The various provisions were introduced following the decision of the House of Lords in *Chapman v Chapman*.¹⁸¹² In that case, the House of Lords held that the court did not have an inherent jurisdiction to vary the beneficial interests in a trust even though all the persons who were *sui juris* consented to the variation and the variation was shown to be beneficial for all interested persons who were not *sui juris*:¹⁸¹³

It is not the function of the court to alter a trust because alteration is thought to be advantageous to an infant beneficiary.

13.101 This decision led to the introduction of the *Variation of Trusts Act 1958* (UK). The material provisions from that Act have been reproduced, in some form, in the trustee legislation of most Australian jurisdictions.¹⁸¹⁴

13.102 These provisions allow orders to be made that may not be possible under the provisions giving the court power to authorise dealings or enlarge trustees' powers.¹⁸¹⁵ For example, these provisions can be used to enable trustees to purchase a residence for a beneficiary,¹⁸¹⁶ and to allow trust property to be sold in circumstances where the intention of the testator was shown to be clearly to the contrary.¹⁸¹⁷

Queensland, Victoria, Western Australia

13.103 In Queensland, Victoria and Western Australia, the trustee legislation enables the court to approve an arrangement that varies or revokes any trusts, or enlarges the powers of the trustees in managing or administering any of the

¹⁸¹¹ There are no equivalent provisions in the ACT, New South Wales or Northern Territory trustee legislation. However, in New South Wales, s 81 of the *Trustee Act 1925* (NSW), which enables the court to authorise dealings or enlarge a trustee's powers (see [13.82]–[13.86] above) has been held to allow a variation of trust that would normally be sought under the variation of trusts provisions in other jurisdictions: see HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [12.110], [15240] (at 24 February 2009). In addition, the courts have exercised powers under the *Minors (Property and Contracts) Act 1970* (NSW) s 50: HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [15240] (at 24 February 2009). In the Northern Territory, s 50A of the *Trustee Act* (NT), which is set out at [13.92] above, confers a limited power to vary a trust in so far as it enables the court to authorise a particular dealing with trust property notwithstanding that the property is the subject of a life interest.

¹⁸¹² [1954] AC 429.

¹⁸¹³ Ibid 446 (Lord Simonds LC).

¹⁸¹⁴ *Trustee Act* (NT) s 50A; *Trusts Act 1973* (Qld) s 95; *Trustee Act 1936* (SA) s 59C; *Variation of Trusts Act 1994* (Tas) s 13; *Trustee Act 1958* (Vic) s 63A; *Trustees Act 1962* (WA) s 90.

¹⁸¹⁵ See [13.80] above.

¹⁸¹⁶ *Re Burney's Settlement Trusts* [1961] 1 WLR 545, where the equivalent section under the *Variation of Trusts Act 1958* (UK) was used.

¹⁸¹⁷ *Palmer v McAllister* (1991) 4 WAR 206.

trust property.¹⁸¹⁸ Section 95(1) of the *Trusts Act 1973* (Qld), which is typical of these provisions, is in the following terms:

95 Power of court to authorise variations of trust

- (1) Where property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under any instrument creating the trust, the court may if it thinks fit by order approve on behalf of—
- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or
 - (b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description, or a member of that class (as the case may be) if the said date had fallen or the said event had happened at the date of the application to the court; or
 - (c) any person unborn; or
 - (d) any person in respect of any discretionary interest of the person under protective trusts where the interest of the principal beneficiary has not failed or determined;

any arrangement (by whomsoever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts, or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts.

13.104 In Queensland and Victoria, the court must be satisfied that the variation on behalf of a person ‘would be for the benefit of that person’.¹⁸¹⁹ It has been held that, in determining whether it would be for the benefit of the relevant person, the court must be satisfied that, on balance, the proposed variation is for his or her benefit. This does not mean that the court must be satisfied that the effect of the variation will mean that each person is ‘bound’ to be better off than previously.¹⁸²⁰ However, the court must consider that the variation is a reasonable bargain and one that an adult would be prepared to make.¹⁸²¹

¹⁸¹⁸ *Trusts Act 1973* (Qld) s 95(1); *Trustee Act 1958* (Vic) s 63A; *Trustees Act 1962* (WA) s 90.

¹⁸¹⁹ *Trusts Act 1973* (Qld) s 95(1A)(b); *Trustee Act 1958* (Vic) s 63A(1)(d).

¹⁸²⁰ *Re Blocksidge* [1997] 1 Qd R 233, 237–8 (Williams J), citing *Re Cohen's Settlement Trusts* [1965] 1 WLR 1229, 1236 (Stamp J).

¹⁸²¹ *Ibid.*

13.105 Under the Western Australian provision, the court must not approve a variation on behalf of a person if the arrangement is to the person's 'detriment'.¹⁸²² Section 90(2) further provides that:

in determining whether any such arrangement is to the detriment of a person, the Court may have regard to all the benefits that may accrue to him directly or indirectly in consequence of the arrangement, including the welfare and honour of the family to which he belongs.

Tasmania

13.106 In Tasmania, section 13 of the *Variation of Trusts Act 1994* (Tas) has a similar effect. It provides:

13 Power of Supreme Court to vary or revoke trusts

- (1) If property, whether real or personal, is held on trusts arising, whether before or after the commencement of this Act, under a will, settlement or other disposition or on the intestacy or partial intestacy of a person or under an order of a court exercising jurisdiction in Tasmania, the Court, subject to subsection (4), may by order approve on behalf of a person specified in subsection (3) an arrangement—
 - (a) varying or revoking all or any of the trusts; or
 - (b) resettling an interest under the trusts; or
 - (c) enlarging the powers of the trustees of managing or administering any property subject to the trusts.
- (2) The powers conferred by subsection (1) may be exercised whether or not—
 - (a) the person proposing the arrangement has any benefit or duty under the trusts; and
 - (b) there is any other person beneficially interested who is capable of consenting to the arrangement.
- (3) For the purposes of subsection (1), a person on whose behalf the Court may approve a proposed arrangement is to be—
 - (a) a person who has, directly or indirectly, an interest, whether vested or contingent, under the trusts and who by reason of minority or other incapacity is incapable of consenting to the arrangement; or
 - (b) a person, whether ascertained or not, who may become entitled to an interest under the trusts on being, at a future date or on the happening of a future event, a person of any specified description or a member of a specified class of persons; or

¹⁸²²

Trustees Act 1962 (WA) s 90(2).

- (c) a person who is unborn or unknown or whose whereabouts are unknown; or
 - (d) a person in respect of any interest that may arise by reason of a discretionary power given to a person on the failure or determination of an existing interest that has not failed or determined at the date of the application to the Court.
- (4) Before a proposed arrangement is submitted to the Court for approval, it must have the consent in writing of any person, other than a person on whose behalf the Court may approve an arrangement, who is beneficially interested under the trusts and who is capable of consenting to the arrangement.
- (5) In any proceedings under this section, the interests of all actual and potential beneficiaries of the trusts are to be represented.

13.107 Section 14 of the *Variation of Trusts Act 1994* (Tas) requires the court, in determining whether or not any proposed arrangement would be in the interests of that person, to consider any financial benefit to that person, the absence of any financial disadvantage to that person, any non-financial benefit to that person, the welfare of the family of that person, and any other circumstances that are advanced for or against the proposed arrangement.

South Australia

13.108 In South Australia, a more stringent test, outlined in section 59C(3) of the *Trustee Act 1936* (SA), must be applied before the court may exercise its power to vary a trust. Unlike other jurisdictions, South Australian legislation requires the court to be satisfied that the application is not substantially motivated by a desire to avoid, or reduce, the incidence of tax.¹⁸²³ Section 59C of the *Trustee Act 1936* (SA) provides:

59C Power of Court to authorise variations of trust

- (1) The Supreme Court may, on the application of a trustee, or of any person who has a vested, future, or contingent interest in property held on trust—
- (a) vary or revoke all or any of the trusts; or
 - (b) where trusts are revoked—
 - (i) distribute the trust property in such manner as the Court considers just; or
 - (ii) resettle the trust property upon such trusts as the Court thinks fit; or
 - (c) enlarge or otherwise vary the powers of the trustees to manage or administer the trust property.

¹⁸²³

Trustee Act 1936 (SA) s 59C(3)(a). See HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [15230] (at 24 February 2009).

- (2) In any proceedings under this section the interests of all actual and potential beneficiaries of the trust must be represented, and the Court may appoint counsel to represent the interests of any class of beneficiaries who are at the date of the proceedings unborn or unascertained.
- (3) Before the Court exercises its powers under this section, the Court must be satisfied—
 - (a) that the application to the court is not substantially motivated by a desire to avoid, or reduce the incidence of tax; and
 - (b) that the proposed exercise of powers would be in the interests of beneficiaries of the trust and would not result in one class of beneficiaries being unfairly advantaged to the prejudice of some other class; and
 - (c) that the proposed exercise of powers would not disturb the trusts beyond what is necessary to give effect to the reasons justifying the exercise of the powers; and
 - (d) that the proposed exercise of powers accords as far as reasonably practicable with the spirit of the trust.
- (4) An order made by the Supreme Court in the exercise of powers conferred by this section is binding upon all present and future trustees and beneficiaries of the trust.
- (5) This section does not apply to—
 - (a) a trust affecting property settled by an Act; or
 - (b) a charitable trust.
- (6) This section does not derogate from any other power of the Supreme Court to vary or revoke a trust, or to enlarge or otherwise vary the powers of trustees.

Trustees' general investment powers

13.109 It has been suggested that, the broad powers conferred on trustees in all Australian jurisdictions to invest in 'any form of investment'¹⁸²⁴ and the power to 'vary an investment' mean that.¹⁸²⁵

There is little need to seek or room to find any implied powers of sale in the light of the explicit nature of this legislation.

¹⁸²⁴ *Trustee Act 1925* (ACT) s 14; *Trustee Act 1925* (NSW) s 14; *Trustee Act* (NT) s 5; *Trusts Act 1973* (Qld) s 21; *Trustee Act 1936* (SA) s 6; *Trustee Act 1898* (Tas) s 6; *Trustee Act 1958* (Vic) s 5; *Trustees Act 1962* (WA) s 17. Trustees' investment powers are considered in greater detail at [11.229]–[11.230] above.

¹⁸²⁵ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [12.3510] (at 24 February 2009).

Discussion Paper

13.110 In the Discussion Paper, the National Committee considered whether a provision to the effect of section 63 of the *Administration and Probate Act 1919* (SA)¹⁸²⁶ should be included in the model legislation, or whether such a provision would be more appropriately located in trustee legislation.¹⁸²⁷ As explained earlier, that provision enables the court to authorise the sale of property held on trust for a minor.¹⁸²⁸

13.111 The National Committee proposed that the model legislation should include a provision to the general effect of section 63 of the *Administration and Probate Act 1919* (SA).¹⁸²⁹

Submissions

13.112 This proposal was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, the ACT and New South Wales Law Societies, and the Law Institute of Victoria.¹⁸³⁰

The National Committee's view

13.113 In light of the various provisions of general application that enable the court to authorise a trustee to sell trust property, the National Committee does not consider it necessary to include in the model legislation a specific provision to enable the court to authorise a trustee to sell property held on trust for a minor beneficiary. Accordingly, the model legislation should not include a provision to the effect of section 63 of the *Administration and Probate Act 1919* (SA).

RETIREMENT OF A TRUSTEE

13.114 As mentioned previously, a personal representative who has completed the duties of administration, but who has not yet distributed the assets, holds those assets as a trustee on behalf of the beneficiaries.¹⁸³¹ A personal representative who has become a trustee may wish to be relieved of his or her responsibilities, particularly where the trust will last for some time because, for example, there is a minor beneficiary.

1826 *Administration and Probate Act 1919* (SA) s 63 is set out at [13.75] above.

1827 *Administration of Estates Discussion Paper* (1999) QLRC 109; NSWLRC [8.162].

1828 See [13.73], [13.75] above.

1829 Ibid, QLRC 110; NSWLRC 157 (Proposal 51).

1830 Submissions 1, 8, 11, 14, 15, 19.

1831 See [13.1] above.

13.115 The provisions under which trustees may appoint new trustees and be discharged from further liability in respect of the trust property have been outlined previously.¹⁸³²

13.116 In *In the Estate of Dunn*,¹⁸³³ an administrator who had, for many years, carried on a grazing business of the deceased's with the consent of the deceased's next of kin applied for an order discharging him from the office of administrator and appointing another person as administrator in his place.¹⁸³⁴ Herring CJ held that, for the previous 15 years, the applicant had been acting as a trustee, rather than as an administrator.¹⁸³⁵

Since 1947 a further 15 years have elapsed and during that time the applicant has ... continued to carry on the farming business. ... It cannot be said, however, that the applicant has carried on the business for the purpose of administering the estate of the deceased or to enable a satisfactory sale to be made. He has carried it on for the benefit of the persons beneficially entitled because they have desired that it should be carried on in this way rather than that it should be sold. It is as owners of the property in equity that they have given this direction and the applicant has treated them as such in carrying it out. His relationship to them has been throughout that of trustee and cestui que trust,¹⁸³⁶ not that of administrator and next of kin. During the period he has performed no duty as administrator, there has been no such duty to perform. The case is, therefore, one where there should be a new trustee appointed and not an administrator *de bonis non*.¹⁸³⁷ (notes added)

13.117 Accordingly, his Honour declined to make the orders sought and instead appointed a new trustee under the *Trustee Act 1958 (Vic)*.¹⁸³⁸

Discussion Paper

13.118 In the Discussion Paper, the National Committee considered whether the model legislation should include a provision requiring the court's consent before a personal representative who has completed administration of the estate but who remains as trustee of estate assets may relinquish the trust duties.¹⁸³⁹

13.119 The National Committee was of the view that the personal representative, as a trustee, should have the same power to relinquish the

1832 See [13.32]–[13.43] above.

1833 [1963] VR 165.

1834 The applicant sought to be discharged under s 34 of the *Administration and Probate Act 1958 (Vic)*. That provision is considered at [25.21]–[25.26] in vol 2 of this Report.

1835 [1963] VR 165, 166.

1836 A cestui que trust is a beneficiary.

1837 See the discussion of letters of administration *de bonis non* at [2.13]–[2.14] above.

1838 [1963] VR 165, 167.

1839 *Administration of Estates Discussion Paper* (1999) QLRC 116; NSWLRC [8.180].

trusteeship as any other trustee.¹⁸⁴⁰ The National Committee therefore proposed that the model legislation should not include a provision requiring personal representatives to obtain court authority before relinquishing their trustee duties.¹⁸⁴¹

Submissions

13.120 All the submissions received by the National Committee that considered this issue agreed with the proposal of the National Committee.¹⁸⁴²

13.121 An academic expert in succession law stated:¹⁸⁴³

A personal representative who has become a trustee is permitted to retire under trustee legislation. There should be no other statutory provision.

The National Committee's view

13.122 The general provisions for the discharge and appointment of trustees that are found in the trustee legislation of all Australian jurisdictions do not include any requirement for a personal representative who has become a trustee to obtain the court's consent before he or she can relinquish the office of trustee. The National Committee remains of the view that those provisions should continue to regulate the requirements for the discharge of trustees, and that the model legislation should not include a provision to require a personal representative who has become a trustee to obtain the court's consent in order to be discharged from the office of trustee.

INVESTMENT OF PROPERTY HELD ON TRUST FOR A MINOR

13.123 Personal representatives may exercise the general powers of investment that are conferred on trustees,¹⁸⁴⁴ although 'the particular duty cast upon them of distributing the estate as soon as may be places their investment powers in a very narrow context with commensurate constraints'.¹⁸⁴⁵ As a result, a personal representative should not invest funds in an asset that may 'subsequently impede the distribution of the estate'.¹⁸⁴⁶

1840 Ibid, QLRC 116; NSWLRC [8.181].

1841 Ibid, QLRC 116; NSWLRC 165 (Proposal 56).

1842 Submissions 1, 8, 11, 12, 14, 15.

1843 Submission 12.

1844 Because the trustee legislation in all jurisdictions defines 'trustee' to include a personal representative (see note 1696 above), the provisions in the trustee legislation dealing with trustees' general powers of investment also apply to personal representatives.

1845 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [9.160].

1846 Ibid.

13.124 In Tasmania, the *Administration and Probate Act 1935* (Tas) provides expressly that a personal representative may invest money on behalf of a minor. Section 33(3) of that Act provides:

33 Trusts for sale

...

- (3) During the minority of any beneficiary or the subsistence of any life interest, and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorized by law for the investment of trust money, with power at the discretion of the personal representatives, to change such investments for others of a like nature.

Discussion Paper

13.125 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the general effect of section 33(3) of the *Administration and Probate Act 1935* (Tas), but that 'rather than set out the trustee powers referred to in that section, the model legislation should cross-refer to the relevant powers in the trustee legislation of the particular jurisdiction'.¹⁸⁴⁷

Submissions

13.126 The proposal for the model legislation to include a modified form of section 33(3) of the *Administration and Probate Act 1935* (Tas) was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, the ACT and New South Wales Law Societies, and the Law Institute of Victoria.¹⁸⁴⁸

13.127 However, an academic expert in succession law suggested an alternative:¹⁸⁴⁹

I think it is desirable for administration legislation to say that personal representatives are trustees in relation to any part of the estate (not required for the purpose of administering the estate) held for a minority or life interest and that they have all the duties and powers of trustees. This is nearly provided already in Qld s 49(1).

¹⁸⁴⁷ *Administration of Estates Discussion Paper* (1999) QLRC 111; NSWLRC 158 (Proposal 52).

¹⁸⁴⁸ Submissions 1, 8, 11, 14, 15, 19.

¹⁸⁴⁹ Submission 12.

The National Committee's view

13.128 Although the National Committee's preliminary proposal was to include a provision to the general effect of section 33(3) of the *Administration and Probate Act 1935* (Tas), the trustee legislation in all Australian jurisdictions has been amended to confer broad powers of investment on trustees. Consequently, the phrase 'any investment for the time being authorized by law', which appears in section 33(3) of the *Administration and Probate Act 1935* (Tas), is now obsolete.

13.129 The National Committee considers that a provision such as section 33(3) of the *Administration and Probate Act 1935* (Tas) is unnecessary in light of the broad general powers of investment that are now conferred on trustees.

PAYMENTS TO MINORS OUT OF THE CAPITAL OF TRUST PROPERTY

Introduction

13.130 The trustee legislation in all Australian jurisdictions gives a trustee the power, in specified circumstances, to make a payment out of the capital of trust property to a beneficiary who is entitled, either absolutely or contingently, to the capital of the trust property. Where the beneficiary is a minor, the power may be exercised where the payment is for the 'maintenance, education, advancement or benefit'¹⁸⁵⁰ (or, in Tasmania,¹⁸⁵¹ for the 'advancement or benefit') of the minor.

13.131 In addition, section 17 of the *Administration Act 1903* (WA) empowers the court, in limited circumstances, to authorise a personal representative to make a distribution to a minor for the minor's maintenance, advancement or education.

13.132 The issue for consideration is whether, given the statutory power of advancement already contained in each jurisdiction's trustee legislation, and the limited provision recommended by the National Committee in its Wills Report,¹⁸⁵² the model legislation should include a provision to the effect of section 17 of the *Administration Act 1903* (WA).

¹⁸⁵⁰ *Trustee Act 1925* (ACT) s 44; *Trustee Act 1925* (NSW) s 44; *Trustee Act* (NT) s 24A; *Trusts Act 1973* (Qld) s 62 (including past maintenance or education); *Trustee Act 1936* (SA) s 33A; *Trustee Act 1958* (Vic) s 38; *Trustees Act 1962* (WA) s 59 (including past maintenance or education). Under the Northern Territory, Queensland, South Australian, Victorian and Western Australian provisions, capital may be applied for these purposes whether or not the beneficiary is a minor. The trustee legislation in these jurisdictions also gives trustees a power to apply the income of trust property towards the maintenance of a minor: see [18.141]–[18.148] in vol 2 of this Report.

¹⁸⁵¹ *Trustee Act 1898* (Tas) s 29 (under which capital may be applied for these purposes whether or not the beneficiary is a minor). However, the Act does not give trustees a power to apply the income of trust property towards the maintenance of a minor.

¹⁸⁵² See [13.139]–[13.140] below.

Trustees' powers of advancement

13.133 The powers of advancement found in the trustee legislation of the Australian jurisdictions are generally similar.¹⁸⁵³ Section 62 of the *Trusts Act 1973* (Qld), which confers the broadest power, provides:

62 Power to apply capital for advancement etc.

- (1) Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee, in such manner as the trustee in the trustee's absolute discretion thinks fit, may from time to time out of that capital pay or apply for the maintenance, education (including past maintenance or education), advancement or benefit of that person, an amount not exceeding in all \$2000 or one-half that capital (whichever is the greater) or with the consent of the court an amount greater than that amount.
- (2) The power conferred by this section may be exercised whether the person is entitled absolutely or contingently on the person attaining any specified age or on the occurrence of any other event, and notwithstanding that the interest of the person so entitled is liable to be defeated by the exercise of a power of appointment or revocation, or to be diminished by the increase of the class to which the person belongs.
- (3) The power conferred by this section may be exercised whether the person is so entitled in possession or in remainder or in reversion.
- (4) Any money so paid or applied shall be brought into account as part of the share in the trust property to which the person is or becomes absolutely or indefeasibly entitled.
- (5) No payment or application pursuant to this section shall be made so as to prejudice any person entitled to any prior life or other interest whether vested or contingent, in the money paid or applied unless that person is in existence and of full age and consents in writing to the payment or application, or unless the court, on the application of the trustee, so orders.
- (6) For the purposes of this section the trustee may raise money by sale, mortgage or exchange of the trust property.

13.134 Section 62(1) refers to 'maintenance, education ... , advancement or benefit' of the beneficiary. It has been held that that should be interpreted broadly and given the 'widest meaning'.¹⁸⁵⁴ The House of Lords has held that

¹⁸⁵³ *Trustee Act 1925* (ACT) s 44; *Trustee Act 1925* (NSW) s 44; *Trustee Act* (NT) s 24A; *Trusts Act 1973* (Qld) s 62; *Trustee Act 1936* (SA) s 33A; *Trustee Act 1898* (Tas) s 29; *Trustee Act 1958* (Vic) s 38; *Trustees Act 1962* (WA) s 59.

¹⁸⁵⁴ *Larkman v Public Trustee* (Unreported, Supreme Court of Western Australia, Miller J, 2 October 1998) 22. This can include using the powers of advancement to satisfy a moral obligation of a beneficiary: *Re Clore's Settlement Trusts* [1966] 2 All ER 272, 275 (Pennycuik J).

the term 'advancement or benefit' in the *Trustee Act 1925* (UK) means 'any use of the money which will improve the material situation of the beneficiary.'¹⁸⁵⁵

13.135 In the ACT, South Australia and Tasmania, a trustee may advance up to one half of the value of the minor's share or interest.¹⁸⁵⁶ The provisions in the Northern Territory, Queensland, Victoria and Western Australia have substantially the same effect, and provide that a trustee may advance an amount not exceeding in all \$2000 or half the capital, whichever is the greater.¹⁸⁵⁷ In addition, however, the provisions in the Northern Territory, Queensland and Victoria enable a trustee, with the court's consent, to advance a greater amount.¹⁸⁵⁸ In New South Wales, although a trustee may ordinarily advance an amount not exceeding one half of the value of the beneficiary's interest, where the beneficiary is a minor, the power of advancement must not be exercised where the value of the minor's interest exceeds \$4000.¹⁸⁵⁹

13.136 In the ACT, New South Wales, the Northern Territory, South Australia and Tasmania, the trustee legislation provides expressly that the power of advancement cannot be exercised where the trust property is land.¹⁸⁶⁰ In the other Australian jurisdictions, the power of advancement is not subject to this limitation.

13.137 Although the trustee legislation in all the jurisdictions provides that the power of advancement may be exercised whether the minor is entitled to the trust property in possession or in remainder or reversion,¹⁸⁶¹ no payment can be made so as to prejudice any person entitled to any prior life or other prior interest, whether vested or contingent, in the money paid or applied unless that person is in existence and of full age and consents in writing to the payment or application.¹⁸⁶² In Queensland and Western Australia, however, there is an

1855 *Pilkington v Inland Revenue Commissioners* [1964] AC 612, 635 (Viscount Radcliffe).

1856 *Trustee Act 1925* (ACT) s 44; *Trustee Act 1936* (SA) s 33A; *Trustee Act 1898* (Tas) s 29; *Trustee Act 1958* (Vic) s 38.

1857 *Trustee Act* (NT) s 24A(1); *Trusts Act 1973* (Qld) s 62(1); *Trustee Act 1958* (Vic) s 38(1); *Trustees Act 1962* (WA) s 59(a). The reference to the sum of \$2000 will be relevant only where the value of the capital is less than \$4000. It means that, where the value is less than \$4000, but more than \$2000, an amount of \$2000, which will be greater than half the capital, may be advanced. Where the value is \$2000 or less, the whole of the capital may be advanced.

1858 *Trusts Act 1973* (Qld) s 62(1); *Trustee Act* (NT) s 24A(1); *Trustee Act 1958* (Vic) s 38(1).

1859 *Trustee Act 1925* (NSW) s 44(1A).

1860 *Trustee Act 1925* (ACT) s 44(6); *Trustee Act 1925* (NSW) s 44(6); *Trustee Act* (NT) s 24A(3); *Trustee Act 1936* (SA) s 33A(5); *Trustee Act 1898* (Tas) s 29(2).

1861 *Trustee Act 1925* (ACT) s 44(3); *Trustee Act 1925* (NSW) s 44(3); *Trustee Act* (NT) s 24A(4); *Trusts Act 1973* (Qld) s 62(3); *Trustee Act 1936* (SA) s 33A(2); *Trustee Act 1898* (Tas) s 29(1); *Trustee Act 1958* (Vic) s 38(3); *Trustees Act 1962* (WA) s 59.

1862 *Trustee Act 1925* (ACT) s 44(5); *Trustee Act 1925* (NSW) s 44(5); *Trustee Act* (NT) s 24A(6); *Trusts Act 1973* (Qld) s 62(5); *Trustee Act 1936* (SA) s 33A(4); *Trustee Act 1898* (Tas) s 29(1)(c); *Trustee Act 1958* (Vic) s 38(5); *Trustees Act 1962* (WA) s 59(c). With the exception of Victoria, where s 38(5) of the *Trustee Act 1958* (Vic) refers to 'any prior life or other prior interest', the provisions in the other jurisdictions refer to 'any prior life or other interest'. However, it has been held that the words 'prior life or other interest' mean 'prior life or other prior interest': *Re Patterson* [1941] VLR 233, 239 (Mann CJ) (emphasis added), referring to s 32(1)(c) of the *Trustee Act 1928* (Vic) (repealed).

exception to this proposition, and a payment may be made, notwithstanding its prejudicial effect on a person with a prior interest, if the court, on the application of the trustee, orders that such a payment be made.¹⁸⁶³

13.138 In the ACT, New South Wales, the Northern Territory, South Australia and Victoria, the ability to exercise the power of advancement is subject to a contrary intention expressed in the trust instrument.¹⁸⁶⁴

Wills legislation

13.139 In its Wills Report, the National Committee recommended that, if a person in whose favour a disposition was made did not survive the testator by thirty days, the will is to take effect as if the person had died immediately before the testator.¹⁸⁶⁵

13.140 As a corollary, the National Committee recommended that, within that thirty day period, the personal representative may make a distribution for the maintenance, support or education of a person who was wholly or substantially dependent on the testator and who has an entitlement under the testator's will. This recommendation was implemented by clause 53 of the Draft Wills Bill included in the Report. Provisions to that effect have since been enacted in New South Wales, the Northern Territory, Queensland, Tasmania and Victoria.¹⁸⁶⁶

Western Australia: administration legislation

13.141 In Western Australia, in addition to the power of advancement discussed above, there is a further provision that deals specifically with court authorised payments for the maintenance, advancement or education of minors.

13.142 Section 17 of the *Administration Act 1903* (WA) provides:

17 Court may deal with interest of infants in certain cases

- (1) Where a person dies leaving infant issue and the value of the share of the real and personal property of the deceased person to which an infant is entitled in distribution does not exceed \$10 000 the Court may, on the application of any such infant, or of any person on his behalf, authorize the executor or administrator to expend the whole or any part of the share of such infant in his maintenance, advancement, or education.

¹⁸⁶³ *Trusts Act 1973* (Qld) s 62(5); *Trustees Act 1962* (WA) s 59(c).

¹⁸⁶⁴ *Trustee Act 1925* (ACT) s 44(7); *Trustee Act 1925* (NSW) s 44(7); *Trustee Act* (NT) s 24A(2); *Trustee Act 1936* (SA) s 33A(6); *Trustee Act 1958* (Vic) s 2(3); *Trustees Act 1962* (WA) s 5(3).

¹⁸⁶⁵ *Wills Report* (1997) 76. See now *Succession Act 2006* (NSW) s 35; *Wills Act* (NT) s 34; *Succession Act 1981* (Qld) s 33B; *Wills Act 2008* (Tas) s 49; *Wills Act 1997* (Vic) s 39.

¹⁸⁶⁶ *Wills Report* (1997) 76. See now *Probate and Administration Act 1898* (NSW) s 92A; *Wills Act* (NT) s 55; *Succession Act 1981* (Qld) s 49A (where the provision also allows a distribution to be made after the thirty day period expires); *Wills Act 2008* (Tas) s 64; *Wills Act 1997* (Vic) s 39(4), (5).

- (3) The power or authority that the Court may confer under this section on an executor or administrator is in addition to any other power or authority, statutory or otherwise, that the executor or administrator may have to pay or apply capital money or assets, or the income thereof, to or on behalf of an infant.

13.143 This section is said to allow ‘the infant to obtain the benefit of any inheritance at a time when it may be most beneficial’,¹⁸⁶⁷ while still allowing a personal representative to exercise the powers of maintenance or advancement that are available under other legislation.¹⁸⁶⁸

13.144 The power under section 17 to expend property to which a minor is entitled differs from a trustee’s power of advancement in the following respects:

- Section 17 is expressed to apply where ‘a person dies leaving infant issue’. Accordingly, the section will apply where a minor is entitled to receive a share of the estate of his or her deceased parent, grandparent, great-grandparent (or other lineal ascendant), but will not apply where the minor is not the issue of the deceased — for example, where a minor receives an inheritance under the will of an aunt or uncle.
- Section 17 requires court authorisation in order for the minor’s share in the property to be expended, whereas a trustee’s power of advancement may be exercised without court authorisation.
- Section 17 is limited to the situation where the minor’s entitlement does not exceed \$10 000, whereas, with the exception of New South Wales,¹⁸⁶⁹ a trustee’s power of advancement is not restricted to where the minor’s entitlement is under a particular value.
- Section 17 allows expenditure of up to \$10 000 to be made for the minor if the court authorises the personal representative to do so, whereas in most jurisdictions a trustee may make a payment of up to half the value of the minor’s interest and, in Queensland, the Northern Territory and Victoria, the trustee may, with the consent of the court, make a payment of a greater amount.
- Section 17 is not subject to a contrary intention expressed in the instrument, whereas in all jurisdictions, except Queensland, a trustee’s power of advancement is subject to a contrary intention expressed in the trust instrument.

¹⁸⁶⁷ JJ Hockley, PR Macmillan and JC Curthoys, *Wills Probate & Administration WA* (LexisNexis online service) [1105.1] (at 21 February 2009).

¹⁸⁶⁸ *Ibid* (at 21 February 2009), referring to s 17(3) of the *Administration Act 1903* (WA).

¹⁸⁶⁹ See *Trustee Act 1925* (NSW) s 44(1A).

- Section 17 is silent as to whether the court may authorise expenditure that will prejudice a person with a prior interest in the property in which the minor also has an interest. Under the trustee legislation in Queensland and Western Australia, it is clear that the court may authorise a payment notwithstanding that it will prejudice a person with a prior interest in the property.
- Under section 17, expenditure may be made only for what the court considers to be for the ‘maintenance, advancement, or education’ of a minor whereas, under the majority of the trustee legislation provisions,¹⁸⁷⁰ the power of advancement may be exercised where the trustee considers it to be for the ‘maintenance, education, advancement or benefit of the person’. ‘Benefit’ is generally considered to have the widest scope of all of these terms.¹⁸⁷¹

13.145 In Queensland, section 62 of the *Trusts Act 1973* (Qld) is capable of achieving the same result as section 17 of the *Administration Act 1903* (WA).¹⁸⁷² This is because section 62(1) provides that a trustee may, with the consent of the court, advance an amount that is greater than half the value of the capital.

Discussion Paper

13.146 In the Discussion Paper, the National Committee considered whether, given the powers of advancement found in the trustee legislation and the fact that clause 53 of Draft Wills Bill 1997 would permit a distribution for the maintenance of a dependant who had an entitlement under a will, it was necessary to include a provision to the effect of section 17 of the *Administration Act 1903* (WA) in the model legislation.¹⁸⁷³

13.147 The National Committee proposed that a provision to the general effect of section 17 of the *Administration Act 1903* (WA) should be included in the model legislation. However, the National Committee proposed that ‘rather than set out the trustee powers referred to in that section, the model legislation should cross-refer to the relevant powers in the trustee legislation of the particular jurisdiction’.¹⁸⁷⁴

¹⁸⁷⁰ Cf *Trustee Act 1898* (Tas) s 29(1) which provides that ‘Trustees may at any time pay or apply any capital money subject to a trust, for the advancement or benefit, in such manner as they may, in their absolute discretion think fit ...’ (emphasis added)

¹⁸⁷¹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [12.12510] (at 24 February 2009). See also *Re Breed’s Will* (1875) 1 Ch D 226, 228 (Jessel MR) and *Re Halsted’s Will Trusts* [1937] 2 All ER 570, 572 (Farwell J).

¹⁸⁷² *Trusts Act 1973* (Qld) s 62 is set out at [13.133] above.

¹⁸⁷³ *Administration of Estates Discussion Paper* (1999) QLRC 112; NSWLRC [8.170].

¹⁸⁷⁴ *Ibid*, QLRC 113; NSWLRC 160 (Proposal 53).

Submissions

13.148 The submissions were fairly evenly divided as to whether the model legislation should include a modified version of section 17 of the *Administration Act 1903* (WA).

13.149 The National Committee's proposal to include such a provision was supported by the Bar Association of Queensland, the ACT and New South Wales Law Societies, and the Law Institute of Victoria.¹⁸⁷⁵ The Queensland Law Society observed that the power of advancement in Queensland is not as narrow as the power under section 17 of the *Administration Act 1903* (WA), but commented that it otherwise agreed with the National Committee's proposal.¹⁸⁷⁶

13.150 The Public Trustee of New South Wales stated that he would support the proposal, but only if it did not require an application to be made to the court.¹⁸⁷⁷

13.151 However, the National Committee's proposal was opposed by the Public Trustee of South Australia, the Public Trustee of Queensland, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia and Trust Company of Australia Limited on the basis that section 17 of the *Administration Act 1903* (WA) requires an application to be made to the court.¹⁸⁷⁸ They instead favoured a provision to the effect of section 62 of the *Trusts Act 1973* (Qld).¹⁸⁷⁹

13.152 The Public Trustee of Queensland commented:¹⁸⁸⁰

The current proposal is not supported. An application to the court is inherently expensive and uncertain. It is suggested a preferable option is, as present Queensland legislation permits, to allow a personal representative to distribute limited amount of capital (or with the consent of the court unlimited amounts of capital) to an infant. The distribution, however, should be comparatively modest and should not put the trust fund at risk.

13.153 Trust Company of Australia Limited expressed a similar view:¹⁸⁸¹

We disagree with a blanket requirement that all distributions to infants must be sanctioned by a Court. This will lead to unnecessary costs and administrative procedures and cause undue delay when distributions are required for legitimate and urgent needs. We would however support a proposal whereby capital distributions can be made to infants, without seeking court approval, as

1875 Submissions 1, 14, 15, 19.

1876 Submission 8.

1877 Submission 11.

1878 Submissions 4, 5, 6, 7, 10.

1879 Ibid.

1880 Submission 5.

1881 Submission 10.

long as they do not put the estate's funds at risk. To this end, we would support a similar provision to section 62(1) of the *Trusts Act 1973* (Qld) to be included.

13.154 The Public Trustee of South Australia and the Trustee Corporations Association of Australia made similar comments, but suggested that the amount referred to in section 62(1) of the *Trusts Act 1973* (Qld) should be raised from \$2000 to \$5000.¹⁸⁸²

13.155 The New South Wales Council of the Trustee Corporations Association of Australia was also opposed to a provision that requires a court application. In addition, it considered that the matter was more appropriately addressed in trustee legislation, as is presently the case:¹⁸⁸³

The NSW Council disagrees with this proposal which would require a court to sanction any distribution of property to an infant. Instead, the NSW Council supports the proposal that the executor or administrator may distribute certain amounts of capital to infant beneficiaries without seeking the consent of the court as long as the amount is modest and does not put the funds at risk.

However, as to including within the model legislation the parameters for distributing certain amounts of capital to infants, the NSW Council disagrees with this approach and believes that the trustee legislation of each jurisdiction is the more appropriate place for these kinds of provisions (as is currently the case).

13.156 An academic expert in succession law was generally of the view that it was preferable for the trustee legislation provisions to be brought up to date, although he conceded that, in the absence of that occurring, there might be merit in the model administration legislation confirming that personal representatives have all the powers of maintenance and advancement conferred on trustees by trustee legislation:¹⁸⁸⁴

Section 17 of the *Administration Act 1903* (WA) is concerned with enlarging the power given by trustee legislation to advance capital to infant beneficiaries. But I have difficulties with it theoretically. If personal representatives are ready to advance capital for the benefit of infant beneficiaries it must be because they have determined that no part of that capital is required for administrative purposes. Theoretically, then, it could be said that they are trustees and not personal representatives at all. There are powers of advancement of capital under trustee legislation but they are niggardly and the WA enactment is presumably an attempt to give infants a better deal where the estate is small. Also the power [in section 17] does not seem to be subject to any provision in the will, as powers given under the trustee legislation are. It would be better if trustee legislation were to bring itself up to speed in this area; but as that is unlikely perhaps we should follow the WA example. But I would prefer to extend it slightly. Perhaps one could say:

¹⁸⁸² Submissions 4, 6. Note, however, that s 62 of the *Trusts Act 1973* (Qld) enables a trustee to advance an amount not exceeding, in all, whichever is the *greater* of \$2000 or one-half of the capital. Accordingly, the figure of \$2000 will operate to limit the amount that can be advanced only where the capital that is held on trust for the minor beneficiary is less than \$4000. This is discussed at note 1857 above.

¹⁸⁸³ Submission 20.

¹⁸⁸⁴ Submission 12.

'Personal representatives have all the powers of maintenance and advancement conferred upon trustees by trustee legislation and in where a person dies' ... etc as s 17(1).

Section 17(3) ... can then be omitted.

The National Committee's view

13.157 The National Committee notes that the trustee legislation in all Australian jurisdictions enables a trustee to apply capital towards the advancement of a beneficiary. For the most part, the trustee provisions are not nearly as limited in their scope as section 17 of the *Administration Act 1903* (WA), which applies only where a minor beneficiary is the issue of the deceased person and where the minor's entitlement does not exceed \$10 000. The trustee provisions also provide a cheaper and quicker mechanism for making an advance of capital. Unlike section 17 of the *Administration Act 1903* (WA), the trustee provisions do not require the trustee to obtain court approval for the application of capital.

13.158 The National Committee is therefore of the view that the issue of the advancement of capital to a minor beneficiary is more appropriately addressed in the current trustee provisions, and that the model legislation should not include a provision to the effect of section 17 of the *Administration Act 1903* (WA).

APPLICATION OF INCOME OF SETTLED RESIDUARY REAL OR PERSONAL ESTATE

The rule in *Allhusen v Whittell*

13.159 The rule in *Allhusen v Whittell*¹⁸⁸⁵ is one of several equitable rules that were developed to achieve fairness between beneficiaries where property was left to beneficiaries by way of succession,¹⁸⁸⁶ in this case, where the income of the residuary estate is left to one beneficiary and the capital of the residuary estate to another. The rule requires that:¹⁸⁸⁷

as between the life tenant and the remainderman of a settled residuary estate, the liabilities which must be met or provided for before the residuary estate can be ascertained are to be treated as discharged neither wholly out of income nor wholly out of corpus but in just proportions out of both.

1885 (1867) LR 4 Eq 295.

1886 See, for example, the discussion at [11.226]–[11.229] above of the rule in *Howe v Lord Dartmouth* (1802) 7 Ves Jun 137; 32 ER 56.

1887 *Hassell v Perpetual Executors Trustees & Agency Co (WA) Ltd* (1952) 86 CLR 513, 526 (Dixon CJ, Webb, Fullagar and Kitto JJ).

13.160 The rule rests upon a presumption that the gift of income to the life tenant is intended to comprise, not the income of the entire estate, but the income of so much of the estate as exceeds what is needed to meet the testator's liabilities and non-residuary dispositions of his will.¹⁸⁸⁸ The rule applies unless a contrary intention is indicated by the rule or can be inferred from the nature of the property or the circumstances of the case.¹⁸⁸⁹

13.161 The application of the rule is illustrated by the following example:¹⁸⁹⁰

An estate consists of assets worth \$10,000 that yield income of \$1000 in the first year after the death of the settlor. There are debts of the estate of \$5000 that remain unpaid. The income beneficiary should not receive the actual income (\$1000) received, for that is the income of the gross estate; but the income of the net estate. The net estate being, in this example, half the gross estate, the \$1000 is divided equally between the capital and income accounts. If the income beneficiary has received more than the correct share, an adjustment from future income must be made.

13.162 If the income beneficiary (that is, the beneficiary who is entitled to the income of the residuary estate) were allowed to retain the whole of the \$1000 income in this situation:¹⁸⁹¹

he would be receiving income on a portion of the estate that had never formed part of the residue, which is only what is left after payment of debts, funeral and testamentary expenses, and specified gifts. The whole of the debts etc would be paid out of corpus, and consequently the tenant for life would make a gain at the expense of the [remainderman].

Abolition of the rule in *Allhusen v Whittell*

13.163 The rule in *Allhusen v Whittell* is a 'complex' rule that has proved to be difficult to apply.¹⁸⁹² It is 'disliked because it obliges trustees to make quite complex arithmetical calculations, which are generally of insignificant advantage to the estate'.¹⁸⁹³

1888 Ibid.

1889 Ibid.

1890 HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [11080] (at 24 February 2009).

1891 G Fricke and OK Strauss, *The Law of Trusts in Victoria* (1964) 347.

1892 Ibid 348.

1893 Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 58.

13.164 In all Australian jurisdictions except South Australia and Tasmania, the rule has been abolished,¹⁸⁹⁴ and replaced with a provision that does not require the trustee to apportion the income produced by the gross estate.¹⁸⁹⁵

The intention of the provisions is that the trustees should not have to make adjustments to the capital and income accounts by reason of the fact that the income beneficiary has received income from assets of a deceased estate that are later sold to pay the debts and other expenses. In consequence the income beneficiary may receive rather more income during the administration period but rather less thereafter because the capital will be reduced in value. So the trustee is absolved from making perhaps a whole series of difficult calculations.

13.165 Section 46D of the *Probate and Administration Act 1898* (NSW) is similar to the provisions in most jurisdictions. It provides:

46D Application of income of settled residuary real or personal estate

- (1) Where, under the provisions of the will of a person dying after the commencement of the *Conveyancing (Amendment) Act 1930* (in this section called the deceased), any real or personal estate included (either by specific or general description) in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the funeral, testamentary, and administrative expenses, debts, and liabilities, or of the interest (if any) thereon up to the date of the death of the deceased, or of any legacies bequeathed by such will.
- (2) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the funeral, testamentary, and administrative expense, debts, liabilities and legacies, after the date of the death of the deceased and up to the payment thereof, and the balance of such income shall be payable to the person for the time being entitled to the income of the property.
- (3) Where, after the death of the deceased, income of assets which are ultimately applied in or towards payment of the funeral, testamentary, and administrative expenses, debts, liabilities and legacies arises pending such application, that income shall, for the purposes of this section, be deemed income of the residuary estate of the deceased.
- (4) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased.
- (5) This section shall have effect, subject to the provisions (if any) to the contrary contained in the will and to the provisions of any Act as to charges on property of the deceased.

¹⁸⁹⁴ *Administration and Probate Act 1929* (ACT) s 41D; *Probate and Administration Act 1898* (NSW) s 46D; *Administration and Probate Act* (NT) s 58; *Trusts Act 1973* (Qld) s 78; *Trustee Act 1958* (Vic) s 74; *Trustees Act 1962* (WA) s 104.

¹⁸⁹⁵ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [11100] (at 24 February 2009).

13.166 The Supreme Court of New South Wales has explained the significance of section 46D(3) in relation to the application of dividends:¹⁸⁹⁶

it seems to me that s 46D(3) makes it clear that where dividends are paid on shares which are ultimately applied in or towards the payment of debts and expenses those dividends shall for the purpose of s 46D be deemed income of the residuary estate. The use of the word 'deemed' is significant ... The income is to be deemed income of the residuary estate even though in fact it cannot truly be described.

Discussion Paper

13.167 In the Discussion Paper, the National Committee considered whether a provision to the effect of section 46D of the *Probate and Administration Act 1898* (NSW), which replaces the rule in *Allhusen v Whittell*, should be included in the model legislation or whether such a provision would be more appropriately located in the trustee legislation.¹⁸⁹⁷

13.168 The National Committee considered that the most suitable place for a provision of this type was in the trustee legislation. The National Committee therefore proposed that the model legislation should not include a provision to the effect of section 46D of the *Probate and Administration Act 1898* (NSW).¹⁸⁹⁸

Submissions

13.169 All the submissions that addressed this issue agreed with the proposal not to include a provision to the effect of section 46D of the *Probate and Administration Act 1898* (NSW).¹⁸⁹⁹

The National Committee's view

13.170 The National Committee remains of the view that the model legislation should not include a provision to the effect of section 46D of the *Probate and Administration Act 1898* (NSW). Because the various provisions that modify the operation of the rule in *Allhusen v Whittell* apply where property is settled on beneficiaries by way of succession (that is, by way of successive interests), the National Committee considers that those provisions are more appropriately located in the trustee legislation of the individual jurisdictions, as is the case in Queensland, Victoria and Western Australia.

¹⁸⁹⁶ *Princess Anne of Hesse v Field* [1963] NSW 998, 1018 (Jacobs J).

¹⁸⁹⁷ *Administration of Estates Discussion Paper* (1999) QLRC 114; NSWLRC [8.174].

¹⁸⁹⁸ *Ibid*, QLRC 114; NSWLRC 163 (Proposal 54).

¹⁸⁹⁹ Submissions 1, 8, 11, 12, 14, 15.

RECOMMENDATIONS

Power to appropriate property

- 13-1 The model legislation should not include a provision to confer a on a personal representative the power to appropriate property to a beneficiary.¹⁹⁰⁰

Power to appoint trustees of a minor's property

- 13-2 The model legislation should not include a provision to confer on a personal representative the power to appoint trustees of a minor's property, as is found in section 17A of the *Administration Act 1903* (WA).¹⁹⁰¹

Sale of property held on trust for a minor

- 13-3 The model legislation should not include a provision to confer on a personal representative a power of sale in relation to property held on trust for a minor, as is found in section 63 of the *Administration and Probate Act 1919* (SA).¹⁹⁰²

Retirement of a trustee

- 13-4 The model legislation should not include a provision requiring a personal representative who has become a trustee to obtain the court's consent in order to be discharged from the office of trustee.¹⁹⁰³

Investment of property held on trust for a minor

- 13-5 The model legislation should not include a provision dealing with the investment of property held on trust for a minor, as is found in section 33(3) of the *Administration and Probate Act 1935* (Tas).¹⁹⁰⁴

1900 See [13.31] above.

1901 See [13.66]–[13.68] above.

1902 See [13.113] above.

1903 See [13.122] above.

1904 See [13.128]–[13.129] above.

Payments to minors out of the capital of trust property

13-6 The model legislation should not include a provision to enable the court, where a minor beneficiary is entitled to capital not exceeding \$10 000, to authorise the personal representative to apply the whole or a part of the capital for the maintenance, advancement or education of the minor, as is found in section 17 of the *Administration Act 1903 (WA)*.¹⁹⁰⁵

Application of income of settled residuary real or personal property

13-7 The model legislation should not include a provision dealing with the application of income of settled residuary real or personal estate, as is found in section 46D of the *Probate and Administration Act 1898 (NSW)*.¹⁹⁰⁶

1905 See [13.157]–[13.158] above.

1906 See [13.170] above.