



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

Report
Volume 4

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 4

Report No 65
April 2009

The short citation for this Report is QLRC R 65.
Published by the Queensland Law Reform Commission, April 2009.
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ISBN: 978 0 9805799 0 1

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*.

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Member

Mr I P Davis
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Mr B J Herd
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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 would like to acknowledge 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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Summary of recommendations

CHAPTER 3

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

- 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).

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.

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

CHAPTER 4

Appointment of personal representatives

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.

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.

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:
- (a) applies if a person appointed executor by a will:
 - (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.

See Administration of Estates Bill 2009 cl 315.

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.

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.

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.

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).

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.

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;

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.

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.

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.

See Administration of Estates Bill 2009 cl 348.

4-13 The model legislation should include a provision that:

- (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.

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.

See Administration of Estates Bill 2009 cl 349(3).

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.

4-17 The model legislation should not set out the various types of other limited or special grants that may be made.

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.

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.

See Administration of Estates Bill 2009 cl 312(2), (3).

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.

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.

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.

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.

See Administration of Estates Bill 2009 sch 3 dictionary.

CHAPTER 5

Appointment of personal representatives: order of priority for letters of administration

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:
- (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;
 - (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:
- (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;
- (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.

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), except that:
- (a) the descending order of priority for letters of administration with the will annexed should be:
 - (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;
 - (c) the model provision should not include a provision to the effect of rule 603(5) or (6).

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.

See Administration of Estates Bill 2009 cll 321(1), 322(1).

CHAPTER 6

Appointment of personal representatives: specific issues concerning public trustees and trustee companies

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).

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).

CHAPTER 7

Transmission of the office of personal representative

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.

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.

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.

See Administration of Estates Bill 2009 cl 337 (definition of 'grant of representation, of the estate of a deceased personal representative' (para (a)).

- 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.

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.

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 administration, 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 administration, of the will or estate of the deceased personal representative.

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:
- (a) renounces the executorship, or administratorship, by representation before taking an active step in the administration of the other estate; and
 - (b) files the renunciation in court.

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.

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:
- (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
 - (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.

7-11 The provision that gives effect to Recommendation 7-10 should:

- (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
 - (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:

- (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
 - (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, 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.

See Administration of Estates Bill 2009 cl 350(3).

7-15 The model legislation should include a provision that:

- (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
- (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.

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.

See Administration of Estates Bill 2009 cl 343.

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).

7-19 The model legislation should include a provision that:

- (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).

CHAPTER 8

Notice provisions and caveats

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.
- 8-2 Any specific requirements about such notices should be contained in the court rules of the individual jurisdictions.

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.

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.

See Administration of Estates Bill 2009 cl 313.

CHAPTER 9

Administration bonds and sureties

- 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.

See Administration of Estates Bill 2009 cl 617(1).

- 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.

See Administration of Estates Bill 2009 cl 617(2).

CHAPTER 10

Vesting of property

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:

- (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.

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.

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.

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
- (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.

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.

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.

See Administration of Estates Bill 2009 cl 206.

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).

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.

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 10-8³ apply notwithstanding the relevant provision in the jurisdiction that deals with the vesting of trust property [in Queensland, *Trusts Act 1973* (Qld), section 16].

See **Administration of Estates Bill 2009 cl 203(4)**.

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.

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 7-11,⁴ 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

³ See Administration of Estates Bill 2009 cl 203(1)–(3).

⁴ 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.

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 7-14⁵ or Recommendation 7-15,⁶ 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.

See Administration of Estates Bill 2009 cl 205(1), (3).

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:

- (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 7-17,⁷ other than because of the

⁵ 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.

⁶ 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.

⁷ 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.

operation of the provision that gives effect to Recommendation 38-3,⁸ 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).

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:

- (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 7-9,⁹ 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

⁸ 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.

⁹ 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.

- (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).

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.

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.

See Administration of Estates Bill 2009 cl 205(9).

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.

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.

See Administration of Estates Bill 2009 cl 201.

CHAPTER 11

Rights and duties of a personal representative

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.

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:

- (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.

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:

- (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:

- (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).

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.

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.

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.

See Administration of Estates Bill 2009 cl 429(3), (5)

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.
- 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.

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.

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.
- 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.

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).

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.

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:

- (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.

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.

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.

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; 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.

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).

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:

- (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.

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.

See Administration of Estates Bill 2009 cll 408, 409.

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.

CHAPTER 12

Powers of a personal representative

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
- (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.

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.

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.

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:

- (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.

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.
- 12-7 The model legislation should not include a provision to the effect of section 83 of the *Probate and Administration Act 1898* (NSW).
- 12-8 The model legislation should not include a provision to the effect of section 142 of the *Administration Act 1903* (WA).

CHAPTER 13

Personal representatives as trustees

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.

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).

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).

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.

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).

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).

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).

CHAPTER 14

The liability of a personal representative

- 14-1 The model legislation should include a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld), except that the model provision:
- (a) should refer to a personal representative who ‘fails’ to perform his or her duties, instead of the current reference in section 52(2) of the *Succession Act 1981* (Qld) to a personal representative who ‘neglects’ to perform his or her duties; and
 - (b) should be expressed to apply in respect of a failure to perform any of the duties of a personal representative, and not be restricted to a failure to perform any of the statutory duties imposed by the model legislation.

See Administration of Estates Bill 2009 cl 404.

- 14-2 The model legislation should not include a provision to the effect of section 52A of the *Succession Act 1981* (Qld).
- 14-3 Those jurisdictions that have a provision to the effect of section 52A of the *Succession Act 1981* (Qld) should repeal their respective provisions.
- 14-4 The model legislation should not include a provision to the effect of section 84 of the *Probate and Administration Act 1898* (NSW).
- 14-5 The States and Territories should include in their court rules a provision to the effect of rule 643 of the *Uniform Civil Procedure Rules 1999* (Qld).
- 14-6 The model legislation should not include a provision prescribing the circumstances in which an attorney-administrator may pay or transfer the balance of an estate to the foreign principal and be discharged from further liability.

CHAPTER 15

Assets for the payment of debts

- 15-1 The model legislation should include a provision to the general effect of section 56 of the *Succession Act 1981* (Qld), and provide that:
- (a) the following property is an asset for the payment of the debts of a deceased person's estate:
 - (i) property of the deceased person that, on the deceased's death, vests in his or her executor or the public trustee (or the statutory equivalent); and
 - (ii) property to which the deceased person's personal representative becomes entitled, in the capacity of personal representative, after the deceased's death;
 - (b) any disposition by the deceased's will that is inconsistent with the provision that gives effect to Recommendation 15-1(a) is void as against creditors of the estate, and the court may, if necessary, administer the property for the payment of debts; and
 - (c) the model provision does not affect the rights of a mortgagee or other encumbrancee.

See Administration of Estates Bill 2009 cl 500.

- 15-2 Because the model legislation provides that a deceased person is taken to be entitled, at his or her death, to any interest in property in relation to which a disposition contained in the deceased's will operates as an exercise of a general power of appointment, it is not necessary for the model legislation to provide that, if a deceased person's will, in exercise of a general power of appointment, disposes of property, that property is to be assets for the payment of the deceased's debts. Such property is an asset for the payment of debts as the result of the combined effect of the provisions giving effect to Recommendations 10-1, 10-18 and 15-1.

See Administration of Estates Bill 2009 cll 200, 201, 500(1)(a).

CHAPTER 16

Payment of debts in an insolvent estate

Inclusion of provisions dealing with the administration of insolvent estates

- 16-1 The model legislation should provide for the administration of an insolvent estate that is not being administered under the provisions of the *Bankruptcy Act 1966* (Cth).
- 16-2 The model provisions should apply where a deceased person's estate is insufficient to pay, in full, the funeral, testamentary and administration expenses and other liabilities payable out of the deceased's estate.

See Administration of Estates Bill 2009 cl 511, sch 3 dictionary (definition of 'debts').

Importation into the model legislation of various rules from the Bankruptcy Act 1966 (Cth)

- 16-3 The model legislation should provide that, if the estate of a deceased person is insufficient to pay, in full, the funeral, testamentary and administration expenses and other liabilities payable out of the deceased's estate, the same rules shall prevail and be observed as to:
- (a) the respective rights of secured and unsecured creditors;
 - (b) debts and liabilities provable;
 - (c) the valuation of annuities and future and contingent liabilities; and
 - (d) the priorities of debts and liabilities;

as may be in force at the death of the deceased under the provisions of the *Bankruptcy Act 1966* (Cth) that apply to the administration of the estates of deceased persons in bankruptcy.

See Administration of Estates Bill 2009 cl 512(1), (4).

Adaptation of rules imported from the Bankruptcy Act 1966 (Cth)

- 16-4 The model legislation should provide that, in the application of the relevant provisions of the *Bankruptcy Act 1966* (Cth), a reference to:
- (a) the date of the order for administration under Part XI; or

- (b) the date on which the administration under Part XI is deemed to have commenced;

is taken to be a reference to the date of the deceased's death.

See Administration of Estates Bill 2009 cl 512(3)(a).

Demands for unliquidated damages

- 16-5 The model legislation should provide that a demand, in respect of which proceedings are maintainable against the deceased's estate, is provable in the administration of the estate, despite being a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

See Administration of Estates Bill 2009 cl 512(2).

Funeral, testamentary and administration expenses

- 16-6 The model legislation should not be expressed to give overall priority to the payment of funeral, testamentary and administration expenses, which should be payable in accordance with the priority given to those expenses by the *Bankruptcy Act 1966* (Cth).

See Administration of Estates Bill 2009 cl 512(1).

Crown debts

- 16-7 The model legislation should include a provision to the effect of section 4(2) of the *Succession Act 1981* (Qld), and provide that the Act binds the Crown not only in right of the particular State or Territory but also, to the extent that the legislative power of the Parliament permits, the Crown in all its other capacities.

See Administration of Estates Bill 2009 cl 106.

Abolition of the common law priority of specialty and judgment debts

- 16-8 The model legislation should not include any of the provisions found in the administration legislation of the States or Territories that were enacted to abolish the common law priorities in relation to the payment of specialty and judgment debts.

Personal representative's right to prefer creditors and right of retainer

- 16-9 Subject to Recommendation 16-10, the model legislation should provide that:
- (a) a personal representative's right to prefer creditors and a personal representative's right of retainer are abolished; and

- (b) a personal representative:
 - (i) must pay the debts of the deceased person's estate rateably according to the priority required by law; and
 - (ii) must not exercise any right to give preference as between creditors standing in equal degree or prefer his or her own debt by reason of being the personal representative.

See Administration of Estates Bill 2009 cll 513(1)–(2).

16-10 The model legislation should allow a limited form of preference and retainer by the inclusion of a provision to the effect of section 58(2) of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cl 513(3)–(4).

CHAPTER 17

Payment of debts in a solvent estate

Model statutory order for application of property towards the discharge of debts in a solvent estate

17-1 The model legislation should include a provision to the effect of section 55 of the *Succession Act 1981* (Qld) so that a reference, in the model provisions dealing with the payment of debts in a solvent estate, to the 'residuary estate' means:

- (a) if the deceased person left a will:
 - (i) property in the deceased's estate that is not effectively disposed of by the deceased's will; and
 - (ii) property in the deceased's estate that is not specifically given by the deceased's will, but is included (either by a specific or general description) in a residuary disposition; or
- (b) if the deceased person did not leave a will, the whole of the deceased's estate.

See Administration of Estates Bill 2009 sch 3 dictionary (definition of 'residuary estate').

17-2 The model statutory order for the application of property towards the payment of debts in a solvent estate should generally be based on section 59(1) of the *Succession Act 1981* (Qld) — except for the minor modification of Class 2 and the omission of Class 4 (*donationes mortis causa*). It should provide that, subject to the provisions that give effect to Recommendations 17-6 and 17-7, property is to be applied in the following order:

Class 1: property specifically appropriated or given by will (either by a specific or general description) for the payment of debts; and property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts;

Class 2: property comprising the residuary estate of the deceased person and property in relation to which a disposition in the deceased's will operates under [the *Succession Act 1981* (Qld), section 33J] as the exercise of a general power of appointment;

Class 3: property specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on property given or appointed.

See Administration of Estates Bill 2009 cl s 502(1).

17-3 Although property the subject of a *donatio mortis causa* is not to constitute a discrete class of property within the model statutory order, the model legislation should not prevent proceedings from being brought to recover property the subject of a *donatio mortis causa* where the debts of the estate cannot be paid without recourse to that property.

Rateability

17-4 The model legislation should include a provision to the effect of the first limb of section 59(2) of the *Succession Act 1981* (Qld), and provide that property within each class is to be applied in the discharge of the debts and, if applicable, in the payment of pecuniary legacies rateably according to value.¹⁰

See Administration of Estates Bill 2009 cl 502(2).

Variation of the model statutory order by the expression of a contrary intention

17-5 The model legislation should include a provision to the effect of the first limb of section 59(3) of the *Succession Act 1981* (Qld), and provide that, if the deceased left a will, the order in which the estate is to be applied towards the discharge of debts, and the incidence of rateability as between different properties within each class, may be varied by a contrary intention appearing in the will.

See Administration of Estates Bill 2009 cl 502(4).

Locke King's Act provisions

17-6 Subject to Recommendations 17-9 and 18-5,¹¹ the model legislation should include a provision, to the effect of section 61(1) of the *Succession Act 1981* (Qld), that:

(a) applies if, on a person's death:

¹⁰ The inclusion of a provision to the effect of the second limb of s 59(2) of the *Succession Act 1981* (Qld) is recommended in Chapter 18 of this Report: see Recommendation 18-3 below.

¹¹ Recommendation 18-5 deals with the abolition of the rule in *Lutkins v Leigh* (1734) Cases T Talbot 53; 25 ER 658.

- (i) the person is entitled to real or personal property that is subject to any debt, whether by way of mortgage, charge or otherwise, legal or equitable, including a lien for unpaid purchase money (the '*encumbered property*'); and
- (ii) there is no Class 1 property in the person's estate;
- (b) provides that the encumbered property is, as between the different persons claiming through the deceased person, primarily liable for the debt or charge to which the encumbered property is subject and each part of the encumbered property, according to its value, is to bear a proportionate part of the debt or charge to which the encumbered property is subject; and
- (c) is subject to a contrary intention that appears in the deceased's will.

See Administration of Estates Bill 2009 cl 506.

17-7 The model legislation should include a further provision to clarify the effect of creating Class 1 property on the application of property towards the payment of a secured debt. The model provision should:

- (a) apply if, on a person's death:
 - (i) the person is entitled to property that is encumbered property as described in Recommendation 17-6(a)(i); and
 - (ii) there is Class 1 property in the person's estate;
- (b) provide that the Class 1 property must be applied rateably towards discharging the debt or charge to which the encumbered property is subject and the deceased's unsecured debts;
- (c) provide that, if the Class 1 property is not sufficient to discharge the debt or charge to which the encumbered property is subject:
 - (i) the encumbered property is, as between the different persons claiming through the deceased person, primarily liable for the payment of so much of the debt or charge that remains after the application of the Class 1 property; and
 - (ii) each part of the encumbered property, according to its value, is to bear a proportionate part of the debt or charge; and
- (d) provide that the provision is subject to a contrary intention that appears in the deceased's will.

See Administration of Estates Bill 2009 cl 507.

Effect of a general direction or disposition for the payment of debts

17-8 The model legislation should include a provision, based on the second limb of section 59(3) and on section 61(2) of the *Succession Act 1981* (Qld), that provides that the appearance of either or both of the following in a will does not constitute the estate or the residuary estate as Class 1 property, and is not a contrary intention for the purposes of the provisions that give effect to Recommendations 17-2, 17-6 and 17-7:

- (a) a general direction, charge or trust for the payment of debts, or of all the debts of the deceased, out of the estate or the residuary estate; or
- (b) a disposition of the estate or the residuary estate after, or subject to, the payment of debts.

See Administration of Estates Bill 2009 cl 503.

17-9 The model legislation should provide that nothing in the provisions referred to in Recommendations 17-6 and 17-7 affects the right of a person entitled to the debt or charge to obtain payment or satisfaction of the debt or charge out of the other property of the deceased person or otherwise.

See Administration of Estates Bill 2009 cl 509.

CHAPTER 18

Payment of legacies and devises

Payment of pecuniary legacies

18-1 The model legislation should include a provision to the effect of section 60 of the *Succession Act 1981* (Qld), and provide that, subject to a contrary intention appearing in the will:

- (a) pecuniary legacies must be paid out of the property comprised in Class 2 of the model statutory order after the discharge of the debts, or such part of the debts, that are payable out of that property; and
- (b) to the extent that the property comprised in Class 2 is insufficient to pay the pecuniary legacies, the pecuniary legacies must abate proportionately.

See Administration of Estates Bill 2009 cl 504(1)–(2), (4).

18-2 The model legislation should include a definition of ‘pecuniary legacy’ to the effect of that found in section 5 of the *Succession Act 1981* (Qld), and provide that ‘pecuniary legacy’ includes:

- (a) an annuity;
- (b) a general legacy;
- (c) a demonstrative legacy, to the extent that it is not discharged out of the specific property on which it is charged; and
- (d) any other general direction by a testator for the payment of an amount, including, for example, if a legacy is directed to be paid free of all duties, the payment of any duties to which the legacy is subject.

See Administration of Estates Bill 2009 sch 3 dictionary (definition of ‘pecuniary legacy’).

Demonstrative legacies

18-3 The model legislation should include a provision that gives effect to the second limb of section 59(2) of the *Succession Act 1981* (Qld), and provide that, if a specific property must be applied in the discharge of the debts and a legacy is charged on the specific property:

- (a) the legacy and the specific property must be applied rateably according to value; and

- (b) for the purpose of paragraph (a), the value of the specific property must be reduced by the amount of the legacy charged on it.¹²

See Administration of Estates Bill 2009 cl 502(3).

Contrary intention

- 18-4 The provision in the model legislation about the payment of pecuniary legacies should be subject to a contrary intention appearing in the deceased person's will.

See Administration of Estates Bill 2009 cl 504(3).

Abolition of the rule in *Lutkins v Leigh*

- 18-5 The model legislation should provide that:

- (a) the rule in *Lutkins v Leigh*¹³ is abolished; and
- (b) if a deceased person's will, for the purposes of either of the model provisions dealing with the effect of Locke King's legislation:¹⁴
- (i) expresses a contrary intention; and
- (ii) as a result of the contrary intention, all or part of the debt or charge to which encumbered property is subject is payable out of Class 2 property;

the person to whom the encumbered property is specifically given by will, or appointed by will in the exercise of a general power of appointment, is not required to restore to Class 2 property any amount applied from Class 2 property towards the discharge of the debt or charge to which the encumbered property is subject.

See Administration of Estates Bill 2009 cl 508.

Payment of interest on general legacies

- 18-6 The model legislation should include a provision based on section 52(1)(e) of the *Succession Act 1981* (Qld) and provide that a general legacy carries interest at the relevant rate:

- (a) from the first anniversary of the deceased person's death until the general legacy is paid; or

¹² The inclusion of a provision giving effect to the first limb of s 59(2) of the *Succession Act 1981* (Qld) is recommended in Chapter 17: see Recommendation 17-4 above.

¹³ (1734) Cases T Talbot 53; 25 ER 658.

¹⁴ See Recommendations 17-6 and 17-7 above.

- (b) if, under the terms of the will, the legacy is payable at a future date — from that date until the general legacy is paid;

See Administration of Estates Bill 2009 cl 510(1)–(2).

18-7 The provision that gives effect to Recommendation 18-6 should be subject to a contrary intention that appears in the will about any of the following:

- (a) whether interest is payable on the general legacy;
- (b) the time from when interest is payable on the general legacy; and
- (c) the rate of interest that is payable on the general legacy.

See Administration of Estates Bill 2009 cl 510(3).

18-8 The relevant rate for Recommendation 18-6 should be the rate that is 2 per cent above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.

See Administration of Estates Bill 2009 cl 510(4).

18-9 The model legislation should not preserve any of the exceptions that apply under the general law under which certain general legacies carry interest from the date of the deceased's death, rather than from when they are payable, and therefore should not include a provision to the effect of the second limb of section 52(1A) of the *Succession Act 1981* (Qld).

18-10 Individual jurisdictions should, if necessary, amend their trustee legislation so that a trustee's power to apply the income of property in which a minor beneficiary has a contingent interest towards the maintenance of the minor does not depend on the legacy carrying interest under the general law for the maintenance of the minor.

CHAPTER 19

Partition of land

- 19-1 The model legislation should not include a provision to deal with the partition of land.

CHAPTER 20

Obtaining the court's advice or directions

- 20-1 The model legislation should include provisions to enable a personal representative or trustee to apply to the court for advice or directions.
- 20-2 The model provisions should be based on sections 96 and 97 of the *Trusts Act 1973* (Qld) and should:
- (a) refer to an application for 'advice or directions' (rather than merely to 'directions');
 - (b) apply to a personal representative and a trustee;
 - (c) refer to property in the deceased person's estate and property that is held on trust for a person because of his or her beneficial interest in the deceased person's estate; and
 - (d) provide that the model provision based on section 96 of the *Trusts Act 1973* (Qld) does not limit any other right a personal representative or trustee may have to apply for the court's advice or directions under any other law.

See Administration of Estates Bill 2009 cll 412–414.

- 20-3 It is not necessary for the model provision based on section 96 of the *Trusts Act 1973* (Qld) to provide that the hearing may be attended by all persons interested in the application or such of them as the court considers expedient.
- 20-4 The model legislation should not include a provision to the effect of section 57 of the *Probate and Administration Act 1898* (NSW).

CHAPTER 21

Distribution after notice

Notice of intended distribution

21-1 Subject to the following matters, the model legislation should include a provision to the effect of section 67(1)–(3) of the *Trusts Act 1973* (Qld):

- (a) the model provision should apply to personal representatives and trustees and refer to property in the deceased person's estate and property that is held on trust for a person because of his or her beneficial interest in the deceased person's estate;
- (b) advertisement should be by way of:
 - (i) a notice published:
 - (A) in a newspaper circulating throughout the jurisdiction and sold at least once a week; or
 - (B) on a dedicated, publicly searchable section of the website of the Supreme Court of the jurisdiction; and
 - (ii) such other notices as would be directed by the Supreme Court to be given in an administration action;
- (c) the period of time for submitting a claim to the personal representative or trustee should be at least two months;
- (d) the provision that is based on section 67(3) of the *Trusts Act 1973* (Qld) should refer to claims, whether formal or not, of which the personal representative or trustee has notice, whether as a result of such claims being filed in response to the published notice or otherwise; and
- (e) the model provision should state that it does not limit any protection available to the personal representative or trustee under any other law.

See Administration of Estates Bill 2009 cll 413, 415(1)–(8).

21-2 For the purpose of the provision that gives effect to Recommendation 21-1, 'personal representative' should not be restricted to a personal representative appointed under a grant of probate or letters of administration, but should be defined to include a person administering a deceased person's estate without a grant.

See Administration of Estates Bill 2009 cl 415(11).

- 21-3 The provisions in the trustee legislation of the Australian States and Territories that deal with notice of intended distribution should be amended to be consistent with the provision referred to in Recommendation 21-1.
- 21-4 The model legislation should not include a provision to the effect of section 47A of the *Administration Act 1903* (WA), which provides that a personal representative is not under any obligation to inquire as to the existence of an ex-nuptial child and which protects a personal representative who distributes an estate to the exclusion of an ex-nuptial child of whose existence he or she did not have notice at the time of distribution.
- 21-5 The provisions in the status of children legislation in the Northern Territory, Queensland, South Australia, Tasmania and Victoria that correspond to section 47A of the *Administration Act 1903* (WA) should be repealed.

CHAPTER 22

The right to follow assets and the barring of claims

Remedies against a person to whom the property has been wrongfully distributed

22-1 The model legislation should include:

- (a) a provision, to the effect of section 67(4)(a) of the *Trusts Act 1973* (Qld), that states that the provisions of the model legislation dealing with the giving of a notice of intended distribution do not affect the right of a person to enforce a remedy in respect of the person's claim against a person to whom a distribution of the estate or of trust property has been made; and
- (b) a further provision to the effect that the provision that gives effect to Recommendation 22-1(a) does not limit any defence that the person to whom the wrongful distribution has been made may have:
 - (i) under the model provision that is based on section 109(3) of the *Trusts Act 1973* (Qld);¹⁵ or
 - (ii) under any Act or at law or in equity.

See Administration of Estates Bill 2009 cl 415(9)–(10).

22-2 The model legislation should include provisions, based generally on section 109(1) and (2) of the *Trusts Act 1973* (Qld), that:

- (a) apply if a personal representative or trustee wrongfully distributes the estate of a deceased person or trust property;
- (b) provide that a person who suffers loss because of the wrongful distribution of trust property may enforce the same remedies against the trustee and against any person to whom the distribution has been made as if a personal representative had wrongfully distributed the estate of a deceased person; and
- (c) provide that a person who suffers loss because of the wrongful distribution:
 - (i) may bring a proceeding to enforce a remedy against either or both of the following:

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See Recommendation 22-5(a) below.

- (A) the personal representative or trustee who made the wrongful distribution;
 - (B) a person to whom the estate or trust property has been wrongfully distributed;
- (ii) is not required to exhaust all his or her remedies against the personal representative or trustee before proceeding against a person to whom the estate or trust property has been wrongfully distributed; and
 - (iii) may bring proceedings at the same time against the personal representative or trustee and a person to whom the estate or trust property has been wrongfully distributed, but a proceeding that is brought against a person to whom a wrongful distribution has been made, but not also against the personal representative or trustee, requires the court's leave.

See Administration of Estates Bill 2009 cll 422, 423, 424(1)–(5).

Contribution from personal representative or trustee

22-3 The model legislation should include a provision that:

- (a) applies if a person who suffers loss because of the wrongful distribution of an estate or trust property brings a proceeding against a person to whom a wrongful distribution has been made; and
- (b) provides that the person to whom the wrongful distribution has been made:
 - (i) is entitled to contribution and indemnity from the personal representative or trustee in the amount or on the terms that the court considers appropriate; and
 - (ii) may join the personal representative or trustee as a party to the proceeding brought against him or her.

See Administration of Estates Bill 2009 cl 425.

Judgment limited to amount of wrongful distribution

22-4 The model legislation should provide that, if a person to whom a wrongful distribution has been made has received the distribution in good faith:

- (a) the judgment against the person must not be more than the amount of the distribution made to the person; and

- (b) in deciding whether the amount of the judgment is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

See Administration of Estates Bill 2009 cl 426.

Defences

22-5 The model legislation should:

- (a) include a provision to the effect of section 109(3) of the *Trusts Act 1973* (Qld), and provide that if:
 - (i) a proceeding is brought against a person to whom a wrongful distribution has been made; and
 - (ii) the person received the distribution in good faith and has so altered his or her position in reliance on the correctness of the distribution that, in the court's opinion, it would be inequitable to enforce the remedy;

the court may make any order it considers to be just in all the circumstances; and

- (b) provide that the provision that gives effect to Recommendation 22-5(a) does not limit any other defence, under an Act or at law or in equity, that may be available to the person to whom the wrongful distribution has been made.

See Administration of Estates Bill 2009 cl 424(6)–(7).

The barring of claims

22-6 The model legislation should include provisions to the effect of section 68 of the *Trusts Act 1973* (Qld) that:

- (a) apply to personal representatives and trustees and refer to the estate of a deceased person and property held on trust for a person because of his or her beneficial interest in the deceased person's estate;
- (b) apply where a personal representative or trustee 'does not accept a claim'; and
- (c) provide that the court may make an order 'barring the claim for all purposes'.

See Administration of Estates Bill 2009 cll 416–421.

- 22-7 The model legislation should not include provisions to the effect of section 93(3)–(6) of the *Probate and Administration Act 1898* (NSW). Further, those subsections, and the similar provisions in the public trustee and trustee company legislation of the other Australian jurisdictions that enable claims against the public trustee or a trustee company to be barred without a court order, should be repealed.

CHAPTER 23

Survivorship and presumptions of death

The general rule

- 23-1 The model survivorship provisions should include a provision to the general effect of section 216(2)(a) of the *Law of Property Act* (NT) and section 120(a) of the *Property Law Act 1969* (WA).
- 23-2 The provision referred to in Recommendation 23-1 should apply unless a contrary intention is shown by the person's will.
- 23-3 For the purpose of the provision that gives effect to Recommendation 23-1, 'property' is to be defined to include property in relation to which a person holds a power of appointment.

See Administration of Estates Bill 2009 cl 801 [344D].

Substitutional dispositions

- 23-4 The model survivorship provisions should include a provision dealing with substitutional dispositions, which applies if:
- (a) under a will, trust or other disposition, a disposition of property to a person (the '*possible beneficiary*') is dependent on the possible beneficiary surviving someone else (the '*specified person*'); and
 - (b) under the will, trust or other disposition, there is a further disposition of the property to another person (the '*substitute beneficiary*') if the possible beneficiary does not survive the specified person, either at all or by a stated period; and
 - (c) apart from the model provision, the further disposition to the substitute beneficiary would fail because of lack of proof that the possible beneficiary did not survive the specified person, either at all or by the stated period.
- 23-5 The provision that gives effect to Recommendation 23-4 should provide that:
- (a) for the purposes of the further disposition to the substitute beneficiary, the possible beneficiary is taken not to have survived the specified person; and
 - (b) the provision may be re-applied with necessary changes.

- 23-6 The provision that gives effect to Recommendation 23-4 should be expressed to apply unless a contrary intention is shown by the will or trust or other disposition.

See Administration of Estates Bill 2009 cl 801 [344E].

Property the subject of a donatio mortis causa

- 23-7 The model survivorship provisions should include a provision to the general effect of section 216(2)(b) of the *Law of Property Act* (NT) and section 120(b) of the *Property Law Act 1969* (WA).

- 23-8 The provision that gives effect to Recommendation 23-7 should not be subject to the expression of a contrary intention by the donor of the property, although it is not necessary for it to provide expressly that it is not subject to the expression of a contrary intention.

See Administration of Estates Bill 2009 cl 801 [344F].

Proceeds of a life insurance or accident insurance policy

- 23-9 The model survivorship provisions should include a provision to the general effect of section 216(2)(c) of the *Law of Property Act* (NT) and section 120(c) of the *Property Law Act 1969* (WA).

- 23-10 The provision that gives effect to Recommendation 23-9 should apply unless a contrary intention is shown by the instrument governing the distribution of the proceeds under the policy of life or accident insurance.

See Administration of Estates Bill 2009 cl 801 [344G].

Property owned exclusively by the deceased persons as joint tenants

- 23-11 The model survivorship provisions should include a provision to the general effect of section 216(2)(d) of the *Law of Property Act* (NT) and section 120(d) of the *Property Law Act 1969* (WA).

- 23-12 The provision that gives effect to Recommendation 23-11 should not be subject to the expression of a contrary intention by any joint tenant, although it is not necessary for it to provide expressly that it is not subject to the expression of a contrary intention.

See Administration of Estates Bill 2009 cl 801 [344H].

Property that is left to the survivor of two or more persons

- 23-13 The model survivorship provisions should include a provision to the general effect of section 216(2)(e) of the *Law of Property Act* (NT) and section 120(e) of the *Property Law Act 1969* (WA).

23-14 The provision referred to in Recommendation 23-13 should apply unless a contrary intention is shown by the will, trust or other disposition.

See Administration of Estates Bill 2009 cl 801 [344I].

Property the subject of a power of appointment that is conferred on the survivor of two or more persons

23-15 The model survivorship provisions should include a provision to the general effect of section 216(2)(f) of the *Law of Property Act* (NT) and section 120(f) of the *Property Law Act 1969* (WA).

23-16 The provision referred to in Recommendation 23-15 should:

- (a) be expressed to apply where a power of appointment could have been exercised by any of two or more persons, whether by operation of the relevant anti-lapse provision or otherwise; and
- (b) apply unless a contrary intention is shown by the instrument creating the power.

See Administration of Estates Bill 2009 cl 801 [344J].

Property that is left to the survivor of two or more of the testator's issue

23-17 The model survivorship provisions should include a provision to the general effect of section 216(2)(g) of the *Law of Property Act* (NT) and section 120(g) of the *Property Law Act 1969* (WA), except that the model provision should:

- (a) be expressed to apply where property is disposed of, or appointed, by will to the survivor of two or more of the testator's 'issue'; and
- (b) provide that, for the purpose of the anti-lapse provision of the particular jurisdiction, the disposition or appointment takes effect as if it were in equal shares to those of the testator's issue who so die and leave 'issue' who survive the testator by 30 days.

23-18 The provision that is referred to in Recommendation 23-17 should apply unless a contrary intention is shown by the testator's will.

See Administration of Estates Bill 2009 cl 801 [344K].

Application of the model survivorship provisions if the persons who die include the testator and issue of the testator

23-19 The model survivorship provisions should include a provision to the general effect of section 216(2)(h) of the *Law of Property Act* (NT) and section 120(h) of the *Property Law Act 1969* (WA), except that it should not contain provisions to the effect of paragraphs (i) and (ii) of those sections.

23-20 The provision referred to in Recommendation 23-19 should apply unless a contrary intention is shown by the testator's will.

See Administration of Estates Bill 2009 cl 801 [344L].

A presumption of last resort: survivorship of the younger

23-21 The model survivorship provisions should include a provision to the general effect of section 217 of the *Law of Property Act* (NT) and section 120(i) of the *Property Law Act 1969* (WA).

See Administration of Estates Bill 2009 cl 801 [344M].

The circumstances in which the model survivorship provisions should apply

23-22 The provisions recommended above should apply where:

- (a) two or more persons have died at the same time or in circumstances that give rise to reasonable doubts as to which of them survived the other or others; or
- (b) two or more persons have died at the same time.

See Administration of Estates Bill 2009 cl 801 [344C(1)].

Application of model survivorship provisions to presumed and inferred deaths

23-23 The model survivorship provisions should apply not only in the case of actual deaths, but also where a court of competent jurisdiction of the Commonwealth or a State or Territory:

- (a) presumes a person to have died on the basis of the common law presumption of death following an absence of seven years or more and makes a declaration to that effect; or
- (b) the court has otherwise inferred from the circumstances that a person has died.

See Administration of Estates Bill 2009 cl 801 [344C(1), (3)].

The common law presumption of death

23-24 There should be no change to the common law presumption of death.

23-25 The model survivorship provisions should not define the common law presumption of death.

Benjamin orders

23-26 The model survivorship provisions should include a provision to the effect of section 218 of the *Law of Property Act* (NT) to highlight the availability of Benjamin orders.

See Administration of Estates Bill 2009 cl 801 [344N].

Application of the model survivorship provisions

23-27 The model survivorship provisions should include a provision to the effect of section 214 of the *Law of Property Act* (NT), which should be expressed to apply to:

- (a) the deaths of persons who die after the commencement of the provisions; and
- (b) the deaths of persons that are inferred or presumed after the commencement of the provisions.

See Administration of Estates Bill 2009 cl 801 [344C].

Location of the model survivorship provisions

23-28 The model survivorship provisions should be located in the property law legislation of the particular jurisdiction, rather than in the model legislation.

See Administration of Estates Bill 2009 cll 800, 801.

23-29 For the purpose of the model survivorship provisions, 'property' should be defined to include real and personal property and any estate or interest in the property and any thing in action and any other right.

See Administration of Estates Bill 2009 cl 801 [344A].

CHAPTER 24

The court's jurisdiction to make a grant on the presumption of death

24-1 The model legislation should ensure that the court has jurisdiction to grant probate of the will, or letters of administration of the estate, of a person whose death is inferred or presumed by defining 'deceased person' to include:

- (a) a person whose death is inferred by the court; and
- (b) a person in relation to whom the court declares the common law presumption of death to be satisfied.

See Administration of Estates Bill 2009 cl 301, sch 3 dictionary (definition of 'deceased person').

24-2 The model legislation should include a provision, based on section 40B(2) of the *Probate and Administration Act 1898* (NSW) and section 9B(1)(a) of the *Administration and Probate Act 1929* (ACT), to the effect that, if the court makes a grant on the presumption of death (but not if the deceased's death is inferred), the grant must be expressed to be made on the presumption of death.

See Administration of Estates Bill 2009 cl 310.

24-3 The model legislation should include a provision, based on section 9A(2) of the *Administration and Probate Act 1929* (ACT), to the effect that a grant made on an inference or presumption of death is valid even though it may subsequently be established that the person whose death was inferred or presumed was living when the grant was made.

See Administration of Estates Bill 2009 cl 309.

24-4 The model legislation should include a provision, based generally on section 40B(3) of the *Probate and Administration Act 1898* (NSW), and:

- (a) provide that the court may impose conditions on a grant made on an inference or presumption of death; and
- (b) give, as an example of such a condition, that the personal representative is not to distribute any part of the estate to a beneficiary unless the beneficiary gives an undertaking or security to restore or return the distributed property or its value to the person entitled if the grant is subsequently revoked because the person was alive when the grant was made.

See Administration of Estates Bill 2009 cl 311(1).

- 24-5 The model legislation should include a provision, based generally on section 16(7) of the *Administration and Probate Act* (NT), to the effect that, if the court imposes a condition on a grant made on an inference or presumption of death, the court may revoke or vary the condition at any time on the application of the personal representative or a person affected by the condition.

See Administration of Estates Bill 2009 cl 311(2).

CHAPTER 25

The revocation of grants and the effect of revocation

Revocation of grants

25-1 The model legislation should not include any provision, in addition to the provisions based on section 6 of the *Succession Act 1981* (Qld), to deal with the court's power to revoke a grant or to remove an executor or administrator.

Effect of revocation

25-2 Subject to Recommendation 25-3, the model legislation should include provisions to the effect of section 53 of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cll 366, 368–371.

25-3 The model provision that is based on section 53(1) of the *Succession Act 1981* (Qld) should provide that the person is 'not liable' for the relevant acts, rather than that the person is to be 'indemnified and protected' in respect of the relevant acts.

See Administration of Estates Bill 2009 cl 366(2).

Revocation of grant made in respect of a living person

25-4 The model legislation should include a provision to the effect of section 40C of the *Probate and Administration Act 1898* (NSW).

See Administration of Estates Bill 2009 cl 372.

CHAPTER 26

The survival of causes of action

Survival of causes of action

26-1 Subject to Recommendation 26-2, the model legislation should include a provision to the effect of section 66(1) of the *Succession Act 1981* (Qld), so that, on the death of a person, subject to the exceptions contained in the separate legislation of the jurisdictions dealing with the survival of specific causes of action, all causes of action subsisting against or vested in the person survive against or, as the case may be, for the benefit of, the person's estate.

See Administration of Estates Bill 2009 cl 600.

26-2 The model provision that gives effect to Recommendation 26-1 should not deal with:

- (a) any exceptions regarding specific causes of action that do not survive the death of a person (presently found in section 66(1) of the *Succession Act 1981* (Qld)); or
- (b) the damages that are recoverable when a cause of action survives for the benefit of an estate (presently found in section 66(2) and (2A) of the *Succession Act 1981* (Qld)).

26-3 The model legislation should include provisions to the effect of section 66(3)–(5) of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cll 601–603.

Proceedings against personal representative or beneficiary

26-4 The model legislation should include a provision to the general effect of section 66(6) of the *Succession Act 1981* (Qld), except that it should provide that, if a cause of action survives against the estate of a deceased person:

- (a) the claimant may bring a proceeding in relation to the cause of action against any or all of the following:
 - (i) the personal representative of the deceased person's estate;
 - (ii) any beneficiary of the estate to whom a distribution of the estate has been made;

- (b) the claimant is not required to exhaust all his or her remedies against the personal representative before proceeding against a beneficiary to whom a distribution of the estate has been made; and
- (c) the claimant may bring proceedings against the personal representative and a beneficiary at the same time, but a proceeding that is brought against a beneficiary, and not also against the personal representative, requires the court's leave.

See Administration of Estates Bill 2009 cl 606.

Beneficiary's entitlement to contribution or indemnity

26-5 The model legislation should include a provision to the effect of section 66(7) of the *Succession Act 1981* (Qld), except that the model legislation should also provide that:

- (a) if a proceeding is brought by a claimant against a beneficiary to whom any part of the estate has been distributed, the beneficiary:
 - (i) is entitled to contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate; and
 - (ii) may join the personal representative as a party to the proceeding that has been brought against the beneficiary; and
- (b) if a proceeding is brought against a beneficiary by another beneficiary claiming an indemnity or contribution, the beneficiary against whom the proceeding is brought (the '*respondent beneficiary*'):
 - (i) is entitled to:
 - (A) an indemnity from any other beneficiary of the estate to whom a distribution has been made who ranks in lower degree than the respondent beneficiary for the payment of the debts of the estate;
 - (B) contribution from any other beneficiary of the estate to whom a distribution has been made who ranks in equal degree with the respondent beneficiary for the payment of the debts of the estate; and
 - (C) contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate; and

- (ii) may join such a beneficiary or the personal representative as a party to the proceeding that has been brought against the respondent beneficiary.

See Administration of Estates Bill 2009 cl 607.

Ranking of beneficiaries

26-6 The model legislation should provide that, for the purpose of the model provision dealing with contribution and indemnity between beneficiaries:

- (a) a beneficiary ranks in equal degree to another beneficiary if each beneficiary is a beneficiary of property that is in the same class under the provision that gives effect to Recommendation 17-2;
- (b) a beneficiary (the '*first beneficiary*') ranks in lower degree to another beneficiary if, under the provision that gives effect to Recommendation 17-2, the property of which the first beneficiary is a beneficiary must be used for the payment of debts before the property of which the other beneficiary is a beneficiary; and
- (c) if a beneficiary is a beneficiary of property that is in a particular class of property and of other property that is in a different class of property, the beneficiary may be ranked in more than one way against another beneficiary for the purposes of contribution and indemnity.

See Administration of Estates Bill 2009 cl 608.

Defences available to a beneficiary

26-7 The model legislation should include:

- (a) a provision to the general effect of section 66(8) of the *Succession Act 1981* (Qld), except that the model provision should omit the words 'the beneficiary may plead equitable defences'; and
- (b) a further provision that states that the provision that gives effect to Recommendation 26-7(a) does not limit any other defence available, under an Act or at law or in equity, to the beneficiary to whom the distribution has been made.

See Administration of Estates Bill 2009 cl 609.

Maximum amount of judgment

26-8 The model legislation should include a provision to the general effect of section 66(9) of the *Succession Act 1981* (Qld) and provide that:

- (a) a judgment against a beneficiary must not be more than the amount of the distribution made to the beneficiary; and
- (b) in deciding whether the amount of the judgment is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

See Administration of Estates Bill 2009 cl 610.

CHAPTER 27

Commission

The court's power to authorise the payment of an amount to a personal representative or trustee for his or her services

27-1 The model legislation should include a provision, based generally on section 68 of the *Succession Act 1981* (Qld), which provides that:

- (a) the court may authorise, out of the estate of a deceased person, the payment to any personal representative or trustee of the estate such amount for the personal representative's or trustee's services as the court considers appropriate;
- (b) the court may attach such conditions to the payment of the amount as it considers appropriate;
- (c) the court may authorise the payment of an amount either periodically or otherwise; and
- (d) for the purpose of this provision, 'estate of a deceased person' includes property held on trust for a person because of his or her beneficial interest in the deceased person's estate.

See Administration of Estates Bill 2009 cll 430–431.

27-2 The model provision in relation to the payment of an amount to a personal representative or trustee for his or her services should not include a provision to the effect of section 70(2)(b) of the *Administration and Probate Act 1919* (SA).

Limited right to indemnity for costs

27-3 The model legislation should include a provision to the general effect of section 86(3) of the *Probate and Administration Act 1898* (NSW) but slightly modified, so that, in the specified circumstances, a personal representative or trustee will be entitled to an indemnity out of the estate in respect of the amount paid or payable to an Australian legal practitioner for his or her charges and disbursements for undertaking executorial duties that are non-professional in nature.

27-4 The provision that gives effect to Recommendation 27-3 should:

- (a) apply if a personal representative renounces the right to payment of an amount for his or her services for any particular 12 month period;

- (b) provide that the personal representative or trustee is entitled to an indemnity out of the estate for the charges and disbursements of a legal practitioner engaged by the personal representative to undertake non-professional work during that 12 month period;
- (c) provide that the amount of the indemnity is to be the lesser of the following amounts:
 - (i) the amount to which the personal representative or trustee would have been entitled as an appropriate amount for his or her services if he or she had undertaken the non-professional work personally and not renounced his or her right to remuneration for the work; and
 - (ii) the amount of the legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale in the jurisdiction.¹⁶

See Administration of Estates Bill 2009 cll 430, 433.

The court's power to review the remuneration of personal representatives and trustees

27-5 Subject to the following modifications, the model legislation should include a provision to the effect of section 86A of the *Probate and Administration Act 1898* (NSW):

- (a) for consistency with Recommendation 27-1, the model provision should refer to 'payment of an amount for services', rather than to 'commission'; and
- (b) to ensure that the court may review and, if necessary, reduce the fees and charges of a public trustee or trustee company that acts as the personal representative or trustee of the estate of a deceased person, the model legislation should provide that the court's power to review may be exercised despite:
 - (i) any provision of a will authorising the charging of the amount; or
 - (ii) any statutory provision authorising the amount charged or proposed to be charged.

See Administration of Estates Bill 2009 cll 430, 432.

¹⁶

This paragraph will need to be adapted if the jurisdiction does not have a relevant professional scale.

CHAPTER 28

Dealings with wills

Production of testamentary documents

28-1 The model legislation should include a provision to the effect of section 150 of the *Probate and Administration Act 1898* (NSW), except that the model provision should:

- (a) refer to 'any document', rather than to 'any paper or writing'; and
- (b) provide that, if a person is required under the provision to answer interrogatories about a testamentary or other document, the person must answer the interrogatories directly and without evasion or resort to technicality.

See Administration of Estates Bill 2009 cl 613.

Concealment of a will

28-2 The model legislation should not include a provision making it an offence for a person to steal or conceal a will.

28-3 The model legislation should include a provision to the effect of section 127 of the *Administration and Probate Act 1929* (ACT), which should include a note that refers to the statutory provisions of the jurisdiction that deal with the criminal offences of stealing and concealing, or interfering with, a will.

See Administration of Estates Bill 2009 cl 614.

CHAPTER 29

Mechanisms to facilitate administration and to minimise the need to obtain a grant

Election to administer a small estate

29-1 The model legislation should include provisions to the general effect of section 110B of the *Administration and Probate Act* (NT), except that:

- (a) the model provisions should refer to a 'professional administrator', rather than to a 'professional personal representative';
- (b) in addition to the requirement that no grant has been made in the jurisdiction of the deceased person's estate, the model legislation should also require that no interstate grant has been made of the deceased person's estate that is effective in the jurisdiction under the provision that gives effect to Recommendation 38-3;
- (c) the provision that is based generally on section 110B(1) of the *Administration and Probate Act* (NT) should be expressed to apply where the professional administrator would otherwise be entitled to apply for a grant or, in the case of the public trustee, an order to administer;
- (d) the provision that is based on section 110B(1)(a) of the *Administration and Probate Act* (NT) should not refer to a specific amount, but should refer instead to the net amount of \$100 000, indexed to annual increases in the consumer price index (the 'prescribed amount');
- (e) the provision that is based on section 110B(2)(d) of the *Administration and Probate Act* (NT) should not refer to 'the testator's last will or an exemplification of the last will', but should refer instead to 'the testator's last will or a certified copy of the testator's last will';
- (f) the model legislation should not require a professional administrator who files an election to administer to give public notice of that fact, and should therefore not include a provision to the effect of section 110B(4) of the *Administration and Probate Act* (NT);
- (g) the provision that is based on section 110B(5) of the *Administration and Probate Act* (NT):
 - (i) should not refer to a specific amount, but should refer instead to an amount that is more than 150 per cent of the prescribed amount; and

- (iii) should provide, in the provision based on section 110B(5)(b), that the professional administrator must apply for a grant or, where applicable, an order to administer;
- (h) the model legislation should not include a provision to the effect of section 110B(6) of the *Administration and Probate Act* (NT).

See Administration of Estates Bill 2009 cll 325–329.

29-2 The model legislation should include provisions to the general effect of section 110C of the *Administration and Probate Act* (NT), except that:

- (a) the model provisions should refer to a ‘professional administrator’, rather than to a ‘professional personal representative’;
- (b) in addition to the requirement that no grant has been made in the jurisdiction of the deceased person’s unadministered estate, the model legislation should also require that no interstate grant has been made of the deceased person’s unadministered estate that is effective in the jurisdiction under the provision that gives effect to Recommendation 38-3;
- (c) the provision that is based generally on section 110C(1) of the *Administration and Probate Act* (NT) should be expressed to apply where the professional administrator would otherwise be entitled to apply for a grant or, in the case of the public trustee, an order to administer;
- (d) the provision that is based on section 110C(1)(b) of the *Administration and Probate Act* (NT) should not refer to a specific amount, but should refer instead to the amount of \$100 000, indexed to annual increases in the consumer price index (the ‘prescribed amount’);
- (e) the provision that is based on section 110C(3) of the *Administration and Probate Act* (NT) should deal only with the effect of the filing of an election to administer on the death of the person to whom representation of the estate was last granted;
- (f) the model legislation should provide additionally that, on the filing of an election to administer because of the incapacity of the person to whom representation of the estate was last granted, the professional administrator is taken to be the administrator of the part of the estate left unadministered as if he or she had been granted letters of administration of the unadministered estate during the incapacity of the person to whom representation was last granted;

- (g) the provision that is based on section 110C(4) of the *Administration and Probate Act* (NT):
 - (i) should not refer to a specific amount, but should refer instead to an amount that is more than 150 per cent of the prescribed amount; and
 - (iii) should provide, in the provision based on section 110C(4)(b), that the professional administrator must apply for a grant of the unadministered estate or, where applicable, an order to administer;
- (h) the model legislation should not include a provision to the effect of section 110C(6) of the *Administration and Probate Act* (NT).

See Administration of Estates Bill 2009 cll 325, 330–333.

29-3 The model legislation should define ‘*professional administrator*’ to mean:

- (a) the public trustee;
- (b) a trustee company within the meaning of the [*insert name of legislation in jurisdiction*]; or
- (c) a legal practitioner.

See Administration of Estates Bill 2009 sch 3 dictionary (definition of ‘professional administrator’).

Administration of small estates without a grant or the filing of an election to administer

29-4 It is unnecessary for the model legislation to include a provision for the administration of small estates without a grant or the filing of an election to administer.

Costs of administering an estate under the authority of an election to administer

29-5 The model legislation should include a provision to the effect of section 110D of the *Administration and Probate Act* (NT), except that the model provision should omit the words ‘as in force immediately before the commencement of this section’, which appear in section 110D(3) of that Act.

See Administration of Estates Bill 2009 cl 334.

Transfer of real property

29-6 Individual jurisdictions should consider implementing provisions to the effect of sections 111 and 112 of the *Land Title Act 1994* (Qld).

Liability and protection of persons acting informally

29-7 The model legislation should include a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld), except that:

- (a) the provision should provide that the relevant person 'is liable to account for estate assets' to the extent prescribed by section 54(1), instead of providing that the person is to be 'charged as executor in the person's own wrong'; and
- (b) the title of the section should be 'Persons acting informally'.

See Administration of Estates Bill 2009 cl 435.

Ratification of acts by personal representative

29-8 The model legislation should include a provision to the effect of section 54(3) of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cl 411.

Payments by third parties without production of a grant

29-9 The model legislation should provide that, if any person holds money or personal property on account of a deceased person not exceeding \$15 000 in value, the person may, without requiring production of probate or letters of administration, pay the money or transfer the property to any of the following persons who has full legal capacity:

- (a) the surviving spouse of the deceased person (which is to be defined to include a person who was in a 'domestic partnership' with the deceased person);
- (b) a child of the deceased person; or
- (c) any other person appearing to be entitled to the property of the deceased person.

29-10 The model legislation should provide that, if a person in good faith exercises the power conferred by the provision that gives effect to Recommendation 29-9, the payment or transfer is a complete discharge to the person of all liability in respect of the money or property so paid or transferred.

29-11 The model legislation should provide that nothing in the provision that gives effect to Recommendations 29-9 and 29-10 is to affect the right of any person who has an entitlement to, or against, the deceased person's estate to enforce a remedy for the person's claim against a person to whom a payment or transfer has been made under the powers conferred by that provision.

See Administration of Estates Bill 2009 cl 434.

CHAPTER 31

Instruments that may be resealed

Grants of probate and letters of administration (including letters of administration granted for special, limited or temporary purposes)

31-1 The model legislation should provide that the court may reseal:

- (a) grants of probate and letters of administration, including letters of administration made for special, limited or temporary purposes;
- (b) where there is an original grant of probate and a further grant of probate that runs concurrently with the original grant — the original grant of probate and any further grant of probate that runs concurrently with it; and
- (b) an exemplification of a grant of probate or letters of administration or such other formal evidence of a grant of probate or letters of administration as is prescribed under the rules.¹⁷

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a), (b) (e), (f), (g)), ‘letters of administration’).

31-2 The resealing of a special, limited or temporary grant should not require the order of a judge or registrar. Those jurisdictions that provide, in their court rules, that a special, limited or temporary grant may not be resealed except by order of a judge or registrar should repeal that particular rule.

Other instruments

31-3 The model legislation should:

- (a) define ‘foreign grant of representation’ in terms similar to the definition of ‘grant of administration’ in the Commonwealth Secretariat Draft Model Bill, and enable an instrument to be resealed if, in the country in which it was issued, it has an effect similar to a grant of probate or administration made in the resealing jurisdiction; and

¹⁷

Note, however, the National Committee’s separate recommendation about the resealing of exemplifications where a grant of double probate has been made: see Recommendation 35-19 below.

- (b) provide that an exemplification of such an instrument or such other formal evidence of the instrument as is prescribed under the rules may be resealed.

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition of 'foreign grant of representation' (paras (c), (e), (g))).

- 31-4 The model legislation need not provide expressly for the resealing of a Scottish confirmation.

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition of 'foreign grant of representation' (para (c))).

Orders to administer

- 31-5 The model legislation should enable the following instruments to be resealed:

- (a) an order to administer made in favour of a public trustee (or the statutory equivalent); and
- (b) an exemplification of such an order to administer or such other formal evidence of an order to administer as is prescribed under the rules.

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition of 'foreign grant of representation' (paras (c), (e), (g))).

Elections to administer

- 31-6 The model legislation should provide that, if an election to administer has been filed in another jurisdiction, the court may reseal a copy of the election to administer, provided it is certified under seal, by or under the authority of the court in which it was filed, as a correct copy of the election to administer that was filed in that court.

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definition 'foreign grant of representation' (para (d))).

- 31-7 The model legislation should provide that an election to administer may be resealed only if the person who applies for the resealing:

- (a) estimates that the net value of the estate in the resealing jurisdiction at the time of making the application is not more than the maximum amount for filing an election to administer in the resealing jurisdiction; and

- (b) gives an undertaking that, in the event of further assets being discovered in the jurisdiction in which the election was filed that would place the estate beyond the statutory limit for the election procedure in that jurisdiction, no further step will be taken in the administration of the estate in the resealing jurisdiction without obtaining a grant in the jurisdiction in which the election was filed.

See Administration of Estates Bill 2009 cl 355.

31-8 The model legislation should provide that if, after the election to administer is resealed, the person **who** applied for the resealing discovers that the net value of the estate in the resealing jurisdiction is more than 150 per cent of the maximum amount for filing an election to administer in the resealing jurisdiction, the person must:

- (a) file a memorandum in the Supreme Court stating the value of the estate in the resealing jurisdiction; and
- (b) apply for a grant of probate or letters of administration (or an order to administer).

See Administration of Estates Bill 2009 cl 356.

CHAPTER 32

Countries whose grants may be resealed

- 32-1 Subject to Recommendation 38-9, the model legislation should provide that the court may reseal a grant made by the Supreme Court of another Australian State or Territory.¹⁸

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a)–(d)), ‘interstate jurisdiction’).

- 32-2 The model legislation should provide for the resealing of a grant made by a court of competent jurisdiction in either:

- (a) a country or part of a country that is prescribed by regulation; or
- (b) any other country or a part of any other country, provided that, in that country or in that part of that country, the grant that is sought to be resealed has a similar effect to a grant of probate or letters of administration made in the resealing jurisdiction.

See Administration of Estates Bill 2009 cl 353(1), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a)–(d)), ‘overseas jurisdiction’).

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Note that Recommendation 38-9 provides that the court may not reseal a grant made in an Australian State or Territory unless the deceased died domiciled overseas. Note also that, when stage two of the proposed scheme for the automatic recognition of Australian grants is implemented, the provision giving effect to Recommendation 38-9 will be repealed, as resealing will no longer be necessary in order for a grant made in one Australian jurisdiction to be effective in another Australian jurisdiction.

CHAPTER 33

Persons who may apply for the resealing of a grant

Resealing by the executor or administrator or person authorised by the executor or administrator under a power of attorney

33-1 The model legislation should provide that an application for the resealing of a grant of probate or letters of administration may be made by:

- (a) the executor named in the grant of probate;
- (b) the administrator named in the letters of administration; or
- (c) a person authorised for that purpose under a power of attorney given by the executor or administrator.

See Administration of Estates Bill 2009 cll 358(1), 359(1), sch 3 dictionary (definition of 'holder' (para (b))).

Resealing by the executor or administrator by representation

33-2 The model legislation should provide that, if the last surviving, or sole, executor or administrator under a grant of probate or letters of administration has died, a person who is:

- (a) granted probate of the will, or letters of administration of the estate, of the deceased personal representative in the resealing jurisdiction; or
- (b) recognised in the resealing jurisdiction as the executor or administrator by representation of the will or estate of the deceased personal representative;

may apply for the resealing of the grant under which the deceased personal representative was appointed.

See Administration of Estates Bill 2009 cl 358(5)–(6).

Resealing by such other person as the court considers appropriate

33-3 The model legislation should provide that the court may, if it is of the opinion that there are special circumstances that warrant the making of the order, authorise such other person as it considers appropriate to apply for the resealing of a grant of probate or letters of administration.

See Administration of Estates Bill 2009 cl 361.

Resealing by the person in whose favour an order to administer is made

33-4 The model legislation should enable an application for the resealing of an order to administer to be made by the public trustee (or statutory equivalent) in whose favour the order to administer was made.

See Administration of Estates Bill 2009 cl 358(1), sch 3 dictionary (definitions of 'foreign grant of representation' (para (c)), 'holder' (para (b))).

Resealing by the person who filed an election to administer

33-5 The model legislation should provide that an application for the resealing of an election to administer may be made by:

- (a) the person (including the public trustee) who filed the election to administer; or
- (b) the trustee company that filed the election to administer.

See Administration of Estates Bill 2009 cl 358(1), sch 3 dictionary (definitions of 'foreign grant of representation' (para (d)), 'holder' (para (b))).

Age of the applicant for resealing

33-6 The model legislation should provide that, if the applicant for the resealing of a grant is an individual, the applicant must be an adult.

See Administration of Estates Bill 2009 cl 357(2).

CHAPTER 34

Effects of resealing a grant

34-1 The model legislation should provide that a grant, when resealed, has the same force, effect and operation within the resealing jurisdiction as if it had been originally granted by the Supreme Court of that jurisdiction.

See Administration of Estates Bill 2009 cl 364(1).

34-2 The model legislation should provide that, on the resealing of a grant:

- (a) the person who made the application for resealing:
 - (i) 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
 - (ii) 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; and
- (b) the force, effect and operation of the grant in the resealing jurisdiction is subject to the jurisdiction of the resealing court.

See Administration of Estates Bill 2009 cl 364(2).

34-3 The model legislation should include a provision to the general effect of section 86 of the *Administration and Probate Act 1958* (Vic), except that it should only permit the attorney to pay over or transfer the balance of the estate to, or as directed by, the donor of the power of attorney.

See Administration of Estates Bill 2009 cl 365.

CHAPTER 35

The resealing process

Multiple personal representatives

35-1 The model legislation should provide that, if two or more executors or administrators are the holders of a grant, an application for the resealing of the grant may be made by:

- (a) all the executors or administrators under the grant; or
- (b) one or more of the executors or administrators, provided that the other executors or administrators consent to the making of the application and their consent is evidenced by affidavit; or
- (c) a person authorised for that purpose under a power of attorney given by all the executors or administrators; or
- (d) if one or more of the executors or administrators have died or lost capacity:
 - (i) all the surviving executors or administrators who have capacity;
 - (ii) one or more of the surviving executors or administrators who have capacity, provided the consent of the other remaining executors or administrators who have capacity has been obtained, and is evidenced by affidavit; or
 - (iii) a person authorised for that purpose under a power of attorney given by all the surviving executors or administrators who have capacity.

See Administration of Estates Bill 2009 cll 358(2)–(4), 359(2)–(3), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a), (c), (d)), ‘holder’ (para (b))).

Grants of double probate

35-2 The model legislation should ensure that, if a grant of double probate has been made in relation to a will, an application for resealing of the grants of probate may be made by:

- (a) all the executors under the grant of probate and the grant of double probate;

- (b) one or more of the executors under the grant of probate and the grant of double probate, provided the consent of all the other executors under both grants has been obtained, and is evidenced by affidavit; or
- (c) a person authorised for that purpose by all the executors under the grant of probate and all the executors under the grant of double probate;
- (d) if one or more of the executors under the grant of probate, or the grant of double probate, have died or lost capacity:
 - (i) all the surviving executors under the grant of probate and the grant of double probate who have capacity;
 - (ii) one or more of the surviving executors under the grant of probate and the grant of double probate who have capacity, provided the consent of all the other surviving executors under both grants who have capacity has been obtained, and is evidenced by affidavit; or
 - (iii) a person authorised for that purpose under a power of attorney given by all the surviving executors under the grant of probate and the grant of double probate who have capacity.

See Administration of Estates Bill 2009 cl 358(2)–(4), 359(2)–(3), sch 3 dictionary (definitions of ‘foreign grant of representation’ (para (b)), ‘holder’ (para (b))).

35-3 The model legislation should provide that, if a grant of probate and a grant of double probate have been made in a foreign jurisdiction in relation to the will of a deceased person and the last surviving executor under the grants has died (the ‘*deceased holder*’), a person who is either of the following may apply for the resealing of the grants of probate:

- (a) a person who is granted probate of the will, or letters of administration of the estate, of the deceased holder in the resealing jurisdiction; or
- (b) a person who is recognised in the resealing jurisdiction as the executor or administrator by representation of the will or estate of the deceased holder.

See Administration of Estates Bill 2009 cl 358(5)–(6), sch 3 dictionary (definitions of ‘foreign grant of representation’ (para (b)), ‘holder’ (para (b))).

Substituted executors and administrators

35-4 The model legislation should ensure that, if an order has been made removing an executor or administrator or substituting an executor or administrator for an executor or administrator who has been removed, an application for resealing may be made by:

- (a) the executor or administrator who holds office under the grant when the application is made; or
- (b) if more than one executor or administrator holds office under the grant when the application is made — one or more of the executors or administrators, provided the other executors or administrators consent to the making of the application and their consent is evidenced by affidavit.

See Administration of Estates Bill 2009 cl 358(1)–(3), sch 3 dictionary (definitions of ‘foreign grant of representation’ (paras (a)–(c)), ‘holder’ (para (b))).

Application by a trustee company

35-5 The model legislation should include a provision that:

- (a) applies if a trustee company:
 - (i) is the executor or administrator under a grant; or
 - (ii) is authorised, by a power of attorney given by an executor or administrator, to apply for the resealing of a grant; and
- (b) provides that the grant may be resealed, even though the trustee company is not one to which the court could, under the laws of the resealing jurisdiction, grant probate or letters of administration.

See Administration of Estates Bill 2009 cl 360.

35-6 The model legislation should not include a provision based on rule 50.01(d) of *The Probate Rules 2004* (SA), although individual jurisdictions may wish to consider whether a provision to that effect, setting out the procedure to be followed when a trustee company applies for the resealing of a grant, is suitable for inclusion in their court rules.

The court’s power to reseat a grant, impose conditions and revoke the resealing of a grant

35-7 The model legislation should include a provision that:

- (a) in conferring on the court the power to reseal a grant, provides that the court 'may' reseal a grant, including subject to any conditions; and
- (b) provides that, without limiting the court's jurisdiction in relation to a resealed grant under the provision that gives effect to Recommendation 34-2, the court may revoke the resealing of a grant or change or add to the conditions to which the resealing is subject.

See Administration of Estates Bill 2009 cl 353(1), 362.

Notification

35-8 The model legislation should provide that a person who applies for the resealing of a grant must depose to the fact that the grant in respect of which resealing is sought has not been revoked or altered by the court that issued the grant.

See Administration of Estates Bill 2009 cl 357(3).

35-9 The model legislation should provide that, if the court reseals a grant, it must notify the court of the jurisdiction in which the grant was issued that the grant has been resealed.

See Administration of Estates Bill 2009 cl 363(1).

35-10 The model legislation should provide that, if the court is notified by the court of another jurisdiction that that court has resealed a grant issued in this jurisdiction, the court must notify the resealing court if it:

- (a) has revoked or altered the grant; or
- (b) subsequently revokes or alters the grant.

See Administration of Estates Bill 2009 cl 363(2).

Succession duty

35-11 The model legislation should not include a provision to the effect that a grant may not be resealed unless the registrar is satisfied that such succession duty, if any, has been paid as would have been payable if the grant had been made by that court.

Grants of probate and letters of administration

35-12 Court rules should provide that an applicant for the resealing of a grant of probate or letters of administration must produce to the registrar:

- (a) the grant of probate or letters of administration; or

- (b) an exemplification of the grant of probate or letters of administration; or
- (c) a duplicate of the grant of probate or letters of administration, provided it is sealed by the granting court; or
- (d) a copy of the grant of probate or letters of administration, or of the exemplification or duplicate of the grant, provided it is certified under seal as a correct copy by or under the authority of the granting court.

35-13 Court rules should provide that an applicant for the resealing of a grant of probate or letters of administration must deposit with the registrar a copy of the grant of probate or letters of administration.

Orders to administer

35-14 Court rules should provide that an applicant for the resealing of an order to administer must produce to the registrar:

- (a) the order to administer; or
- (b) a duplicate of the order to administer, provided it is sealed by the court that issued the order; or
- (c) a copy of the order to administer, or of the duplicate of the order, provided it is certified under seal as a correct copy by or under the authority of the court that issued the order.

35-15 Court rules should provide that an applicant for the resealing of an order to administer must deposit with the registrar a copy of the order to administer.

Elections to administer

35-16 Court rules should provide that an applicant for the resealing of an election to administer must produce to the registrar a copy of the election to administer, provided it is certified under seal, by or under the authority of the court in which it was filed, as a correct copy of the election to administer that was filed in that court.

35-17 Court rules should provide that an applicant for the resealing of an election to administer must deposit with the registrar a copy of the election to administer.

Testamentary instruments

35-18 Court rules should provide that an applicant for resealing must produce to the registrar a copy of the will (if there is one), if this is not included in the documentation referred to above.

Grants of double probate

35-19 Court rules should provide that, where a grant of double probate has been made of a will, the seal of the court may be affixed to:

- (a) an exemplification that contains copies of the grant of probate and the grant of double probate; or
- (b) the grant of probate (or an exemplification of the grant of probate) and the grant of double probate (or an exemplification of the grant of double probate), provided both instruments are deposited together in the court.

Substituted executors and administrators

35-20 Court rules should provide that, if an order has been made removing an executor or administrator or substituting an executor or administrator for an executor or administrator who has been removed, the seal of the court may be affixed to:

- (a) an exemplification that contains copies of the grant and the order by which the executor or administrator is substituted; or
- (b) the grant and the order, or exemplifications of either or both, provided both instruments are deposited together in the court.

CHAPTER 36

Choice of law issues: The person in whose favour a grant may be made or resealed

Original grants

36-1 The model legislation should include a provision based generally on rule 40.01 of *The Probate Rules 2004* (SA) and rule 30 of the *Non-Contentious Probate Rules 1987* (UK), except that:

- (a) the model provision should confer the relevant powers on the Supreme Court; and
- (b) the model provision should be expressed not to limit the provision that is based on section 6(3) of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cl 352.

36-2 The model provision should apply if the deceased died domiciled outside the enacting jurisdiction.

See Administration of Estates Bill 2009 cl 352(1).

36-3 The model provision should provide that the Supreme Court may make a grant to:

- (a) the person entrusted with the administration of the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled;
- (b) the person entitled to administer the estate by the law of the place where the deceased died domiciled;
- (c) a person to whom the court having jurisdiction at the place where the deceased died domiciled could entrust the administration of the deceased's estate;
- (d) if there is no such person as mentioned in paragraph (a), (b) or (c) or, if in the opinion of the Supreme Court the circumstances so require — to such person as the court may direct.

See Administration of Estates Bill 2009 cl 352(4).

36-4 The model provision should provide that the options of making an appointment to the persons mentioned in Recommendation 36-3 do not apply if:

- (a) the deceased has appointed an executor in the enacting jurisdiction to administer the estate in that jurisdiction; and

- (b) the executor has legal capacity and is willing to administer the estate.

See Administration of Estates Bill 2009 cl 352(5).

- 36-5 The model provision should provide that, if the whole or substantially the whole of the estate in the enacting jurisdiction consists of immovable property, a grant in respect of the whole estate may be made in accordance with the law that would have applied if the deceased had died domiciled in the enacting jurisdiction.

See Administration of Estates Bill 2009 cl 352(6)(b).

Resealing of grants

- 36-6 The model legislation should include a provision based generally on rule 39(3) of the *Non-Contentious Probate Rules 1987* (UK), except that the model provision:

- (a) should provide that the relevant power is conferred on the Supreme Court; and
- (b) should be generally consistent with the provision proposed in Recommendation 36-3 above, which applies to an application for a grant where the deceased died domiciled outside the jurisdiction.

- 36-7 The model provision should provide that, unless the Supreme Court orders otherwise, a grant may be resealed only if it was made to:

- (a) the person entrusted with the administration of the deceased's estate by the court having jurisdiction at the place where the deceased died domiciled;
- (b) the person entitled to administer the estate by the law of the place where the deceased died domiciled;
- (c) a person to whom the court having jurisdiction at the place where the deceased died domiciled could entrust the administration of the deceased's estate;
- (d) in the case of a grant of probate of a will that is admissible to proof — to the executor named in the will or to the executor according to the tenor of the will.

See Administration of Estates Bill 2009 cl 354.

CHAPTER 38

The scheme for the automatic recognition of grants

38-1 The model legislation should include provisions creating a scheme for the automatic recognition of grants made by the Supreme Court of an Australian State or Territory.

38-2 The scheme for the automatic recognition of grants should be implemented in two stages.

Stage one

38-3 The model legislation should include a provision that:

- (a) applies if, after the commencement of the provision giving effect to this recommendation:
 - (i) the Supreme Court of the enacting jurisdiction has not made a grant endorsed to the effect that the deceased person died domiciled in the enacting jurisdiction;¹⁹ and
 - (ii) a grant of the deceased person's estate is made in another State or Territory (the '*interstate grant*') and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated; and
- (b) provides that, on the endorsing of the interstate grant:
 - (i) the interstate grant has the same force, effect and operation in the enacting jurisdiction as it would have if it had been originally made by the Supreme Court of the enacting jurisdiction; and
 - (ii) the force, effect and operation of the interstate grant in the enacting jurisdiction is subject to the Supreme Court's jurisdiction.

See Administration of Estates Bill 2009 cl 335(1), (2)(a), (b).

38-4 The model legislation should provide that, for the purpose of these recommendations, 'grant' means:

- (a) probate of the will of a deceased person;
- (b) letters of administration of the estate of a deceased person; or

¹⁹

See Recommendation 38-5 below.

- (c) an order to administer the estate of a deceased person.

See Administration of Estates Bill 2009 cll 304(2), 305(3), 335, sch 3 dictionary (definitions of 'grant of representation', 'interstate grant of representation').

- 38-5 The model legislation should provide that if, in making a grant of a deceased person's estate, the Supreme Court of the enacting jurisdiction is satisfied that the deceased died domiciled in the enacting jurisdiction, the court must endorse the grant to that effect.

See Administration of Estates Bill 2009 cl 304.

- 38-6 The court rules should provide that if, in making a grant of a deceased person's estate, the Supreme Court of the enacting jurisdiction is satisfied that the deceased died domiciled in the enacting jurisdiction, the court must endorse the grant with a statement:

- (a) specifying the particular States and Territories in which the grant is effective without the need for resealing; and
- (b) explaining that, in any State or Territory in which the grant is effective, the personal representative is required to comply with the law in that jurisdiction regarding the duties of a personal representative.

- 38-7 The model legislation should include a provision that:

- (a) applies if, in making a grant of a deceased person's estate (the '*local grant*'), the Supreme Court of the enacting jurisdiction:
- (i) is satisfied that the deceased died domiciled in another State or Territory; or
- (ii) does not make a finding about where the deceased died domiciled; and
- (b) provides that the Supreme Court must endorse the local grant to the effect that it ceases to have effect if a grant of the deceased person's estate is subsequently made in another State or Territory and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated.

See Administration of Estates Bill 2009 cl 305.

- 38-8 The model legislation should include a provision that:

- (a) applies if, after the commencement of the provision giving effect to this recommendation:

- (i) the Supreme Court of the enacting jurisdiction has not made a grant endorsed to the effect that the deceased person died domiciled in the enacting jurisdiction;²⁰ and
 - (ii) a grant of the deceased person's estate is made in another State or Territory (the '*interstate grant*') and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated; and
- (b) provides that, on the endorsing of the interstate grant, each of the following ceases to have effect:
- (i) a local grant of the deceased person's estate that was previously made by the Supreme Court of the enacting jurisdiction and endorsed under the provision that gives effect to Recommendation 38-7;
 - (ii) an election to administer the deceased person's estate that was previously filed in the Supreme Court of the enacting jurisdiction by a professional administrator; and
 - (iii) an interstate or overseas grant of the deceased person's estate that was previously resealed by the Supreme Court of the enacting jurisdiction.

See Administration of Estates Bill 2009 cl 335(1), (2)(c).

38-9 The provision that gives effect to Recommendation 32-1 (which provides for the resealing of foreign grants) should provide that the Supreme Court of the enacting jurisdiction may reseal a grant made by the court of another State or Territory only if it is satisfied that the deceased did not die domiciled in Australia.

See Administration of Estates Bill 2009 cl 353(2).

38-10 The model legislation should include a provision that deals with the protection from liability of a person administering an estate if the person's limited grant, election to administer or resealed grant²¹ ceases to have effect because an interstate grant is made in relation to the deceased person's estate and is endorsed by the court making it to the effect that the deceased died domiciled in the State or Territory in which the court is situated.

38-11 The model legislation should provide that the person:

²⁰ See Recommendation 38-5 above.

²¹ In this context, 'grant' is used to refer to any instrument that may be resealed under the National Committee's recommendations: see Chapter 31 above.

- (a) may retain from the estate, and reimburse himself or herself, an amount equivalent to the amount of payments made by the person that the personal representative appointed under the subsequent interstate grant might properly have made; and
- (b) is not liable for any distribution of the estate made in good faith and without negligence in reliance on the grant endorsed under the provision that gives effect to Recommendation 38-7, the election to administer or the resealed grant, despite the fact that the relevant instrument had ceased to have effect when the payment or distribution was made.

See Administration of Estates Bill 2009 cl 373.

Implementation of stage two by a State or Territory other than the enacting jurisdiction

38-12 Once a State or Territory other than the enacting jurisdiction has implemented stage two of the proposed scheme, the court rules of the enacting jurisdiction should be amended to provide that every grant made by the Supreme Court of the enacting jurisdiction must be endorsed with a short statement specifying the particular States and Territories in which the grant is effective without the need for resealing.

Stage two

38-13 Stage two of the automatic recognition scheme should be implemented when all States and Territories have the technology to publish on their Supreme Court website, in a format that can be searched by interested parties and by the Supreme Courts of the other States and Territories:

- (a) a notice of intended application for a grant;
- (b) details of all grants and orders to administer made by the Supreme Court, and of all elections to administer filed in the Supreme Court; and
- (c) details of all caveats filed against the making of a grant.

38-14 The model legislation should be amended to provide that a caveat filed in the Supreme Court of a State or Territory, other than the enacting jurisdiction, against the making of a grant in that State or Territory has the same force, effect and operation in the enacting jurisdiction as if it had been filed in the Supreme Court of the enacting jurisdiction.

38-15 The model legislation should be amended to provide that:

- (a) a grant made in another State or Territory 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;
and

- (b) the force, effect and operation of the interstate grant in the enacting jurisdiction is subject to the Supreme Court's jurisdiction.

38-16 The model legislation should be amended to provide that the Supreme Court of the enacting jurisdiction may decline to make a grant if it appears that the Supreme Court of another State or Territory would be a more appropriate forum in which to apply for that grant.

38-17 The model legislation should continue to include a provision that gives effect to Recommendation 38-5.

38-18 The court rules should continue to include a rule that gives effect to Recommendation 38-6.

38-19 The model legislation should continue to include a provision that gives effect to Recommendation 38-7.

38-20 The model legislation should:

- (a) continue to include a provision that gives effect to Recommendation 38-8(a), (b)(i); and
- (b) provide that an election to administer a deceased person's estate that was previously filed in the enacting jurisdiction ceases to have effect if a grant of the deceased person's estate is subsequently made in any other State or Territory; and
- (c) provide that a grant that was previously resealed in the enacting jurisdiction ceases to have effect if a grant of the deceased person's estate is subsequently made in any other State or Territory.

38-21 The provisions in the model legislation giving effect to the following Recommendations are to be omitted:

- (a) Recommendation 38-3 (Effectiveness of grant made in the State or Territory in which the deceased died domiciled and endorsed to the effect that the deceased died domiciled in that jurisdiction); and
- (b) Recommendations 32-1 and 38-9 (Australian grants that may be resealed).

Implementation of stage two by all States and Territories

38-22 When all States and Territories have implemented stage two of the proposed scheme:

- (a) the provision giving effect to Recommendations 38-5 and 38-17 is to be omitted (Certain grants made in the enacting jurisdiction to be endorsed to the effect that the deceased died domiciled in that jurisdiction);
- (b) the court rule giving effect to Recommendation 38-6(a) is to be amended to provide that every grant made by the Supreme Court of the enacting jurisdiction must be endorsed with a short statement to the effect that the grant is effective in every other State and Territory without the need for resealing;
- (c) the provision giving effect to Recommendations 38-7 and 38-19 is to be omitted (Certain grants made in the enacting jurisdiction to be limited in time until a grant is made in the State or Territory in which the deceased died domiciled); and
- (d) the model legislation should continue to provide that the following cease to have effect if a grant of the deceased person's estate is made in any State or Territory:
 - (i) an election to administer the deceased's estate that was filed in the enacting jurisdiction; and
 - (ii) a grant that was previously resealed in the enacting jurisdiction.

Review of the automatic recognition scheme

38-23 The model legislation should provide that, within five years of the commencement of the provision giving effect to this recommendation, the Minister must start a review to determine:

- (a) the effectiveness of the legislative provisions that implement the National Committee's recommendations for stage one of the automatic recognition scheme; and
- (b) whether the National Committee's further recommendations for stage two of the scheme can be implemented.

38-24 The model legislation should require the Minister to table the report of that review in Parliament as soon as practicable, but within one year after the end of the five year period.

See Administration of Estates Bill 2009 cl 336.

CHAPTER 40

Miscellaneous administration provisions

Application for a grant, or the resealing of a grant, to be made in accordance with court rules

40-1 The model legislation should include a provision to the effect of section 42(1) of the *Probate and Administration Act 1898* (NSW), requiring an application for a grant of probate or letters of administration to be made in such manner as may be prescribed by the relevant court rules.

See Administration of Estates Bill 2009 cl 306.

40-2 The model legislation should require an application for the resealing of a grant of probate or letters of administration or other instrument²² to be made in such manner as may be prescribed by the relevant court rules.

See Administration of Estates Bill 2009 cl 357(1).

Delay in applying for a grant or the resealing of a grant

40-3 The model legislation should not require an applicant for a grant, or for the resealing of a grant, to provide evidence explaining the delay in making the application.

Application for resealing by a non-resident executor, administrator or attorney

40-4 The model legislation should provide that the court may reseal a grant even though the applicant for resealing is not resident or domiciled in the jurisdiction.

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

Service on a non-resident executor, administrator or attorney

40-5 The model legislation should include a provision to the general effect of section 97(2) of the *Probate and Administration Act 1898* (NSW), except that the model provision should:

- (a) apply to the service of a notice, or an originating process for a proceeding, that relates to the administration of the estate in question; and

22

See Chapter 31 of this Report for the National Committee's recommendations about the instruments that may be resealed.

- (b) apply if a person who applies for a grant of probate or letters of administration, or for the resealing of a grant (including a person who is authorised under a power of attorney to obtain the resealing of a grant), is not resident in the jurisdiction.

See Administration of Estates Bill 2009 cll 302(2)–(3), 353(4)–(5).

Finding as to domicile

- 40-6 The model legislation should not include a provision to the effect of section 8C of the *Administration and Probate Act 1929* (ACT).

Record of grant

- 40-7 The model legislation should not include a provision to the effect of section 140 of the *Administration Act 1903* (WA).

Registrar's powers

- 40-8 The model legislation should include a provision to the effect of section 69 of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cl 612.

Court practice

- 40-9 The model legislation should include a provision to the effect of section 70 of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cl 611.

Service

- 40-10 The model legislation should include a provision to the effect of section 72 of the *Succession Act 1981* (Qld).

See Administration of Estates Bill 2009 cl 618.

Model administration legislation: Administration of Estates Bill 2009

The Administration of Estates Bill 2009 gives effect to recommendations made by the National Committee in Volumes 1, 2 and 3 of this Report.



Queensland

Administration of Estates Bill 2009

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2009

A Bill

for

An Act relating to the administration of estates of deceased persons, and to amend the [*Property Law Act 1974*] for related purposes

The Parliament of Queensland enacts—

Chapter 1 Preliminary

100 Short title

This Act may be cited as the *Administration of Estates Act 2009*.

101 Commencement

This Act commences on a day to be fixed by proclamation.

102 Definitions

- (1) The dictionary in schedule 3 defines particular words used in this Act.
- (2) A definition in this Act applies except so far as the context or subject matter otherwise indicates or requires.

Drafter's note: Subsection (2) may be unnecessary in some jurisdictions. See *Acts Interpretation Act 1954* (Qld), s 32A.

103 Relationships

- (1) For this Act—
 - (a) an adopted child is to be regarded as a child of the adoptive parent or parents; and
 - (b) the child's family relationships are to be decided accordingly; and
 - (c) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

- (2) Also, a person is a brother or sister of another person if they have 1 or both parents in common.

104 Notes in text

A note in the text of this Act is part of this Act.

Drafter's note: This statement may be unnecessary in some jurisdictions. See *Acts Interpretation Act 1954* (Qld), s 14(4).

105 Examples

In this Act—

- (a) an example of the operation of a provision is not exhaustive; and
- (b) an example of the operation of a provision does not limit, but may extend, the meaning of the provision; and
- (c) an example of the operation of a provision and the provision are to be read in the context of each other and the other provisions of this Act, but, if the example and the provision so read are inconsistent, the provision prevails.

Drafter's note: This statement may be unnecessary in some jurisdictions. See *Acts Interpretation Act 1954* (Qld), s 14D.

106 Act binds all persons [Q s4(2); R 16-7]

This Act binds all persons, including the State, and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States [and Territories].

Chapter 2 Vesting of estate

200 Initial vesting on death [Q s45(1); R 10-1]

- (1) If a person dies leaving a will appointing 1 or more executors who survive the person, the person's estate vests, on the person's death—
 - (a) if only 1 executor survives the person—in the surviving executor; or
 - (b) if more than 1 executor survives the person—in the surviving executors as joint tenants.

Drafter's note: Individual jurisdictions may need to amend their trust legislation to deal with the vesting of trust property. [R 10-2]

- (2) However—
 - (a) if any, but not all, of the executors lack legal capacity to act as executor—the estate vests in the executor or executors who have legal capacity and, if more than one, as joint tenants; or
 - (b) if the executor or all of the executors lack legal capacity to act as executor—the estate vests in the [public trustee].

Drafter's note: Public trustee as used in the Bill is in [square brackets]. In Victoria the reference will need to be to State Trustees. Public trustee is in the dictionary for definition as appropriate for each jurisdiction.

- (3) If a person dies—
 - (a) without leaving a will; or
 - (b) leaving a will appointing 1 or more executors none of whom survives the person;the person's estate vests, on the person's death, in the [public trustee].
- (4) Subsections (1), (2) and (3)(b) apply despite a testamentary disposition to the contrary.

(5) In this section—

estate, of a deceased person, means property to which a person was entitled at the time of his or her death, but does not include—

- (a) property of which the person was a trustee; or
- (b) an interest in property that ceased on the person's death.

201 Property subject to a general power of appointment exercisable by will [Tas s6(2); R 10-18]

A deceased person is taken to be entitled at his or her death to any interest in property in relation to which a disposition contained in the deceased's will operates as an exercise of a general power of appointment.

202 On the making of a grant of representation [Q s45(2)-(3); R 10-3 to 10-5]

- (1) On the making of a grant of representation of a deceased person's estate, the estate that vested in the deceased's executor or the [public trustee] under section 200(1), (2) or (3)—
 - (a) is divested from the executor or [public trustee]; and
 - (b) vests in—
 - (i) the person to whom the grant is made; or
 - (ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.
- (2) If any grant of representation (the *relevant grant*) of a deceased person's estate is revoked, ends or ceases to have effect—
 - (a) on the revocation, ending or ceasing of effect of the relevant grant, the deceased person's estate that is vested in the person to whom the relevant grant was made is divested from the person; and

[s 203]

- (b) on the making of a subsequent grant of representation, the deceased person's estate vests in—
 - (i) the person to whom the subsequent grant is made; or
 - (ii) if the subsequent grant is made to more than 1 person, the persons to whom it is made as joint tenants.

Example for subsection (2)—

Assume the relevant grant is a grant of representation of a deceased person's estate made by the Supreme Court and endorsed under section 305.

On the making of an interstate grant of representation as mentioned in section 335(1), the relevant grant ceases to have effect under section 335(2)(c)(i). Paragraph (a) of this subsection operates to divest the deceased person's estate from the person to whom the relevant grant was made. Further, because, under section 335(2)(a), the interstate grant of representation has the same force, effect and operation in this jurisdiction as it would have if it had been originally made by the Supreme Court, paragraph (b) operates to vest the deceased person's estate in—

- (a) the person to whom the interstate grant of representation is made; or
 - (b) if the interstate grant of representation is made to more than 1 person, the persons to whom it is made as joint tenants.
- (3) If there is an interval between the revocation, ending or ceasing of effect of a grant of representation and the making of a subsequent grant of representation, the deceased person's estate vests in the [public trustee] until the making of the subsequent grant.

203 On death of personal representative [new; R 10-7 to 10-9]

- (1) This section applies if, on the death of a deceased person's last surviving, or sole, personal representative, the deceased person's estate is unadministered.
- (2) On the personal representative's death, the unadministered estate that is vested in the personal representative vests in the [public trustee].

- (3) If, after the unadministered estate is vested in the [public trustee], the Supreme Court makes a grant of representation of the deceased's estate, on the making of the grant the unadministered estate—
- (a) is divested from the [public trustee]; and
 - (b) vests in—
 - (i) the person to whom the grant is made; or
 - (ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.
- (4) This section applies despite [insert local equivalent of the *Trusts Act 1973* (Qld), section 16].

204 On becoming an executor or administrator by representation [new; R 10-10]

If, under section 338, a person becomes an executor or administrator by representation of a deceased person's will or estate, on the happening of that event the deceased person's unadministered estate—

- (a) is divested from—
 - (i) if it is vested in the [public trustee]—the [public trustee]; 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 1 executor or administrator by representation, the executors or administrators by representation as joint tenants.

205 On executor or administrator by representation ceasing to hold office [new; R 10-11 to 10-16]

- (1) Subsections (2) and (3) apply if—

[s 205]

- (a) an executor or administrator by representation (the *representative*) of the deceased person's will or estate stops holding office as executor or administrator by representation for the person under section 341 or 342; and
 - (b) the deceased person's estate is unadministered.
- (2) If the representative stops holding office under section 341, on the happening of that event the unadministered estate vested in the representative—
- (a) is divested from the representative; and
 - (b) vests in—
 - (i) the person to whom a grant of probate is made under section 341(2); or
 - (ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.
- (3) If the representative stops holding office under section 342, on the happening of that event the unadministered estate vested in the representative—
- (a) is divested from the representative; and
 - (b) vests in—
 - (i) the person to whom a grant of letters of administration is made under section 350 or 351; or
 - (ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.
- (4) Subsection (5) applies if—
- (a) the last surviving, or sole, executor or administrator by representation (the *representative*) of the deceased person's will or estate stops holding office as executor or administrator by representation for the person under section 343, other than because of section 335(2)(c)(i), or section 344; and
 - (b) the deceased person's estate is unadministered.

- (5) On the happening of the event mentioned in subsection (4), the unadministered estate vested in the representative—
- (a) is divested from the representative; and
 - (b) vests in the [public trustee].
- (6) Subsection (7) applies if—
- (a) all of the executors or administrators by representation (the *representatives*) of the deceased person's will or estate stop holding office as executor or administrator by representation for the person under section 343, other than because of section 335(2)(c)(i), or section 344; and
 - (b) the deceased person's estate is unadministered.
- (7) On the happening of the event mentioned in subsection (6), the unadministered estate vested in the representatives—
- (a) is divested from the representatives; and
 - (b) vests in the [public trustee].
- (8) If the unadministered estate of a deceased person vests in the [public trustee] as provided under subsection (5) or (7), on the making of a grant of representation of the deceased's estate to another person the unadministered estate—
- (a) is divested from the [public trustee]; and
 - (b) vests in—
 - (i) the person to whom the grant is made; or
 - (ii) if the grant is made to more than 1 person, the persons to whom it is made as joint tenants.
- (9) If 1 or more, but not all, of the executors or administrators by representation stop holding office for any reason (the *outgoing representatives*), on the happening of that event, the unadministered estate, to the extent it is vested in the outgoing representatives—
- (a) is divested from the outgoing representatives; and
 - (b) vests in—

[s 206]

- (i) if only 1 person continues to be an executor or administrator by representation—the person; or
- (ii) if more than 1 person continues to be an executor or administrator by representation—the persons as joint tenants.

206 Title relates back [Q s45(4); R 10-6]

- (1) This section applies to the following persons—
 - (a) an executor to whom a grant of probate of a deceased person's will is made by the Supreme Court;
 - (b) an administrator of a deceased person's estate;
 - (c) an executor or administrator by representation of a deceased person's estate.
- (2) The title of the executor, the administrator, or the executor or administrator by representation, to the deceased's estate relates back to, and is taken to have arisen on, the deceased's death.

207 Role of [public trustee] [Q s45(4A) and (6); R 10-17]

- (1) If the estate of a deceased person vests in the [public trustee] under section 200, 202, 203 or 205, the section does not require the [public trustee]—
 - (a) to act in the administration of the deceased's estate or in any trust created by the deceased's will; or
 - (b) to exercise any discretion, power, or authority of a personal representative, trustee or beneficiary.
- (2) An act lawfully done by, or in relation to, the [public trustee] in relation to the estate is as valid and effectual as it would be if it had been done by, or in relation to, the holder of a grant of representation of the estate.
- (3) Subsection (2) applies despite section 206.

Chapter 3 Grants of representation

Part 1 Supreme Court's jurisdiction

Division 1 General jurisdiction

300 Application of part [Q s6(5); R 3-1]

This part applies in relation to a deceased person whether the person died before or after the commencement of this section.

301 Jurisdiction [Q s6(1); R 3-1]

- (1) Subject to this Act, the Supreme Court has jurisdiction, including jurisdiction for all purposes the court considers appropriate—
 - (a) to make and revoke a grant of probate of the will or letters of administration of the estate of any deceased person; and
 - (b) to hear and decide all testamentary matters; and
 - (c) to hear and decide all matters relating to the estate and the administration of the estate of any deceased person.
- (2) The Supreme Court may make any declaration, and make and enforce any order, that may be necessary or convenient in the exercise of its jurisdiction under this Act.

302 Jurisdiction is not dependent on particular factors relating to property, residence or domicile [Q s6(2); NSW s97(2); R 3-1, 40-5]

- (1) The Supreme Court may make a grant of probate of the will or letters of administration of the estate of a deceased person even though—

[s 303]

- (a) the deceased left no estate in this jurisdiction or elsewhere; or
 - (b) the person to whom the grant is made is not resident or domiciled in this jurisdiction.
- (2) However, a person who is not resident in this jurisdiction must file with the application for the grant a notice giving an address for service in this jurisdiction.
 - (3) Service of a document relating to the administration of the estate, or a proceeding relating to the administration of the estate, at the address for service given under subsection (2) is taken to be personal service of the document on the holder of the grant.

Example of a document for a proceeding relating to the administration of the estate—

an originating process

303 Grant of probate and letters of administration may be made subject to limitations [Q s6(3); R 3-1]

- (1) The Supreme Court may make a grant of probate or letters of administration to any person and may make the grant subject to any conditions or limitations that the court considers appropriate.
- (2) Subsection (1) is subject to section 312.

304 Grant of representation—[Queensland] domicile [new; R 38-4 and 38-5]

- (1) If, in making a grant of representation, the Supreme Court is satisfied that the deceased person died domiciled in this jurisdiction, the court must endorse the grant to that effect.
- (2) In this section—
grant of representation does not include an election to administer.

305 Grant of representation—domicile other than [Queensland] [new; R 38-4 and 38-7]

- (1) This section applies if, in making a grant of representation (the *local grant*), the Supreme Court—
 - (a) is satisfied that the deceased person died domiciled in an interstate jurisdiction; or
 - (b) does not make a finding about where the deceased died domiciled.
- (2) The Supreme Court must endorse the local grant to the effect that it ceases to have effect if a later interstate grant of representation is 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.
- (3) In this section—

grant of representation does not include an election to administer.

306 Application for grant of probate or letters of administration to be made as provided under the rules of court [NSW s42(1); R 40-1]

An application for a grant of probate or letters of administration must be made in the way prescribed under the rules of court.

307 Supreme Court's jurisdiction extends to making of orders available under the [insert local equivalent of *Trusts Act 1973* (Qld)] [Q s6(4); R 3-1]

- (1) The Supreme Court may make, for the proper administration of any property in a deceased person's estate, any order that it may make for the administration of trust property under [insert local equivalent of the *Trusts Act 1973* (Qld)].
- (2) Subsection (1) does not limit sections 301 to 303.

[s 308]

Division 2 **Grants of representation on inference or presumption of death**

308 **Definition for division**

In this division—

grant of representation does not include an election to administer.

309 **Validity if death is inferred or presumed [ACT s9A(2); R 24-3]**

- (1) This section applies if the Supreme Court—
 - (a) infers that a person has died or declares, in relation to a person, that the common law presumption of death is satisfied; and
 - (b) makes a grant of representation of the person's estate.
- (2) The grant is valid even though it may subsequently be established that the person whose death was inferred or who was presumed to be dead was living when the grant was made.

Note—

See section 372 if the person was living when the grant of representation was made.

310 **Endorsement if death is presumed [NSW s40B(2) and ACT s9B(1)(a); R 24-2]**

If the Supreme Court makes a grant of representation on the presumption of a person's death, the grant must be endorsed by the court to the effect that it has been made on the presumption of the person's death.

311 Imposition of conditions [NSW s40B(3) and NT s16(7); R 24-4 and 24-5]

- (1) The Supreme Court may impose conditions on a grant of representation made on an inference or presumption of death.

Example of a condition—

that the personal representative not distribute any part of the estate to a beneficiary unless the beneficiary gives an undertaking or security to restore or return any property the beneficiary receives from the estate, or its value, to the person entitled if the grant is subsequently revoked because the person was alive when the grant was made

- (2) If the grant is subject to a condition, the Supreme Court may revoke or vary the condition at any time on the application of the personal representative or a person affected by the condition.
- (3) This section does not limit section 303.

Division 3 Limitations

312 Grants of probate and letters of administration [Q s48; R 4-18 and 4-19]

- (1) The Supreme Court may make a grant of probate or letters of administration of a deceased person's will or estate to an individual only if the individual is an adult.
- (2) Not more than 4 persons may hold a grant of probate or letters of administration of a deceased person's will or estate at any 1 time.
- (3) If more than 4 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.

Note—

See section 318 about reserving leave to apply for a grant of probate.

Part 2 Caveats

313 Person objecting to grant of representation [NT s44; R 8-3 and 8-4]

- (1) A person may, at any time before a grant of representation of a deceased person's estate is made, file with the registrar a caveat against the making of a grant.
- (2) The caveat must be filed as required under the rules of court.
- (3) The rules of court may provide for how a caveat filed under this section may be dealt with by the Supreme Court.
- (4) In this section—

grant of representation includes a foreign grant of representation.

make, a grant of representation, includes reseal a foreign grant of representation.

Part 3 Renunciation

314 Application of part

This part only applies in relation to a deceased person who dies after the commencement of this section.

315 Renunciation of executorship [Q s54(2); R 4-4]

- (1) An executor named in the will of a deceased person may renounce his or her executorship of the deceased's will.
- (2) Subsection (1) applies whether or not the executor has intermeddled in the administration of the estate.
- (3) However, the renunciation may only be made before a grant of probate of the deceased's will has been made to the executor.

316 Limited ability to apply for a grant of representation in another capacity [WA Non-contentious Probate Rules, r28; R 4-5]

A person who has renounced the executorship of the will or administration of the estate of a deceased person in 1 capacity may not be the holder of a grant of representation of the deceased's estate in another capacity unless the Supreme Court otherwise directs.

317 Retraction [R 4-6 and 4-7]

- (1) This section applies if a person has renounced the executorship of the will or administration of the estate of a deceased person and applies to the Supreme Court to retract the renunciation.
- (2) The Supreme Court may permit the person to retract the renunciation if the court is satisfied that the retraction would be for the benefit of the estate or persons interested in the estate.
- (3) However, if a grant of letters of administration of the deceased's estate has been made to someone (the *current administrator*) lower in priority than the person, the Supreme Court may permit the retraction only if the court is satisfied that it would be to the detriment of the estate or persons interested in the estate for the current administrator to continue as administrator.

Note—

See sections 321 and 322 for the order of priority for letters of administration.

[s 318]

Part 4 **Particular provisions for probate and executors**

318 **Leave to apply for a further grant of probate [NSW s41; R 4-1]**

- (1) This section applies 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.
- (2) The Supreme Court may—
 - (a) make a grant of probate to 1 or more of the executors who apply for the grant; and
 - (b) reserve leave to the executor or executors who have not applied for the grant and have not renounced their executorship to apply for a grant of probate at a later time.

319 **When an executor's right to prove the will ends [Q s46; R 4-3]**

- (1) This section applies if a person appointed executor by a will—
 - (a) survives the testator but dies without having a grant of probate being made to him or her; or
 - (b) renounces his or her executorship of the will; or
 - (c) after being required by the Supreme Court, including by citation or summons, to apply for a grant of probate, fails to apply for the grant as required by the court.
- (2) The person's rights in relation to the executorship end.
- (3) 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.

Examples of ways in which a testator's personal representative may be determined—

- by operation of law

- on application to the Supreme Court for a grant of representation
- (4) Nothing in this section affects the person's liability for an act or omission happening before the person's rights in relation to the executorship end.

Part 5 **Particular provisions for letters of administration**

320 **Application of part [NSW s74; R 4-9]**

- (1) This part applies if a person 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 1 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.
- (2) For this part, it does not matter whether the person's death happens before or after the commencement of this section.
- (3) Nothing in this part limits the Supreme Court's jurisdiction under section 301.

321 **Priority for grant—will and [Queensland] domicile [SA Probate Rules, r36.02; Qld UCPR r603; R 5-4 and 5-5]**

- (1) This section applies if a person dies domiciled in this jurisdiction.

[s 322]

- (2) The priority of persons to whom the Supreme Court may make a grant of letters of administration with the will annexed of the estate of the deceased person is stated in descending order in schedule 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) An applicant for the grant must establish that any person higher than the applicant in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation.
- (5) This section does not limit section 303.

**322 Priority for grant—intestacy and [Queensland] domicile
[SA Probate Rules, r36.02; Qld UCPR r610; R 5-1 and 5-5]**

- (1) This section applies if a person dies domiciled in this jurisdiction.
- (2) The priority of persons to whom the Supreme Court may make a grant of letters of administration on intestacy of the estate of the deceased person is stated in descending order in schedule 2.
- (3) A person who represents a person mentioned in schedule 2 has the same priority as the person represented.
- (4) An applicant for the grant must establish that any person higher than the applicant in the order of priority is not entitled to priority because of death, lack of legal capacity or renunciation.
- (5) The applicant must file in the Supreme Court an affidavit, sworn by the applicant or someone else with relevant knowledge, about the existence or nonexistence and beneficial interest of any spouse or a person claiming to be a spouse.
- (6) This section does not limit section 303.

Example for subsection (6)—

If there is more than 1 surviving spouse, the Supreme Court may make the grant to 1 or more of them, or to a person lower than the surviving spouse or spouses in the order of priority.

323 Endorsement if grant made to creditor [new; R 7-4]

- (1) This section applies if a grant of letters of administration is made to a person who applies for the grant as a creditor of the deceased person's estate.
- (2) The grant must be endorsed by the Supreme Court to the effect that it has been made to the administrator of the deceased's estate as a creditor of the estate.

Part 6 Elections to administer—simplified procedure for small estates

Division 1 Preliminary

324 Application of part [Qld Public Trustee Act, s30]

This part applies in relation to a deceased person whether the person died before or after the commencement of this section.

325 Definitions for part [R 29-3]

In this part—

CPI means the all groups consumer price index, being the weighted average of the 8 capital cities, published by the Australian statistician.

[s 326]

CPI indexed, in relation to an amount for a preceding calendar year, means the amount is increased by the percentage change in CPI for the [September] quarter for the calendar year immediately before the preceding calendar year and the [September] quarter for the preceding calendar year.

preceding calendar year, in relation to a later calendar year, means the calendar year immediately preceding the later calendar year.

prescribed amount means—

- (a) for the calendar year ending 31 December [*insert relevant year*—\$100000; or
- (b) for a later calendar year—the amount for the preceding calendar year, CPI indexed.

Division 2 No previous grant of representation

326 Filing an election to administer [NT s110B; R 29-1]

A professional administrator may file in the Supreme Court an election to administer the estate of a deceased person if—

- (a) the professional administrator is entitled to have a grant of probate of the deceased's will or letters of administration of [or an order to administer] the deceased's estate made to the professional administrator; and
- (b) the professional administrator estimates that the net value of the estate in this jurisdiction at the time of filing the election to administer is not more than the prescribed amount; and
- (c) no grant of representation of the estate has been made in this jurisdiction; and
- (d) no interstate grant of representation of the estate has been made that is effective in this jurisdiction under section 335.

327 Form and content of election to administer [NT s110B; R 29-1]

- (1) An election to administer filed under section 326 must be in writing and state the following matters—
 - (a) the deceased's name, address, occupation and date of death;
 - (b) details of the deceased's estate;
 - (c) whether the deceased died leaving a will or without leaving a will;
 - (d) if the deceased died leaving a will, a statement that, after making proper inquiries, the professional administrator believes—
 - (i) that the document annexed to the election to administer is the deceased's last will or a certified copy of the deceased's last will; and
 - (ii) that the will has been properly executed.
- (2) If the form of an election to administer is approved for use under section 619, the election to administer must be in the approved form.
- (3) In this section—

properly executed, in relation to a will, means executed in accordance with the law governing the execution of the will.

328 Status of professional administrator after filing an election to administer [NT s110B; R 29-1]

On filing the election to administer, the professional administrator is taken to be—

- (a) if the deceased died leaving a will and the professional administrator is an executor of the will—the holder of a grant of probate of the will; or
- (b) if the deceased died leaving a will and the professional administrator is not an executor of the will—the holder

[s 329]

of a grant of letters of administration with the will annexed; or

- (c) if the deceased died without leaving a will—the holder of a grant of letters of administration on intestacy of the deceased’s estate.

329 Value of estate must not exceed prescribed amount [NT s110B; R 29-1]

If, after filing the election to administer, the professional administrator discovers that the net value of the estate in this jurisdiction is more than 150% of the prescribed amount, the professional administrator must—

- (a) file in the Supreme Court a memorandum stating the value of the estate in this jurisdiction; and
- (b) apply for a grant of probate or letters of administration [or an order to administer].

Division 3 Previous grant of representation

330 Filing election to administer [NT s110C; R 29-2]

A professional administrator may file in the Supreme Court an election to administer the unadministered part of a deceased person’s estate if—

- (a) a grant of representation of a deceased person’s estate has been made to a person (the *last personal representative*) but, because of the death or loss of legal capacity of the last personal representative, the estate has been left unadministered; and
- (b) the professional administrator is entitled to have a grant of letters of administration [or an order to administer] of the unadministered estate made to the professional administrator; and

- (c) the professional administrator estimates that the net value of the unadministered estate in this jurisdiction at the time of filing the election to administer is not more than the prescribed amount; and
- (d) no grant of representation of the unadministered estate has been made since the death or loss of legal capacity of the last personal representative; and
- (e) no interstate grant of representation of the unadministered estate has been made that is effective in this jurisdiction under section 335.

331 Form and content of election to administer [NT s110C; R 29-2]

- (1) An election to administer filed under section 330 must be in writing and state details of the following matters—
 - (a) the last grant of representation;
 - (b) the death or loss of legal capacity of the last personal representative;
 - (c) the estate in this jurisdiction left unadministered.
- (2) If the form of an election to administer is approved for use under section 619, the election to administer must be in the approved form.
- (3) A statement by the professional administrator in the election to administer giving details of the death or loss of legal capacity of the last personal representative—
 - (a) is evidence of the details stated; and
 - (b) in the absence of evidence to the contrary, is to be accepted by all courts and persons, whether acting under an Act or not, without further proof.

[s 332]

332 Status of professional administrator [NT s110C; R 29-2]

- (1) On filing the election to administer, the professional administrator is taken to be the administrator of the unadministered estate as if a grant of letters of administration of the unadministered estate had been made to the professional administrator.
- (2) However, if the professional administrator filed the election to administer because of the last personal representative's lack of legal capacity, subsection (1) applies only for the period of the lack of legal capacity.

333 Value of unadministered estate must not exceed prescribed amount [NT s110C; R 29-2]

If, after filing the election to administer, the professional administrator discovers that the net value of the unadministered estate in this jurisdiction is more than 150% of the prescribed amount, the professional administrator must—

- (a) file in the Supreme Court a memorandum stating the value of the unadministered estate in this jurisdiction; and
- (b) apply for letters of administration of [or an order to administer] the unadministered estate.

Division 4 Estate administration fees

334 Fees that may be charged under this part [NT s110D; R 29-5]

- (1) A professional administrator who administers an estate under this part may charge a fee for the administration.
- (2) A regulation may prescribe the maximum fee that a professional administrator may charge under this section.

- (3) If a maximum fee is not prescribed, a professional administrator may charge a fee that is not more than the amount that the [public trustee] is entitled to charge according to the [insert local equivalent of scale of commission and fees prescribed under section 74(5) of the *Public Trustee Act* (NT)].

Part 7 Automatic recognition

335 Effect of an interstate grant of representation for an Australian domicile [new; R 38-3, 38-4 and 38-8]

- (1) This section applies if, after the commencement of this section—
- (a) the Supreme Court has not made a grant of representation endorsed under section 304 to the effect that the deceased person died domiciled in this jurisdiction; and
 - (b) an interstate grant of representation (the *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.
- (2) On the endorsing of the interstate grant—
- (a) the interstate grant has the same force, effect and operation in this jurisdiction as it would have if it had been originally made by the Supreme Court; and
 - (b) the force, effect and operation of the interstate grant in this jurisdiction is subject to the Supreme Court's jurisdiction; and
 - (c) each of the following ceases to have effect—
 - (i) a grant of representation of the deceased's estate previously made by the Supreme Court and endorsed under section 305;

[s 336]

- (ii) an election to administer the deceased's estate previously filed in the Supreme Court by a professional administrator;
 - (iii) a foreign grant of representation of the deceased's estate previously resealed by the Supreme Court under section 353.
- (3) For this section, it does not matter whether the deceased died before or after the commencement of this section.

336 Review [new; R 38-23, 38-24]

- (1) The Minister must review the operation of provisions of this Act providing for automatic recognition of interstate grants of representation—
- (a) to decide their effectiveness; and
 - (b) to ascertain whether the further recommendations for automatic recognition of interstate grants of representation contained in the Law Reform Report can be implemented.
- (2) The review must be started within 5 years after the commencement of this section.
- (3) As soon as practicable, but within 1 year after the end of the 5 year period, the Minister must table a report about the review in the Legislative Assembly.
- (4) In this section—

Law Reform Report means the Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General published by the Queensland Law Reform Commission.

Editor's note—

The report is Report 65 and the recommendations are R 38-14 to 38-16 and 38-20 to 38-21.

Part 8 Chain of representation

Division 1 Preliminary

337 Definitions for part [R 7-2 and 7-3]

In this part—

deceased personal representative means a deceased person who, immediately before his or her death, was—

- (a) the last surviving, or sole, executor of a deceased person's will and was the holder of a grant of probate of the will; or
- (b) the last surviving, or sole, administrator of a deceased person's estate.

grant of representation, of the estate of a deceased personal representative, does not include—

- (a) a grant of letters of administration made only because the administrator is a creditor of the estate; or
- (b) [an order to administer]; or
- (c) an election to administer.

Division 2 Becoming an executor or administrator by representation

338 Executor or administrator by representation [new; R 7-1 and 7-19]

- (1) If, after the commencement of this section, the Supreme Court makes a grant of probate or letters of administration of the will or estate of a deceased personal representative to a person, the person is, on the making of the grant of probate or letters of administration—

[s 338]

- (a) an executor by representation of any will of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, executor under a grant of probate; and
 - (b) an administrator by representation of any estate of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, administrator; and
 - (c) an executor by representation of any will of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, executor by representation; and
 - (d) an administrator by representation of any estate of which the deceased personal representative was, at the time of the representative's death, the last surviving, or sole, administrator by representation.
- (2) However, subsection (3) applies if—
- (a) after the death of the deceased personal representative; and
 - (b) before the 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, administrator, or executor or administrator by representation.
- (3) The person to whom a grant of probate or letters of administration is made of the will or estate of the deceased personal representative does not, on the making of the grant, become the executor or administrator by representation of—
- (a) the will or estate of the other person; or

- (b) any will or estate of which the other person was the executor, administrator, or executor or administrator by representation.

Division 3 Rights and liabilities of executor or administrator by representation

339 Rights and liabilities [Q s47(4); R 7-5]

An executor or administrator by representation—

- (a) has the same rights in relation to any estate of which the person is the executor or administrator by representation that the deceased personal representative of the estate would have had if living; and
- (b) is, to the extent to which any estate mentioned in paragraph (a) has come under his or her control, accountable in the same way as the person would be if he or she were an original executor or administrator of the estate.

Division 4 Renouncing executorship or administratorship by representation

340 Renunciation [Q s47(5); R 7-6 to 7-8]

- (1) This section applies to a person who is an executor of the will or administrator of the estate of a deceased personal representative.
- (2) The person may renounce the executorship or administratorship by representation of the will or estate (the *other estate*) of which the deceased personal representative was the executor, the administrator, or the executor or administrator by representation.

[s 341]

- (3) The renunciation may be made without renouncing the executorship or administratorship of the will or estate of the deceased personal representative.
- (4) The renunciation must be filed in the Supreme Court and may be made before or after a grant of representation of the deceased personal representative's estate has been made.
- (5) However, the renunciation must be made before the person takes any active step in the administration of the other estate.
- (6) In this section—
active step, in the administration of the other estate, does not include any of the following—
 - (a) an act of necessity;
 - (b) an act taken to protect or preserve any property in the estate;
 - (c) an act of a minor character that is for the estate's benefit;
 - (d) an act taken for the purpose of arranging disposal of the deceased person's remains.

Division 5 Ceasing to hold office as executor or administrator by representation

341 Grant of probate to someone else—leave reserved [Q s47(1A); R 7-10 and 7-11]

- (1) This section applies if—
 - (a) the Supreme Court—
 - (i) has made a grant of probate to only 1 or some of the executors named in a deceased person's will (the *proving executors*); and
 - (ii) 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*); and

- (b) the last surviving, or sole, proving executor dies; and
 - (c) a person becomes the executor by representation of the deceased person's will under section 338.
- (2) On the making of a grant of probate by the Supreme Court to 1 or more of the non-proving executors, the executor by representation of the deceased person's will stops being—
- (a) an executor by representation of the deceased's will; and
 - (b) 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.

342 Grant of letters of administration to someone else—s 350 or 351 applies [new; R 7-16]

A person who is an executor or administrator by representation of the will or estate of a deceased person stops being—

- (a) an executor or administrator by representation of the deceased's will or estate; and
- (b) 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;

if section 350 or 351 applies and the Supreme Court makes a grant of letters of administration of the deceased's estate to another person.

[s 343]

343 Grant of representation is revoked, ends or ceases to have effect [new; R 7-17]

- (1) Subsection (2) applies if a person is the holder of a grant of representation of a deceased personal representative's estate and the grant is revoked, ends or ceases to have effect.
- (2) The person stops being 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.

344 Renunciation [new; R 7-9]

- (1) This section applies to a person who—
 - (a) is the holder of a grant of representation of a deceased personal representative's estate; and
 - (b) 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.
- (2) The person stops being an executor or administrator by representation of—
 - (a) the deceased person's will or estate; and
 - (b) any will or estate of which the deceased person was the executor, the administrator, or the executor or administrator by representation.

Part 9 Passing over

345 Application of part

- (1) This part applies in relation to a deceased person whether the person died before or after the commencement of this section.
- (2) This part does not limit section 301, 302, 303 or 307.

346 Definitions for part [R4-14]

In this part—

lawful authority includes authority under a law of another State [or Territory].

prescribed provision means section 349(1)(b) or 350(1)(c).

substitute decision-maker, for a beneficiary of an estate who lacks legal capacity to enter into an agreement under a prescribed provision, means a person, other than a person who is also a beneficiary of the estate, who has lawful authority to make binding decisions for the beneficiary for the agreement.

347 Supreme Court's general discretion [new; R 4-10 and 4-11]

- (1) This section applies if the Supreme Court, on application, considers it appropriate to make a grant of probate or letters of administration of a deceased person's will or estate to a person other than the person, or all of the persons, otherwise entitled to the grant of probate or letters of administration—
 - (a) for the proper administration of the deceased's estate; and
 - (b) in the interests of the persons who are, or may be, interested in the deceased's estate.
- (2) The Supreme 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 make the grant to—

[s 348]

- (a) without limiting paragraph (b), if there is more than 1 person entitled to the grant—any or all of the other persons entitled; or
- (b) any person the court considers appropriate.

348 Offences relating to the deceased's death [new; R 4-12]

- (1) This section applies if the Supreme Court, on application, considers there are reasonable grounds for believing that a person otherwise entitled to a grant of probate or letters of administration of a deceased person's will or estate has committed an offence relating to the deceased's death.
- (2) The Supreme 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 make the grant of probate or letters of administration to—
 - (a) without limiting paragraph (b), if there is more than 1 person entitled to the grant—any or all of the other persons entitled; or
 - (b) any person the court considers appropriate.

349 Person entitled to original grant of probate or letters of administration [new; R 4-13 to 4-15]

- (1) This section applies if—
 - (a) all the beneficiaries of a deceased person's estate are adults; and
 - (b) all the beneficiaries agree that a grant of probate or letters of administration of the deceased's will or estate should be made to a person or persons, other than the person or all of the persons otherwise entitled to the grant, nominated by the beneficiaries.
- (2) The Supreme Court may, on application, make the grant of probate or letters of administration to the person or persons nominated by all the beneficiaries.

- (3) However, the Supreme 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.
- (4) For subsection (1)(b), if a 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.

350 Person who is executor or administrator by representation [new; R 7-12 to 7-14]

- (1) This section applies if—
 - (a) there is an executor or administrator by representation of a deceased person's will or estate; and
 - (b) all the beneficiaries of the deceased's estate are adults; and
 - (c) all the beneficiaries agree that a grant of letters of administration of the deceased's estate should be made to—
 - (i) without limiting subparagraph (ii), if there is more than 1 executor or administrator by representation—1 or more executors or administrators by representation nominated by the beneficiaries; or
 - (ii) another person or other persons nominated by the beneficiaries.
- (2) The Supreme Court may, on application, make the grant of letters of administration of the estate to the person or persons nominated by all the beneficiaries.
- (3) However, the Supreme Court may not make the grant of letters of administration unless it is satisfied that the applicant for the grant, or someone else with relevant knowledge,

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reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate.

- (4) For subsection (1)(c), if a 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.

351 Executor or administrator by representation—other applications [new; R 7-15]

- (1) This section applies if—
 - (a) there is an executor or administrator by representation of a deceased person's will or estate; and
 - (b) a person who, if there were no executor or administrator by representation of the will or estate, would be entitled to a grant of letters of administration applies to the Supreme Court for a grant of letters of administration.
- (2) The Supreme Court may make the grant of letters of administration to the person mentioned in subsection (1)(b).

Part 10 Foreign domicile

352 Grant of representation when deceased person dies domiciled outside this jurisdiction [SA Probate Rules, rr36.02 and 40.01; R 36-1 to 36-5]

- (1) This section applies if a person dies domiciled outside this jurisdiction, including outside Australia.
- (2) For this section, it does not matter whether the person's death happens before or after the commencement of this section.
- (3) The Supreme Court may make a grant of representation of the deceased person's estate under subsection (4) or (6) as it considers appropriate.

- (4) The Supreme Court may make a grant of representation to any of the following persons—
- (a) the person entrusted with the administration of the estate by the court (the *domiciliary court*) having jurisdiction at the place where the deceased died domiciled;
 - (b) the person entitled to administer the estate by the law of the place where the deceased died domiciled;
 - (c) a person to whom the domiciliary court could entrust the administration of the estate;
 - (d) another person the Supreme Court considers appropriate to administer the estate if—
 - (i) there is no person who meets the description of a person mentioned in paragraph (a), (b) or (c); or
 - (ii) the court considers the circumstances of the case require it.
- (5) However, the Supreme Court may not make a grant of representation under subsection (4) if—
- (a) the deceased appointed 1 or more executors in this jurisdiction to administer the deceased's estate in this jurisdiction; and
 - (b) the executor or executors have legal capacity and are willing to administer the estate.
- (6) The Supreme Court may—
- (a) if the deceased left a will admissible to proof in this jurisdiction, make a grant of probate of the will to—
 - (i) an executor named in the will; or
 - (ii) if the will describes the duties of a named person in terms that are sufficient to constitute the named person executor according to the tenor of the will—the named person; or
 - (b) if the whole, or substantially the whole, estate consists of immovable property, make a grant of representation

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of the whole estate to the person or persons who would have been entitled to the grant if the deceased had died domiciled in this jurisdiction.

Notes—

- 1 For paragraph (a), a will is admissible to proof in this jurisdiction if it is taken to be properly executed under [insert local equivalent of the *Succession Act 1981* (Qld), part 2, division 6 (Wills with a foreign connection)].
- 2 See sections 321 and 322 for the priority of persons to letters of administration if a person dies domiciled in this jurisdiction.

(7) This section does not limit section 303.

Part 11 Resealing foreign grants of representation

Division 1 Supreme Court may reseal foreign grants of representation

353 Resealing foreign grants of representation [NSW s97(2); R 3-2, 32-1, 32-2, 35-7, 38-9, 40-4, 40-5]

- (1) The Supreme Court may reseal a foreign grant of representation of a deceased person's estate.
- (2) However, the Supreme Court may reseal an interstate grant of representation of a deceased person's estate only if the court is satisfied that the deceased person was not domiciled in Australia when the person died.

Note—

See part 7 for provisions dealing with the automatic recognition of interstate grants of representation.

- (3) The Supreme Court may reseal a foreign grant of representation even though—
 - (a) the deceased left no estate in this jurisdiction or elsewhere; or
 - (b) the person applying to reseal the foreign grant is not resident or domiciled in this jurisdiction.
- (4) If the person applying to reseal a foreign grant of representation (the *applicant*) is not resident in this jurisdiction, the applicant must file with the application a notice giving an address for service in this jurisdiction.
- (5) Service of a document relating to the administration of the estate, or a proceeding relating to the administration of the estate, at the address for service given under subsection (4) is taken to be personal service of the document on the applicant.

Example of a document for a proceeding relating to the administration of the estate—

an originating process

Division 2 Limitations on resealing

354 **Foreign grant of representation must be held by particular persons [UK Non-Contentious Probate Rules 1987, r39(3); R 36-6 and 36-7]**

Unless the Supreme Court otherwise orders, a foreign grant of representation of a deceased person's estate may be resealed only if the foreign grant—

- (a) was made to the person entrusted with the administration of the estate by the court (the *domiciliary court*) having jurisdiction at the place where the deceased died domiciled; or
- (b) was made to the person entitled to administer the estate by the law of the place where the deceased died domiciled; or

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- (c) was made to a person to whom the domiciliary court could entrust the administration of the estate; or
- (d) was made to, for a grant of probate of a will admissible to proof in this jurisdiction—
 - (i) an executor named in the will; or
 - (ii) if the will describes the duties of a named person in terms that are sufficient to constitute the person executor according to the tenor of the will—the named person.

Note—

For paragraph (d), a will is admissible to proof in this jurisdiction if it is taken to be properly executed under [insert local equivalent of the *Succession Act 1981* (Qld), part 2, division 6 (Wills with a foreign connection)].

**355 Interstate and overseas elections to administer [new;
R 31-7]**

- (1) The Supreme Court may reseal a certified interstate election to administer or a certified overseas election to administer a deceased person's estate only if the person applying to reseal it—
 - (a) estimates that the net value of the estate in this jurisdiction at the time of the making of the application is not more than the prescribed amount; and
 - (b) gives an undertaking to the Supreme Court as required by subsection (2).
- (2) The person must undertake that, if relevant assets are discovered, no further step in the administration of the estate in this jurisdiction will take place until lawful authority is obtained in the foreign jurisdiction to administer the estate in that jurisdiction.
- (3) In this section—

certified interstate election to administer means an interstate election to administer certified under the seal of, or under the

authority of, the court in which it is filed as a correct copy of the instrument filed in that court.

certified overseas election to administer means an overseas election to administer certified under the seal of, or under the authority of, the court in which it is filed as a correct copy of the instrument filed in that court.

prescribed amount has the same meaning it has in section 325.

relevant assets means assets in the jurisdiction in which the interstate election to administer or the overseas election to administer was filed that prevent the estate in that jurisdiction being administered under the authority of the existing interstate election to administer or overseas election to administer.

356 Value of estate must not exceed prescribed amount [new; R 31-8]

- (1) If, after the resealing of the certified interstate election to administer or certified overseas election to administer, the person who applied to reseal it discovers that the net value of the estate in this jurisdiction is more than 150% of the prescribed amount, the person must—
 - (a) file in the Supreme Court a memorandum stating the value of the estate in this jurisdiction; and
 - (b) apply for a grant of probate or letters of administration [or an order to administer].
- (2) In this section—

prescribed amount has the same meaning it has in section 325.

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Division 3 Applications for resealing

357 Requirements [NSW s42(1); R 33-6, 35-8, 40-2]

- (1) An application to the Supreme Court to reseal a foreign grant of representation must be made in the way prescribed under the rules of court.
- (2) If the applicant for the resealing is an individual, the applicant must be an adult.
- (3) The applicant must depose, by affidavit, that the foreign grant has not been revoked or changed in the foreign jurisdiction in which it was made.
- (4) Subsections (2) and (3) do not limit the requirements for resealing a foreign grant of representation that may be provided for under the rules of court.
- (5) In this section—
applicant, for the resealing of the foreign grant of representation, includes—
 - (a) a trustee company; and
 - (b) a person who is acting as an attorney for the holder of the foreign grant.

358 Holders of a foreign grant of representation [R 33-1(a) and (b), 33-2, 33-4, 33-5; 35-1(a), (b), (d)(i) and (ii); 35-2(a), (b), (d)(i) and (ii), 35-3 and 35-4]

- (1) The holder of a foreign grant of representation may apply to reseal the foreign grant.
- (2) If there is 1 or more holders of the foreign grant, any 1 or more, or all, of the holders may apply to reseal the foreign grant.
- (3) However, if fewer than all the holders apply to reseal the foreign grant, the consent to the application, by affidavit, of

each of the holders who did not apply must be produced in support of the application.

- (4) If any holder is unable to consent because of death or lack of legal capacity, the person applying to reseal the foreign grant must establish the death or lack of legal capacity of that holder.
- (5) If the last surviving, or sole, holder of a foreign grant of representation has died (the *deceased holder*), a person who is either of the following is taken to be the holder of the foreign grant—
 - (a) a person to whom the Supreme Court has made a grant of probate or letters of administration of the deceased holder's will or estate;
 - (b) a person recognised in this jurisdiction as the executor or administrator by representation of the will or estate of the deceased holder.
- (6) Subsection (5) applies only if the foreign grant is a grant of probate or letters of administration.

359 Persons authorised under a power of attorney [R 33-1(c); 35-1(c) and (d)(iii); 35-2(c) and (d)(iii)]

- (1) The holder of a foreign grant of representation may, by power of attorney, authorise a person (the *attorney*) to apply to reseal the foreign grant.
- (2) However, if there is more than 1 holder of the foreign grant, each holder must authorise the attorney to apply to reseal the foreign grant.
- (3) If any holder is unable to give the authorisation because of death or lack of legal capacity, the attorney must establish the death or lack of legal capacity of that holder.

360 Trustee companies [R 35-5]

- (1) This section applies if a trustee company—

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- (a) is the holder of a foreign grant of representation; or
 - (b) is authorised by the holder of a foreign grant of representation, by power of attorney, to apply to reseal the foreign grant.
- (2) The Supreme Court may reseal the foreign grant of representation even though a grant of representation of the estate could not be made to the trustee company under the laws of this jurisdiction.
- (3) This section does not limit section 358 or 359.

361 Special circumstances [new; R 33-3]

- (1) A person who is not otherwise permitted under this division to apply to reseal a foreign grant of representation may apply to the Supreme Court for an order to reseal the foreign grant.
- (2) The Supreme Court may make an order under subsection (1) if it is satisfied that there are special circumstances warranting the making of the order.

Division 4 Supreme Court may impose conditions etc.

362 Imposing conditions on, or revoking, the resealing of a foreign grant of representation [new; R 35-7]

- (1) The Supreme Court may reseal a foreign grant of representation subject to any conditions the court considers appropriate.
- (2) Without limiting section 364(2)(b), the Supreme Court may revoke the resealing of a foreign grant of representation or change or add to the conditions to which the resealing is subject.

Division 5 Notice

363 Notification [R 35-9 and 35-10]

- (1) If the Supreme Court reseals a foreign grant of representation, it must notify the relevant court of the jurisdiction in which the foreign grant was made that the foreign grant has been resealed in this jurisdiction.
- (2) If the Supreme Court is notified by a court of a foreign jurisdiction that a grant of representation made by the Supreme Court has been resealed in the other jurisdiction, the Supreme Court must notify the court of the other jurisdiction if—
 - (a) it has revoked the grant or changed or added to any conditions to which the grant is subject; or
 - (b) after receiving the notice, it revokes the grant or changes or adds to any conditions to which the grant is subject.

Division 6 Effect of resealing a foreign grant of representation

364 Resealed foreign grant of representation operates as a grant of representation [Vic ss81(3), 85; R 34-1 and 34-2]

- (1) A foreign grant of representation of a deceased person's estate, when resealed in this jurisdiction, has the same force, effect and operation in this jurisdiction as a grant of representation made in this jurisdiction.
- (2) On the resealing of a foreign grant of representation of a deceased person's estate—
 - (a) the person who applied to reseal the foreign grant—
 - (i) has the same rights and powers, and is subject to the same duties and liabilities, that the person would have or be subject to if the resealed foreign

[s 365]

grant of representation were a grant of representation made in this jurisdiction; and

- (ii) is to be taken, for all purposes, to be the personal representative of the deceased person in relation to the deceased's estate in this jurisdiction; and
- (b) the force, effect and operation of the foreign grant in this jurisdiction is subject to the Supreme Court's jurisdiction.
- (3) Subsections (1) and (2)(a) are subject to sections 355(2) and 356.
- (4) Nothing in this section requires the Supreme Court to endorse the resealed foreign grant of representation under section 304 or 305.

365 Particular provision for attorneys [Vic s86; R 34-3]

- (1) This section applies if—
 - (a) a person's authority to apply to reseal a foreign grant of representation of a deceased person's estate was a power of attorney; and
- Note—*
- See section 359 (Persons authorised under a power of attorney).
- (b) the Supreme Court resealed the foreign grant of representation; and
 - (c) the person has satisfied or provided for the claims against the estate of all persons resident in this jurisdiction of which the person has notice.
- (2) For subsection (1)(c), it does not matter whether the person had notice of the claims before or after advertising for creditors.
 - (3) The person may dispose of the balance of the estate in this jurisdiction to, or as directed by, the donor of the power of attorney.

- (4) The person—
 - (a) is not required to see to the application of the balance of the estate disposed of under subsection (3); and
 - (b) is not liable for the disposition of the balance of the estate as provided for under subsection (3).
- (5) However, the person must account to the donor for the person's administration of the estate.
- (6) In this section—

claims includes debts.

Part 12 Disposition under a grant of representation affected by a defect

366 Disposition of property in reliance on a grant of representation [Q s53(1); R 25-2 and 25-3]

- (1) This section applies to a person who, in good faith, disposes of a deceased person's property under a grant of representation.
- (2) The person is not liable for the disposition despite any defect or circumstance affecting the validity of the grant.
- (3) In this section—

dispose, of property, includes pay an amount.

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Part 13 **Revocation, ending or ceasing of effect of a grant of representation**

367 **Definition for part**

In this part—

dispose, of property, includes pay an amount.

368 **Disposition to personal representative is a valid discharge [Q s53(2); R 25-2]**

- (1) This section applies if a person, in good faith, disposes of a deceased person's property to the personal representative named in a grant of representation before the revocation, ending or ceasing of effect of the grant.
- (2) The disposition is a valid discharge to the person making it.
- (3) For subsection (2), it does not matter whether the disposition was made before the grant of representation was made.

369 **Distribution or disposition by personal representative [Q s53(2) to (4); R 25-2]**

- (1) This section applies to a personal representative who has acted under a grant of representation of a deceased person's estate that is subsequently revoked or ends.
- (2) The personal representative may retain from the estate, and reimburse himself or herself, an amount equivalent to the amount of prescribed payments he or she made.
- (3) The personal representative is not liable for any distribution of the estate made in good faith and without negligence in reliance on the grant.
- (4) However, the personal representative must have sought the grant of representation in good faith and without negligence.

(5) A disposition of an interest in property by the personal representative to a purchaser in good faith is valid.

(6) In this section—

prescribed payments, made by a personal representative, means payments made by the personal representative that a person to whom a grant of representation of the estate is afterwards made might properly have made.

370 Personal representative may recover particular distributions [Q s53(5); R 25-2]

(1) This section applies if—

- (a) a distribution of a deceased person's estate is made under a grant of representation (the *first grant*); and
- (b) the first grant is subsequently revoked and a new grant of representation (the *subsequent grant*) is made; and
- (c) the person to whom the distribution was made under the first grant is not entitled to it under the subsequent grant.

(2) The holder of the subsequent grant may recover the distribution, or its value, from the person to whom the distribution was made.

(3) However, if the person—

- (a) has received the distribution in good faith; and
- (b) has so altered the person's position in reliance on the correctness of the distribution that, in the Supreme Court's opinion, it would be inequitable to order the recovery of the distribution, or its value;

the court may make any order it considers to be just in all the circumstances.

(4) Subsection (3) does not limit any other defence available, under an Act or at law or in equity, to the person to whom the distribution has been made.

[s 371]

371 Proceedings may be continued by or against new personal representative [Q s53(6); R 25-2]

- (1) This section applies if—
 - (a) a proceeding by or against a personal representative to whom a grant of representation has been made is pending in a court of this jurisdiction; and
 - (b) the grant is revoked, ends or ceases to have effect and a grant of representation is made to someone else (the *new personal representative*).
- (2) The court in which the proceeding is pending may order that the proceeding be continued by or against the new personal representative as if it had been originally commenced by or against the new personal representative.
- (3) The order may be made subject to any conditions or variations the court considers appropriate.

372 Person living when grant of representation is made [NSW s40C; R 25-4]

- (1) If—
 - (a) a grant of representation of a person's estate has been made by the Supreme Court, whether before or after the commencement of this section; and
 - (b) it is established that the person was living when the grant was made;the Supreme Court must revoke the grant of representation.
- (2) The Supreme Court may impose any conditions in relation to a proceeding commenced by or against the personal representative, or in relation to costs or other matters, that the court considers appropriate.
- (3) A proceeding for the revocation may be started by the person, or, if the person has since died, by any person entitled to apply for a grant of representation of the person's estate or by any person interested in the estate.

- (4) The Supreme Court may make any order, including an order for an injunction against the personal representative or any other person and an order for the appointment of a receiver, that the court considers appropriate for protecting the estate.
- (5) An order mentioned in subsection (4) may be made at any time, whether before or after the revocation.

373 Former personal representative—reimbursement and liability [R 38-10 and 38-11]

- (1) This section applies if—
 - (a) a grant of representation ceases to have effect under section 335(2)(c)(i); or
 - (b) an election to administer ceases to have effect under section 335(2)(c)(ii); or
 - (c) a resealed foreign grant of representation ceases to have effect under section 335(2)(c)(iii).
- (2) The former personal representative may retain from the estate, and reimburse himself or herself, an amount equivalent to the amount of payments made by the former personal representative that the person to whom the interstate grant of representation has been made might properly have made.
- (3) Also, the former personal representative is not liable for any distribution of the estate made in good faith and without negligence in reliance on the grant of representation, election to administer or resealed foreign grant of representation.
- (4) In this section—

former personal representative means—

 - (a) the person who was the holder of the grant of representation mentioned in subsection (1)(a); or
 - (b) the professional administrator who filed the election to administer mentioned in subsection (1)(b); or
 - (c) the person who applied to reseal the foreign grant of representation mentioned in subsection (1)(c).

Chapter 4 Personal representatives

Part 1 Accountability

400 Rights and liabilities of administrators [Q s50; R 11-1]

- (1) A person to whom the Supreme Court makes a grant of letters of administration of a deceased person's estate has the same rights and liabilities, and is accountable in the same way, as the person would be if the person were the deceased's executor.

Note—

See section 339 for the accountability of executors and administrators by representation.

- (2) Subsection (1) is subject to any condition or limitation of the grant of letters of administration.

Part 2 Duties

401 General duties [Q s52(1)(a), (c) and (d); R 11-2]

- (1) A personal representative has the following general duties—
- (a) to collect the deceased person's real and personal estate and administer it according to law;
 - (b) if the personal representative is appointed under a grant of representation—to deliver up the grant of representation to the Supreme Court, when required to do so by the court;
 - (c) to distribute the deceased person's estate, subject to its administration, as soon as practicable.

- (2) Subsection (1) does not limit any other duty to which a personal representative may be subject under an Act, at law or in equity.

402 Providing information [Q s52(1)(b); R 11-3 and 11-4]

- (1) A personal representative has a duty, whenever required by the Supreme Court, to do any or all of the following—
- (a) file a statement of the assets and liabilities of the deceased person's estate, whether situated within this jurisdiction or outside this jurisdiction, including outside Australia;
 - (b) file, or file and have approved by the Supreme Court, the personal representative's accounts of the administration of the deceased person's estate.

Notes—

- 1 For the effect of the Supreme Court approving a personal representative's accounts, see section 429(2).
 - 2 For a personal representative's ability to apply to the Supreme Court to have his or her accounts approved, see section 428.
- (2) The Supreme Court may require a personal representative to do a thing mentioned in subsection (1)(a) or (b) if the court considers it necessary in a particular case.

403 Maintaining documents [new; R 11-8 and 11-9]

A personal representative must keep the documents necessary to enable the personal representative to comply with the duty mentioned in section 402 for 3 years after the administration of the deceased person's estate is complete.

Note—

See section 615 for a beneficiary's right to access particular documents.

Part 3 Failure to perform duties

404 Remedy if personal representative fails to perform duties [Q s52(2); R 14-1]

- (1) If a personal representative fails to perform his or her duties as personal representative, the Supreme Court may, on the application of any person aggrieved by the failure, make any order it considers appropriate.
- (2) Without limiting subsection (1), the court may make any or all of the following orders—
 - (a) an order for damages;
 - (b) an order requiring the personal representative to pay interest on any amount under the personal representative's control;
 - (c) an order for the costs of the application.

405 Relief from liability for failing to maintain documents [new; R 11-10]

If it appears to the Supreme Court that a personal representative—

- (a) may be liable for a breach of statutory duty because of a failure to comply with section 403; but
- (b) has acted honestly and reasonably and ought fairly to be excused for the breach;

the court may relieve the personal representative either entirely or partly from liability for the breach.

Part 4 Powers

406 Real and personal estate [Q s49(1), (4) and (5); R 12-1, 12-3 and 12-5]

- (1) A personal representative—
 - (a) represents the deceased person in relation to his or her real and personal estate; and
 - (b) has, in relation to the real and personal estate, from the deceased's death—
 - (i) all the powers exercisable by an executor in relation to personal estate; and
 - (ii) all the powers conferred on personal representatives by [insert local equivalent of the *Trusts Act 1973* (Qld)].
- (2) The Supreme Court may confer on the personal representative any further powers for the administration of the deceased's estate that the court considers appropriate.
- (3) If there is more than 1 personal representative of a deceased person, the powers of the personal representatives must be exercised by them jointly.

407 On the making of a grant of representation [Q s49(2) and (3); R 12-2 and 12-4]

- (1) On the making of a grant of representation, only a personal representative to whom the grant is made may—
 - (a) exercise the powers of a personal representative; and
 - (b) bring actions or otherwise act as personal representative without the Supreme Court's consent.
- (2) The personal representative's powers relate back to, and are taken to have arisen on, the deceased person's death as if the making of the grant happened immediately after the

[s 408]

deceased's death.

- (3) Subsections (1) and (2) are subject to the terms of the grant.

408 Carrying on a business [WA Trustees Act, s55; R 11-21]

- (1) This section applies if, at the time of a person's death, the person is engaged in carrying on a business.
- (2) Subject to any other Act, it is lawful for the deceased person's personal representative to continue to carry on the business for—
- (a) the period, up to 2 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 Supreme Court approves.
- (3) For the purpose of carrying on the business, the personal representative may do any of the following—
- (a) use any part of the deceased's estate that is reasonably necessary;
 - (b) increase or reduce, as necessary, usage of the estate under paragraph (a);
 - (c) purchase stock, machinery, implements and chattels;
 - (d) employ the managers, agents, workers and others the personal representative considers appropriate;
 - (e) at any time, enter into a partnership agreement to take the place of any partnership agreement subsisting immediately before the deceased's death or at any time after;
 - (f) enter into share-farming agreements.
- (4) For subsection (3)(e), it does not matter that the personal representative was a partner of the deceased in his or her own right.

- (5) The personal representative or a beneficiary of the deceased's estate may apply to the Supreme Court for leave to carry on the business at any time, whether or not any previous authority to carry on the business has ended.
- (6) For subsection (5), the Supreme Court may make the order, including an order subject to conditions, it considers appropriate.
- (7) Nothing in this section affects any other authority to do the acts authorised to be done under this section.
- (8) If the deceased's estate is being administered under the deceased's will, this section is subject to a contrary intention appearing in the will.

**409 Subscribing to a relevant fund if carrying on a business
[WA Trustees Act, s55; R 11-21]**

- (1) This section applies if a personal representative is carrying on a business under section 408.
- (2) The personal representative may subscribe to any relevant fund in connection with the business that the personal representative considers would be prudent to subscribe to if he or she were acting for himself or herself.
- (3) Subscriptions must be paid from the business income.
- (4) Nothing in this section affects any other authority the personal representative may have to subscribe to a relevant fund.
- (5) If the deceased's estate is being administered under the deceased's will, this section is subject to a contrary intention appearing in the will.
- (6) In this section—

relevant fund, in connection with a business, means any fund created for objects or purposes in support of any business of a similar nature and subscribed to by other persons engaged in a similar business.

[s 410]

410 Postponing realisation of estate [Tas s43(2)(a); R 11-20]

- (1) A personal representative may apply to the Supreme Court for an order to postpone the realisation of the deceased person's estate.
- (2) The Supreme Court may, if it considers it appropriate to do so, order that the realisation of the estate be postponed for the period it decides.

411 Ratifying particular acts [Q s54(3); R 29-8]

A personal representative may ratify and adopt any act done on behalf of the deceased person's estate by someone else if the act was one that the personal representative might properly have done himself or herself.

Part 5 Obtaining the Supreme Court's advice or directions

412 Applying to Supreme Court for advice or directions [Qld Trusts Act, s96; R 20-1 and 20-2]

- (1) A personal representative may apply to the Supreme Court for advice or directions about—
 - (a) property in the deceased person's estate, or the management or administration of the property; or
 - (b) the exercise of a power or discretion vested in the personal representative.
- (2) The application must—
 - (a) state all relevant facts; and
 - (b) be served on each person having an interest in the application.

- (3) However, the Supreme Court may dispense with service on a person mentioned in subsection (2)(b) if it considers it appropriate.
- (4) This section does not limit any other right the personal representative may have to seek the advice or direction of the Supreme Court under another law.
- (5) In this section—
estate, of a deceased person, includes property held on trust for a person because of the person’s beneficial interest in the deceased’s estate.
personal representative includes trustee.

Part 6 Protection for personal representatives

413 Definitions for part [R20-2 and 21-1(a)]

In this part—

estate, of a deceased person, includes property held on trust for a person because of the person’s beneficial interest in the deceased’s estate.

personal representative includes trustee.

414 Acting in accordance with Supreme Court advice or direction [Qld Trusts Act, s97; R 20-1 and 20-2]

- (1) This section applies if a personal representative is acting in accordance with the advice or direction of the Supreme Court under section 412.
- (2) The personal representative is taken, in relation to the personal representative’s own liability, to have discharged his

[s 415]

or her duty as personal representative in the subject matter of the advice or direction.

- (3) Subsection (2) applies even if the advice or direction is later varied or set aside.
- (4) This section does not protect the personal representative from liability for an act done in accordance with the advice or direction if the personal representative commits a fraud or wilfully conceals or misrepresents a material matter—
 - (a) in obtaining the advice or direction; or
 - (b) in agreeing, either expressly or impliedly, with the Supreme Court in giving the advice or in making the order giving the direction.
- (5) In this section—

varied or set aside includes invalidated, overruled and declared to be of no effect.

415 Advertising intention to distribute [Qld Trusts Act, s67(1), (2), (3) and (4)(a); R 21-1, 21-2 and 22-1]

- (1) A personal representative intending to distribute the deceased person's estate may give notice of that intention—
 - (a) by advertising—
 - (i) in a newspaper circulating throughout this jurisdiction and sold at least once each week; or
 - [(ii) on the Supreme Court's website in the way prescribed under the rules of court]; and
 - (b) in the other ways the Supreme Court would direct notice to be given in an action for administration.
- (2) The notice must require any person having a claim to, or against, the estate, whether as beneficiary or creditor or otherwise, to send particulars of the person's claim to the personal representative not later than the date stated in the notice (the *closing date*).

- (3) For the purposes of subsection (1)(a)(i), the notice is sufficient if given in the approved form.
- (4) The closing date must be at least 2 months after the date of publication of the notice.
- (5) After the closing date, the personal representative may distribute the estate having regard only to the claims, whether formal or not, of which the personal representative has notice at the time of the distribution.
- (6) For subsection (5), it does not matter whether the personal representative has notice of a claim because it has been made in response to the advertising or has otherwise come to the personal representative's notice.
- (7) The personal representative is not liable to any person of whose claim the personal representative had no notice at the time of the distribution for any of the estate distributed after the closing date.
- (8) This section does not limit any other protection the personal representative may have in relation to the distribution of the estate.
- (9) This section does not affect the right of a person to enforce a remedy for the person's claim against a person to whom a distribution of the estate has been made.

Note—

See sections 424 and 606.

- (10) Subsection (9) does not limit section 424(6) or any other defence available, under an Act or at law or in equity, to the person to whom the distribution is made.
- (11) In this section—

[s 416]

personal representative includes a person administering a deceased person's estate without a grant of representation.

Drafter's note: Each jurisdiction should amend its trustee provisions to ensure consistency with this clause. See *Trusts Act 1973* (Qld), s 67; *Trustee Act 1925* (NSW), s 60 and *Supreme Court Rules 1970* (NSW), pt 78, r 91; *Trustee Act 1958* (Vic), s 33; *Trustee Act 1925* (ACT), s 60; *Trustee Act 1898* (Tas), s 25A; *Trustee Act* (NT), s 22; *Trustee Act 1936* (SA), s 29; *Trustees Act 1962* (WA), s 63.

Drafter's note: Section 47A of the *Administration Act 1903* (WA) and equivalent provisions in the status of children legislation in Qld, Vic, Tas, NT and SA should be repealed.

Part 7 Barring of claims

416 Application of part [Qld Trusts Act, s68(5); R 22-6]

This part does not apply to a claim—

- (a) under the [insert local equivalent of the *Succession Act 1981* (Qld), part 4]; or
- (b) that is an application to revoke a grant of representation.

417 Definitions for part [Qld Trusts Act, s68(1) and (5); R 22-6]

In this part—

claim does not include a claim for which insurance is required to be, and is, maintained under an Act.

claimant includes each of the following—

- (a) a creditor;
- (b) a person who makes a claim as a beneficiary;

- (c) a person who the personal representative has reason to believe may become a claimant.

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes trustee.

418 Requiring claimant to start a proceeding [Qld Trusts Act, s68(1); R 22-6]

- (1) Subsection (2) applies if a personal representative does not accept a claim that has been made, or that the personal representative has reason to believe may be made—
- (a) to, or against, the deceased person's estate; or
 - (b) against the personal representative personally because the personal representative is under a liability for which the personal representative is entitled to reimbursement out of the estate.
- (2) The personal representative may serve on the claimant a notice requiring the claimant, within 6 months after the date of service of the notice, to start a proceeding to enforce the claim and to prosecute the proceeding with proper diligence.

Drafter's note: Provisions in jurisdictions that create special procedures for trustee companies are to be repealed [R 22-7]. See *Public Trustee Act 1978* (Qld), s 131 and *Trustee Companies Act 1968* (Qld), s 32; *Public Trustee Act 1913* (NSW), s 34B and *Probate and Administration Act 1898* (NSW), s 93(3) and (4); *Trustee Companies Act 1984* (Vic), s 43; *Public Trustee Act 1930* (Tas), s 58 and *Trustee Companies Act 1953* (Tas), s 26; *Public Trustee Act 1985* (ACT), s 33.

[s 419]

419 Applying to Supreme Court to make orders [Qld Trusts Act, s68(2) to (4) and Vic s30(3)(b); R 22-6]

- (1) At the end of the 6 month period, the personal representative may apply to the Supreme Court for an order under subsection (4).
- (2) A copy of the application must be served on the claimant.
- (3) The Supreme Court may make an order under subsection (4) if, on the hearing of the application, the claimant does not satisfy the Supreme Court that the claimant—
 - (a) has started a proceeding to enforce the claim; and
 - (b) is prosecuting the proceeding with proper diligence.
- (4) The Supreme Court may, by order—
 - (a) extend the period, or bar the claim (including for all purposes), or enable the estate to be dealt with without regard to the claim; and
 - (b) impose the conditions and give the directions, including a direction as to the payment of the costs of or incidental to the application, that the court considers appropriate.
- (5) If a personal representative has served notices under section 418 on 2 or more claimants, the personal representative may seek orders against any or all of the claimants in a single application and the Supreme Court may make orders accordingly.

420 Contesting personal representative's right to indemnity [Qld Trusts Act, s68(6); R 22-6]

- (1) Subsection (2) applies if a beneficiary of the deceased person's estate is not made a party to an application by a personal representative under this part.
- (2) An order made by the Supreme Court on the application does not affect the beneficiary's right to contest the claim of the personal representative to be entitled to indemnify himself or herself out of the estate.

421 Service [Qld Trusts Act, s68(7) and (8); R 22-6]

Without limiting the [insert local equivalent of the *Acts Interpretation Act 1954* (Qld), section 39], a notice or application under this part may be served in any way directed by the Supreme Court.

Part 8 Wrongful distributions

422 Application of part

This part applies if a personal representative wrongfully distributes a deceased person's estate.

423 Definitions for part

In this part—

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes—

- (a) a trustee; and
- (b) a person who is administering a deceased person's estate without a grant of representation.

prescribed person means a person to whom a deceased person's estate has been wrongfully distributed.

424 Rights of persons suffering loss [Qld Trusts Act s109; R 22-2 and 22-5]

- (1) A person who suffers loss because of the wrongful distribution may start a proceeding to enforce a remedy against either or both of the following—

[s 424]

- (a) the personal representative;
 - (b) a prescribed person.
- (2) If the wrongful distribution was a distribution of trust property made by a trustee, the person who suffers loss may enforce the same remedies against the trustee and against the prescribed person that the person could enforce if the wrongful distribution—
- (a) were a distribution of property in the estate, other than trust property; and
 - (b) had been made by the executor or administrator of the estate.
- (3) It is not necessary for the person to exhaust the person's remedies against the personal representative before proceeding against a prescribed person.
- (4) Proceedings against persons mentioned in subsection (1) may be started and progressed at the same time.
- (5) However, a proceeding against a prescribed person that is not also against the personal representative requires the Supreme Court's leave.
- (6) If—
- (a) a proceeding is started against a prescribed person; and
 - (b) the prescribed person—
 - (i) has received the distribution in good faith; and
 - (ii) has so altered the person's position in reliance on the correctness of the distribution that, in the Supreme Court's opinion, it would be inequitable to enforce the remedy;
- the Supreme Court may make any order it considers to be just in all the circumstances.
- (7) Subsection (6) does not limit any other defence available, under an Act or at law or in equity, to the prescribed person.

425 Rights of prescribed persons [new; R 22-3]

- (1) This section applies if a person who suffers loss because of the wrongful distribution by the personal representative starts a proceeding against a prescribed person.
- (2) The prescribed person—
 - (a) is entitled to a contribution and indemnity from the personal representative in the amount or on the terms that the Supreme Court considers appropriate; and
 - (b) may join the personal representative as a party to an action started against the prescribed person.

426 Judgement limited to amount of wrongful distribution [new; R 22-4]

- (1) This section applies if a prescribed person has received the distribution in good faith.
- (2) In a proceeding against the prescribed person under this part, judgement against the prescribed person must not be for an amount more than the amount of the distribution made to the prescribed person.
- (3) In deciding whether the amount of the judgement is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

Part 9 Approval of accounts

427 Definitions for part

In this part—

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the

[s 428]

deceased's estate.

personal representative includes trustee.

428 Applying for approval of accounts [NSW s85(1B); R 11-5]

A personal representative may apply to the Supreme Court to file, and have approved, the personal representative's accounts of the administration of the deceased person's estate.

429 Approval of accounts by the Supreme Court [NSW s85(3) and (4); R 11-6 and 11-7]

- (1) This section applies if—
 - (a) a personal representative applies to the Supreme Court under section 428 to file, and have approved, the personal representative's accounts of the administration of the deceased person's estate; or
 - (b) the Supreme Court requires a personal representative to file, and have approved, the personal representative's accounts of the administration of the deceased person's estate under section 402(1)(b).
- (2) If the Supreme Court, by order, approves the accounts, the order is evidence of the correctness of the accounts and, subject to subsections (3) and (4), operates as a release for the personal representative.
- (3) If, in approving the accounts, the Supreme 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.
- (4) The approval of the accounts does not—
 - (a) prevent a person who is interested in the accounts applying to the Supreme Court, within 3 years after the order, to show that there is an error or omission in the accounts; or

- (b) operate as a release for the personal representative in relation to any material nondisclosure or fraudulent entry in the accounts.
- (5) Nothing in subsection (3) limits a right a person may have, apart from this section, to proceed against a personal representative.

Part 10 Payment for services

430 Definitions for part

In this part—

estate, of a deceased person, includes property held on trust for a person because of the person's beneficial interest in the deceased's estate.

personal representative includes trustee.

431 Supreme Court may authorise payment for services [Q s68; R 27-1]

- (1) The Supreme Court may authorise the payment of an amount, from a deceased person's estate, to the personal representative for the personal representative's services.
- (2) The amount to be paid to the personal representative is the amount that the court considers appropriate.
- (3) The court may attach any conditions to the payment that it considers appropriate.
- (4) Without limiting when the court may authorise the payment to be made, the court may authorise payment to be made periodically.

[s 432]

**432 Supreme Court may reduce amounts that are excessive
[NSW s86A; R 27-5]**

- (1) This section applies if the Supreme Court considers that either of the following amounts is excessive—
 - (a) an amount payable to a personal representative for the personal representative's services;
 - (b) an amount charged or proposed to be charged by the personal representative in relation to the deceased person's estate.
- (2) The Supreme Court may, on its own initiative or on the application of a person interested in the estate, review the amount and may, on the review, reduce the amount.
- (3) Subsection (2) applies despite—
 - (a) any provision of a will authorising the charging of the amount; or
 - (b) any provision of an Act [or subordinate legislation] authorising the charging of the amount.
- (4) In this section—

amount includes a part of the amount.

**433 Limited right to indemnity for costs in a particular case
[NSW s86(3); R 27-3 and 27-4]**

- (1) This section applies if a personal representative renounces the personal representative's right to an amount for the personal representative's services for a particular 12 month period.
- (2) The personal representative is entitled to indemnity out of the deceased person's estate for the charges and disbursements of an Australian legal practitioner engaged by the personal representative to undertake non-professional work in the 12 month period.
- (3) However, the entitlement under subsection (2) can not be more than the lesser of the following amounts—

- (a) the amount to which the personal representative would have been entitled if the personal representative had undertaken the work personally and not renounced the personal representative's right to an amount for the services;
- (b) [the amount of the legal practitioner's charges and disbursements, as moderated in accordance with the relevant professional scale].

Part 11 Informal administration

434 Protection for limited payments made without production of a grant of representation [Vic s32; R 29-9 to 29-11]

- (1) This section applies if a person holds money or personal property for a deceased person of not more than \$15000 in value.
- (2) The person may, without requiring production of a grant of representation, pay the money or transfer the personal property to any of the following persons having legal capacity—
 - (a) a surviving spouse of the deceased; or
 - (b) a child of the deceased; or
 - (c) another person who appears to be entitled to the money or personal property.
- (3) A payment of money or transfer of personal property under subsection (2), if made in good faith, is a complete discharge to the person of all liability for the money or personal property.
- (4) This section does not affect the right of a person who has a claim to, or against, the deceased's estate to enforce a remedy for the person's claim against a person to whom a payment or transfer has been made under subsection (2).

[s 435]

435 Persons acting informally [Q s54(1); R 29-7]

- (1) This section applies if a person who does not hold a grant of representation of a deceased person's estate—
 - (a) obtains, receives or holds the estate other than for full and valuable consideration; or
 - (b) effects the release of any debt payable to the estate.
- (2) The person is liable to account for estate assets to the extent of—
 - (a) the estate obtained, received or held by the person; or
 - (b) the debt released.
- (3) However, the person's liability is reduced to the extent of any payment made by the person that might properly be made by a personal representative to whom a grant of representation of the estate is made.

Chapter 5 Administration of assets

Part 1 Property for payment of debts

500 Property that is an asset available for the payment of debts [Q s56; R 15-1 and 15-2]

- (1) The following property is an asset for the payment of the debts of a deceased person's estate—
 - (a) property in the estate that, on the deceased's death, vests in his or her executor or the [public trustee];

Notes—

- 1 Property that, in the exercise of a general power of appointment, the deceased disposes of by will also vests in his or her executor or the [public trustee] because of sections 200 and 201.

- 2 Property of which the deceased was trustee is not an asset for the payment of the deceased's debts. See section 200 (Initial vesting on death).
- (b) property to which the deceased's personal representative becomes entitled, as personal representative, after the deceased's death.
- (2) Any disposition by the deceased's will inconsistent with subsection (1) is void as against creditors of the estate, and the Supreme Court may, if necessary, administer the property for the payment of the debts.
- (3) This section does not affect the rights of a mortgagee or other encumbrancee.

Part 2 Solvent estates

Division 1 Application

501 Application of part

This part applies if a deceased person's estate is sufficient to pay, in full, the debts of the estate.

Division 2 Classes of property for payment of debts

502 Payment of debts [Q s59; R 17-2, 17-4, 17-5, 18-3]

- (1) The debts of the estate are, subject to sections 506 and 507, to be paid from the estate as follows—
 - (a) first, from the following property (*class 1 property*), if any—

[s 502]

- (i) property specifically appropriated or given by will (either by a specific or general description) for the payment of debts;
 - (ii) property charged by will with, or given by will (either by a specific or general description) subject to a charge for, the payment of debts;
 - (b) second, from property (*class 2 property*) comprising—
 - (i) the residuary estate; and
 - (ii) any property in relation to which a disposition by will operates under [insert local equivalent of the *Succession Act 1981* (Qld), section 33J] as the exercise of a general power of appointment;
 - (c) third, from property (*class 3 property*), if any, specifically given by will, including property specifically appointed under a general power of appointment, and any legacy charged on the property given or appointed.
- (2) Property within each class must be applied in the discharge of the debts and, if applicable, in the payment of pecuniary legacies rateably according to value.

Example—

Assume class 1 property and class 2 property have been applied fully in the discharge of the debts and there are still debts of \$20000 to be paid out of class 3 property. Assume further that class 3 property is comprised of jewellery valued at \$40000, which is given to A, and a parcel of shares valued at \$60000, which is given to B. To discharge the remaining debts, \$20000 (20% of the value of the class 3 property) is required to be applied for the purpose.

In this example, the rule requiring property in the class to be applied in the discharge of debts rateably according to value requires 20% of each of the jewellery and parcel of shares to be applied in the discharge of the debts. As a result, A receives a distribution to the value of \$32000 (80% of \$40000) and B receives a distribution to the value of \$48000 (80% of \$60000).

- (3) Also, if a specific property must be applied in the discharge of the debts and a legacy is charged on the specific property—

- (a) the legacy and the specific property must be applied rateably according to value; and
- (b) for the purpose of paragraph (a), the value of the specific property must be reduced by the amount of the legacy charged on it.

Example—

Assume a deceased person's estate has a total value of \$200000. It is comprised of two properties, Blackacre and Whiteacre, each of which has a value of \$100000. Assume further that, under the deceased's will, Blackacre is given to A, Whiteacre is given to B and a legacy of \$50000, charged on Whiteacre, is given to C. The estate has unsecured debts of \$50000.

In this example, the rule in paragraph (a) requires that Blackacre, Whiteacre and the legacy charged on Whiteacre be applied in the discharge of the debts rateably according to value. However, for the purpose of paragraph (a), paragraph (b) provides that the value of Whiteacre is \$50000 (\$100000 less the amount of the legacy that is charged on Whiteacre). So the total value of the class 3 property is \$200000. Because the debts are \$50000 (25% of the value of the class 3 property), 25% of the value of Blackacre and Whiteacre and of the legacy will be applied in the discharge of the debts. As a result, A receives a distribution to the value of \$75000 (75% of \$100000), B receives a distribution to the value of \$37500 (75% of \$50000) and C receives a distribution of \$37500 (75% of \$50000).

- (4) If the deceased left a will, the order in which the estate is to be applied towards the discharge of debts, and the incidence of rateability as between different properties within each class, may be varied by a contrary intention appearing in the will.

503 Effect of general direction or disposition for the payment of debts [Q ss59(3), 61(2); R 17-8]

The appearance of either or both of the following in a will does not constitute the estate or the residuary estate as class 1 property and is not a contrary intention for the purposes of this part—

- (a) a general direction, charge or trust for the payment of debts, or of all the debts, out of the estate or the residuary estate;

[s 504]

- (b) a disposition of the estate or the residuary estate after, or subject to, the payment of debts.

Division 3 Pecuniary legacies

504 Payment [Q s60; R 18-1 and 18-4]

- (1) Pecuniary legacies must be paid out of available class 2 property.
- (2) However, to the extent that available class 2 property is insufficient to pay the pecuniary legacies, the legacies must abate proportionately.

Example—

Assume a deceased person, by will, gives pecuniary legacies totalling \$4000 to A, B and C. A is to receive \$500, B is to receive \$1500 and C is to receive \$2000. However, available class 2 property has a value of \$2000.

In this example the rule requires the pecuniary legacies to abate proportionally. So as only 50% of the value of the gifts is available to meet them, each gift must abate by 50%. As a result, A receives \$250, B receives \$750 and C receives \$1000.

- (3) Subsections (1) and (2) are subject to a contrary intention appearing in the deceased person's will.
- (4) In this section—

available class 2 property means class 2 property or, if debts are to be discharged from the property, class 2 property after the discharge of the debts.

Division 4 Encumbered property

505 Definitions for division

In this division—

encumbered property, of the deceased person, means property, or an interest in the property, that at the time of the deceased's death is charged with the payment of any property debt.

property debt includes mortgage and charge, whether legal or equitable (including a lien for unpaid purchase money).

506 Payment of property debts if there is no class 1 property [Q s61(1); R 17-6]

- (1) This section applies if, on the person's death—
 - (a) the person is entitled to encumbered property; and
 - (b) there is no class 1 property in the person's estate.

Note—

Under section 201, a testator is taken to have been entitled at his or her death to any interest in property in relation to which a disposition contained in his or her will operates as an exercise of a general power of appointment.

- (2) The encumbered property is, as between the different persons claiming through the deceased person, primarily liable for the payment of the property debt with which it is charged and each part of the encumbered property, according to its value, is to bear a proportionate part of the property debt.

Example—

Assume that a deceased person's estate has a total value of \$300000. It is comprised of Blackacre, which has a value of \$200000 and other property with a value of \$100000. Assume further that the estate has total debts of \$80000. This is comprised of a property debt of \$50000 secured by mortgage on Blackacre and unsecured debts of \$30000.

The deceased's will gives Blackacre to A and B in equal share as tenants in common and the residuary estate to C. The estate does not include class 1 property.

In this example, the rule in subsection (2) requires that Blackacre is primarily liable for the payment of the property debt of \$50000 with which it is charged. As a result, the debt secured on Blackacre must be paid out of Blackacre and not out of class 2 property. As a result, C

[s 507]

receives a distribution to the value of \$70000 (\$100000 less the unsecured debts of \$30000).

Because the rule in subsection (2) further requires that each part of Blackacre, according to its value, is to bear a proportionate part of the property debt, A and B each receive a distribution to the value of \$75000 (\$100000, which is half the value of Blackacre, less \$25000, which is a proportionate part of the property debt).

- (3) Subsection (2) does not apply if a contrary intention appears in the deceased person's will.

**507 Payments of property debts if there is class 1 property
[new; R 17-7]**

- (1) This section applies if, on the person's death—
- (a) the person is entitled to encumbered property; and
 - (b) there is class 1 property in the person's estate.

Note—

Under section 201, a testator is taken to have been entitled at his or her death to any interest in property in relation to which a disposition contained in his or her will operates as an exercise of a general power of appointment.

- (2) The class 1 property must be applied rateably towards discharging—
- (a) the property debt to which the encumbered property is subject; and
 - (b) the unsecured debts of the deceased person's estate.
- (3) If the class 1 property is not sufficient to discharge the property debt to which the encumbered property is subject—
- (a) the encumbered property is, as between the different persons claiming through the deceased person, primarily liable for the payment of the remainder of the property debt after the application of the class 1 property; and
 - (b) each part of the encumbered property, according to its value, is to bear a proportionate part of the property debt.

Example—

Assume that a deceased person's estate has a total value of \$240000. It is comprised of two properties, Blackacre and Whiteacre, each of which has a value of \$90000, and other property with a value of \$60000. Assume further that the estate has total debts of \$120000. This is comprised of a property debt of \$80000 secured by mortgage on Blackacre and unsecured debts of \$40000.

Under the deceased's will, Blackacre is given to A and the residuary estate is given to B. The executors are directed to pay 'all my debts' out of Whiteacre, which is therefore class 1 property.

In this example the rule in subsection (2) requires that Whiteacre, as class 1 property, must be applied rateably towards discharging the property debt of \$80000 to which Blackacre is subject and the unsecured debts of \$40000. Because the value of Whiteacre (\$90000) is 75% of the total amount of the debts (\$120000), Whiteacre will be applied to pay 75% of the property debt of \$80000 (\$60000) and 75% of the unsecured debts of \$40000 (\$30000).

The rule in subsection (3) further requires that, because Whiteacre is not sufficient to discharge the property debt to which Blackacre is subject, Blackacre is primarily liable for the payment of the remainder of the property debt of \$20000.

As a result A receives a distribution of \$70000 (\$90000 less the remaining property debt of \$20000). As Whiteacre has been fully applied, the unsecured debts of \$10000 that remain after the application of Whiteacre must be paid out of class 2 property. B, as the residuary beneficiary, therefore receives a distribution to the value of \$50000 (\$60000 less the remaining unsecured debts of \$10000).

- (4) Subsections (2) and (3) do not apply if a contrary intention appears in the deceased person's will.

508 Abolition of rule in *Lutkins v Leigh* [new; R 18-5]

- (1) The rule in *Lutkins v Leigh* is abolished.

Note—

Lutkins v Leigh (1734) Cases T Talbot 53; 25 ER 658

- (2) Consequently, if, for section 506 or 507—
(a) a contrary intention appears in the deceased person's will; and

[s 509]

- (b) as a result of the contrary intention, all or part of a property debt charged against encumbered property is payable out of class 2 property;

the person to whom the encumbered property is specifically given by the will or appointed under a general power of appointment is not required to restore to class 2 property any amount applied from class 2 property towards the discharge of the property debt charged against the encumbered property.

509 Division does not affect other rights to payment [ACT Civil Law (Property) Act, s500(5); R 17-9]

This division does not affect the right of a person entitled to a property debt charged against an encumbered property to obtain payment for, or satisfaction of, the property debt out of the other assets of the deceased person's estate or otherwise.

Part 3 Interest

510 General legacies [Q s52(1)(e); R 18-6 to 18-8]

- (1) The personal representative must pay interest at the prescribed rate on a general legacy to the beneficiary of the legacy as provided under this section.
- (2) Interest is payable on the general legacy—
 - (a) from the first anniversary of the deceased person's death until the general legacy is paid; or
 - (b) if, under the will, the general legacy is payable at a future date—from that date until the general legacy is paid.
- (3) Payment of interest on the general legacy is subject to a contrary intention in the will about any of the following—
 - (a) whether interest is payable on the general legacy;

- (b) the time from when interest is payable on the general legacy;
 - (c) the rate of interest that is payable on the general legacy.
- (4) In this section—
- prescribed rate*, of interest, means the rate that is 2% above the cash rate last published by the Reserve Bank of Australia before 1 January in the calendar year in which interest begins to accrue.¹

Drafter's note: In some jurisdictions, year may be defined under its interpretation legislation to mean calendar year.

Part 4 Insolvent estates

511 Application of part [R 16-1 and 16-2]

This part applies if a deceased person's estate—

- (a) is insufficient to pay, in full, the debts of the estate; and
- (b) is not being administered under the *Bankruptcy Act 1966* (Cwlth).

512 Application of bankruptcy rules [Q s57; WA s10A, fifth schedule, para 2; R 16-3 to 16-6]

- (1) The bankruptcy rules as in force at the date of the deceased person's death apply to the following—
 - (a) the rights of secured and unsecured creditors against the deceased's estate;
 - (b) the debts and liabilities provable against the deceased's estate;

¹ See <http://www.rba.gov.au/Statistics/cashrate_target.html>.

[s 513]

- (c) the valuation of annuities and future and contingent liabilities of the deceased's estate;
 - (d) the priorities of debts and liabilities of the deceased's estate.
- (2) A demand, in relation to which proceedings are maintainable against the deceased's estate, is provable against the estate despite being a demand in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust.
- (3) For the purpose of applying the bankruptcy rules for this part—
- (a) a reference to either of the following—
 - (i) the date of the order for administration under Part XI;
 - (ii) the date on which the administration under Part XI is deemed to have commenced;is taken to be a reference to the date of the deceased's death; and
 - (b) a reference to the Court is taken to be a reference to [*insert relevant court of local jurisdiction*].
- (4) In this section—
- bankruptcy rules*** means the provisions of the *Bankruptcy Act 1966* (Cwlth) and the regulations under that Act applying in relation to the administration of estates of deceased persons in bankruptcy.

513 Preference, right of retainer and the payment of debts by personal representatives [Q s58; R 16-9 and 16-10]

- (1) A personal representative's right to prefer creditors and right of retainer are abolished.
- (2) A personal representative—

- (a) must pay the debts of the deceased person's estate rateably according to the priority required by law; and
 - (b) must not—
 - (i) exercise any right to give preference as between creditors of the deceased person's estate of equal standing; or
 - (ii) prefer his or her own debt only because he or she is the personal representative.
- (3) However, a personal representative who, acting genuinely, pays an amount to a creditor is not liable to account to a creditor of equal standing to the paid creditor for the amount paid to the paid creditor if—
- (a) it subsequently appears that the estate is insolvent; and
 - (b) the personal representative—
 - (i) if subparagraph (ii) does not apply—pays the debt of any person, including himself or herself, who is a creditor of the estate; or
 - (ii) if the personal representative is a person to whom a grant of letters of administration has been made only because he or she is a creditor of the estate—pays the debt of another person who is a creditor of the estate.
- (4) In this section—
- acting genuinely*, in relation to a personal representative, means acting in good faith and at a time when the personal representative has no reason to believe that the deceased's estate is insolvent.

Chapter 6 General

Part 1 Subsisting causes of action

Division 1 Causes of action continue

600 Survival of causes of actions [Q s66(1); R 26-1 and 26-2]

- (1) On a person's death, all causes of action subsisting against or vested in the person survive against, or for the benefit of, the person's estate.
- (2) However, subsection (1) does not apply if, or to the extent, [*insert any provisions providing exceptions*] or another Act provides otherwise in relation to a specific cause of action.

601 Cause of action subsists in particular circumstances [Q s66(3); R 26-3]

- (1) This section applies if damage has been suffered because of an act or omission in relation to which a cause of action would have subsisted against a person (the *respondent*) if the respondent had not died before or at the same time as the damage was suffered.
- (2) For section 600, a cause of action, of the same kind as would have subsisted if the respondent had died after the damage was suffered, is taken to have been subsisting against the respondent before his or her death in relation to the act or omission.

602 Rights are additional [Q s66(4); R 26-3]

The rights conferred by this division for the benefit of the estates of deceased persons are in addition to, and do not limit, any rights conferred on the dependants of deceased persons by

[insert local equivalent of the *Supreme Court Act 1995* (Qld), part 4, division 5²].

603 Part does not revive cause of action not previously maintainable [Q s66(5); R 26-3]

Nothing in this division enables a proceeding to be started for a cause of action that ceased to be maintainable before the commencement of this Act.

Division 2 Proceedings for causes of action that continue

604 Application of division [Q s66(4); R 26-3]

- (1) This division applies if a cause of action survives against a deceased person's estate.
- (2) This division applies in relation to causes of action under [insert local equivalent of the *Supreme Court Act 1995* (Qld), part 4, division 5] as it applies in relation to other causes of action that survive under division 1.

605 Definitions for division

In this division—

claimant means a person whose cause of action survives against a deceased person's estate.

court means the court of this jurisdiction in which a proceeding is brought.

² *Supreme Court Act 1995*, part 4 (Provisions from Common Law Practice Act 1867), division 5 (Actions against and by executors)

[s 606]

606 Proceeding may be brought against personal representative or beneficiary [Q s66(6); R 26-4]

- (1) A claimant may start a proceeding, for the cause of action, against any or all of the following—
 - (a) the personal representative of the deceased person's estate;
 - (b) any beneficiary of the estate to whom the estate has been distributed (a *prescribed person*).
- (2) It is not necessary for the claimant to exhaust all remedies against the personal representative before proceeding against a prescribed person.
- (3) Proceedings against persons mentioned in subsection (1) may be started and progressed at the same time.
- (4) A proceeding against a prescribed person that is not also against the personal representative requires the court's leave.

607 Beneficiary is entitled to contribution or indemnity [Q s66(7); R 26-5]

- (1) If a claimant starts a proceeding, for the cause of action, against a beneficiary of a deceased person's estate, the beneficiary is entitled—
 - (a) to an indemnity, from any other beneficiary of the estate to whom a distribution has been made who ranks in lower degree than the beneficiary, for the payment of the debts of the estate; and
 - (b) to a contribution, from any other beneficiary of the estate to whom a distribution has been made who ranks in equal degree with the beneficiary, for the payment of the debts of the estate; and
 - (c) to a contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate.

- (2) If a beneficiary of the estate starts a proceeding, for an indemnity or contribution mentioned in subsection (1)(a) or (b), against another beneficiary of the estate (the *respondent beneficiary*), the respondent beneficiary is entitled—
 - (a) to an indemnity, from any other beneficiary of the estate to whom a distribution has been made who ranks in lower degree than the respondent beneficiary, for the payment of the debts of the estate; and
 - (b) to a contribution, from any other beneficiary of the estate to whom a distribution has been made who ranks in equal degree with the respondent beneficiary, for the payment of the debts of the estate; and
 - (c) to a contribution and indemnity from the personal representative in the amount or on the terms that the court considers appropriate.
- (3) Subsection (2) may be re-applied, with necessary changes, so that a beneficiary against whom a proceeding is started (as mentioned in subsection (2)(a) or (b) or the re-application of subsection (2) under this subsection) is entitled to the indemnity, contribution, or contribution and indemnity mentioned in subsection (2)(a), (b) or (c).
- (4) A beneficiary of the estate may join as a party to a proceeding brought against the beneficiary the following persons—
 - (a) for a proceeding mentioned in subsection (1)—any other beneficiary mentioned in subsection (1)(a) or (b);
 - (b) for a proceeding mentioned in subsection (2), including as re-applied under subsection (3)—any other beneficiary mentioned in subsection (2)(a) or (b);
 - (c) for either of the proceedings mentioned in subsections (1) and (2)—the personal representative.

608 Ranking of beneficiaries [new; R 26-6]

- (1) For section 607, beneficiaries are ranked for the payment of the debts of the estate as follows—

[s 609]

- (a) a beneficiary ranks in equal degree to another beneficiary if each beneficiary is a beneficiary of property that is in the same class under section 502; and

Example—

Each beneficiary is a beneficiary of class 2 property.

- (b) a beneficiary (the *first beneficiary*) ranks in lower degree to another beneficiary if, under section 502, the property of which the first beneficiary is a beneficiary must be used for the payment of the debts before the property of which the other beneficiary is a beneficiary.

Example—

A is a beneficiary of class 2 property and B is a beneficiary of class 3 property. A ranks in lower degree than B because the debts of the estate must first be paid from class 2 property.

- (2) If a beneficiary is a beneficiary of a particular class of property and of other property that is of a different class, the beneficiary may be ranked in more than 1 way against another beneficiary for the purposes of contribution and indemnity.

Example—

Assume an action is brought against B who is the beneficiary of class 3 property. A is the beneficiary of class 2 and class 3 property. B is entitled to an indemnity from A to the extent of A's class 2 property and to a contribution from A in relation to A's class 3 property. Under section 610, the liability of a beneficiary can not be more than the amount distributed to the beneficiary.

609 Defences available to a beneficiary [Q s66(8); R 26-7]

- (1) If—

- (a) a proceeding is brought, under section 606 or 607, against a beneficiary of a deceased person's estate to whom a distribution has been made; and

- (b) the beneficiary—

- (i) has received the distribution in good faith; and

- (ii) has so altered the beneficiary's position in reliance on the correctness of the distribution that, in the court's opinion, it would be inequitable to enforce the action;

the court may make any order it considers appropriate.

- (2) Subsection (1) applies whether the proceeding is brought by another beneficiary or someone else.
- (3) Subsection (1) does not limit any other defence available, under an Act or at law or in equity, to the beneficiary.

610 Judgement limited to amount of distribution [Q s66(9); R 26-8]

- (1) In a proceeding against a beneficiary under this division, judgement against the beneficiary must not be for an amount more than the amount of the distribution made to the beneficiary.
- (2) In deciding whether the amount of the judgement is more than the amount of the distribution, any amount awarded by way of interest is to be disregarded.

Part 2 Supreme Court practice and the registrar

611 Practice [Q s70; R 40-9]

- (1) The practice of the Supreme Court is as provided for under this or another Act or by the rules of court [as in force from time to time].

Drafter's note: The bracketed words may be unnecessary in some jurisdictions (*Acts Interpretation Act 1954* (Qld), s 14H).

[s 612]

- (2) If, in relation to a particular matter, the practice of the Supreme Court can not be ascertained under subsection (1), the practice of the court is the practice of the court before the passing of this Act to the extent the circumstances of the matter will allow.

612 Registrar's functions and powers [Q s69; R 40-8]

Subject to this Act, the registrar, in relation to proceedings in the Supreme Court under this Act, has and may exercise—

- (a) the functions and powers that may be conferred on the registrar [from time to time] by the court and by the rules of court; and

Drafter's note: The bracketed words may be unnecessary in some jurisdictions. The Supreme Court of Qld has power to confer jurisdiction on registrars under the rules of court. (See also, *Acts Interpretation Act 1954* (Qld), s 23.)

- (b) the functions and powers that the registrar exercised before the passing of this Act.

Part 3 Concealing wills etc.

613 Supreme Court may require production of testamentary documents [NSW s150; Qld UCPR, r232(3); R 28-1]

- (1) This section applies if a person (the *applicant*) applies to the Supreme Court for an order that a person produce to the court a testamentary document of a deceased person or any other document relevant to the matter before the court (each of which is a *relevant document*).
- (2) For subsection (1), it does not matter whether a proceeding about any probate or administration matter in relation to the deceased person is pending in the Supreme Court.

- (3) If the Supreme Court is satisfied that the person may have a relevant document in the person's possession or under the person's control, the court may order the person to produce the relevant document to the court.
- (4) If the Supreme Court is not satisfied that a relevant document is in the person's possession or under the person's control, but the court is satisfied that the person has knowledge of the relevant document, the court may—
 - (a) direct the person to attend before the court to be examined about the relevant document; or
 - (b) give the applicant leave to serve interrogatories on the person about the relevant document.
- (5) The person must—
 - (a) if subsection (4)(a) applies—answer questions put to the person; or
 - (b) if subsection (4)(b) applies—answer, directly and without evasion or resort to technicality, the interrogatories and return the completed interrogatories to the applicant.
- (6) If the person fails, without reasonable excuse—
 - (a) to produce the relevant document as required under subsection (3); or
 - (b) to answer questions on the examination or interrogatories as required under subsection (5);the person commits a contempt of court.
- (7) In this section—

testamentary document includes a document purporting to be a testamentary document.

[s 614]

**614 Person fraudulently disposing of will liable in damages
[ACT s127; R 28-3]**

- (1) This section applies if a person suffers loss as a result of a person interfering with a will.

Editor's note—

See [insert local equivalent of the Criminal Code (Qld), sections 398 and 399] for offences involving interfering with wills.

- (2) The person may recover damages in relation to the loss by action in a court of competent jurisdiction from the person who interfered with the will.

- (3) In this section—

interfere, with a will, includes either or both of the following—

- (a) steal the will;
- (b) fraudulently destroy, cancel, obliterate or conceal the will.

will includes part of a will.

Part 4 Other provisions

615 Access to information held by personal representative—beneficiaries [new; R 11-11 to 11-14]

- (1) This section applies to documents the personal representative is required to keep under section 403.
- (2) A beneficiary of the deceased person's estate may, on giving reasonable notice to the personal representative—
- (a) inspect the documents; and
 - (b) obtain copies of the documents.

- (3) 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 to the personal representative of the personal representative's reasonable costs of providing the copies.
- (4) If the personal representative fails to comply with subsection (3), the beneficiary may apply to the Supreme Court for an order requiring the personal representative to comply with subsection (3).

616 Access to information held by personal representative—family provision applicants and creditors [new; R 11-15 to 11-17]

- (1) This section applies to documents the personal representative is required to keep under section 403.
- (2) A person eligible to apply for provision out of the deceased person's estate under [insert local equivalent of the *Succession Act 1981*, section 41], or a creditor of the estate, may apply to the Supreme Court for access to the documents.
- (3) The Supreme Court may order that the personal representative give the person or creditor access to all or some of the documents as the court considers appropriate.

Examples of giving access—

- allowing inspection of the documents
 - providing copies of the documents
- (4) If the Supreme Court orders access under subsection (3), the right to access may be exercised by the person or creditor personally, or by the person's or creditor's agent.
 - (5) The person or creditor must pay to the personal representative the personal representative's reasonable costs of providing the access.

[s 617]

617 Abolition of administration bond and sureties [Q s51; R 9-1 and 9-2]

- (1) An administrator of a deceased person's estate can not be required to provide an administration bond or a surety for an administration bond in relation to the grant of representation.
- (2) The holder of a foreign grant of representation or another person applying to reseal a foreign grant of representation can not be required to provide an administration bond or a surety for an administration bond for the resealing of the foreign grant of representation.

618 Service [Q s72; R 40-10]

- (1) This section applies if—
 - (a) a person wishes to serve, within a prescribed time, notice of a proceeding, or any other document that is required or permitted to be served in relation to a deceased person's estate; and
 - (b) the person is uncertain as to the person to be served.
- (2) The person wishing to serve the document may, within the prescribed time, apply to the Supreme Court for directions as to service.
- (3) The Supreme Court may direct how service is to be effected and, if the court considers it appropriate, extend the time within which service may be effected.
- (4) In this section—

prescribed time means a time prescribed [by or] under this or another Act.

Drafter's note: The bracketed words may be unnecessary in some jurisdictions.

619 Approval of forms

- (1) The [*insert relevant officer or body of local jurisdiction*] may approve forms for use under this Act.
- (2) Without limiting subsection (1), the [*insert relevant officer or body of local jurisdiction*] may approve the form of an election to administer for use under this Act.

620 Regulation-making power

- (1) The Governor in Council may make regulations under this Act.
- (2) Without limiting subsection (1), a regulation may prescribe the fees and charges payable for doing a thing under this Act.

Chapter 7 Transitional provisions and repeal

700

[Provisions to be drafted by each jurisdiction.]

Chapter 8 Amendment of [Property Law Act 1974]

800 Act amended

This chapter amends [*insert local equivalent of the Property Law Act 1974 (Qld)*].

[s 801]

801 Insertion of new [pt 19A] [R 23-28]

After [section 344]—

insert—

‘[Part 19A] Rules about survivorship in particular circumstances

‘344A Definitions for [pt 19A] [R 23-29]

‘In this part—

issue, of a deceased person, includes a person—

- (a) who is born after a period of gestation in the uterus that commenced before the deceased’s death; and
- (b) who survives for at least 30 days after the birth.

property includes real and personal property and any estate or interest in the property and any thing in action and any other right.

Drafter’s note: This definition may be unnecessary in some jurisdictions. See, for example, the definition *property* in the *Acts Interpretation Act 1954* (Qld), s 36.

this jurisdiction means [Queensland].

‘344B Relationships

‘For this part—

- (a) an adopted child is to be regarded as a child of the adoptive parent or parents; and
- (b) the child’s family relationships are to be decided accordingly; and
- (c) family relationships that exist as a matter of biological fact, and are not consistent with the relationship created by adoption, are to be ignored.

‘344C Application of [pt 19A] [NT Law of Property Act, s214; R 23-22, 23-23 and 23-27]

- ‘(1) This part applies if, after the commencement of this part—
- (a) 2 or more persons die or are presumed dead, or 1 or more persons die and 1 or more persons are presumed dead, and the circumstances in which they die, or that give rise to the presumption of their death, raise reasonable doubts about the order in which they died or are presumed to have died; or
 - (b) 2 or more persons die at the same time.
- ‘(2) This part applies in relation to—
- (a) all property that devolves on the death or presumed death of a person under this or another Act or law of this jurisdiction; and

Drafter’s note: Under the *Acts Interpretation Act 1954* (Qld), s 6(2), a reference to ‘an Act’ includes the Act in which the reference occurs.

- (b) all appointments of trustees that are made under an Act or law of this jurisdiction.
- ‘(3) For this part, a person is presumed to be dead if, on application to a court of competent jurisdiction of the Commonwealth or a State [or Territory], the court—
- (a) declares that the common law presumption of death is satisfied; or
 - (b) having regard to the circumstances of the person’s disappearance, infers that the person has died.
- ‘(4) For this part, it does not matter whether the deaths or presumed deaths happen in this jurisdiction or elsewhere.

‘344D General rule [NT Law of Property Act, s216(2)(a), WA Property Law Act s120(a); R 23-1 to 23-3]

- ‘(1) The property of each of the persons is to devolve as if he or she had survived the other or others of them and had died immediately afterwards.

[s 801]

- ‘(2) However, if a person mentioned in subsection (1) left a will, subsection (1) is subject to a contrary intention appearing in the will.
- ‘(3) In this section—
property includes property over which a person holds a power of appointment.

**‘344E Particular provision for substitutional dispositions
[new; R 23-4 to 23-6]**

- ‘(1) If—
- (a) under a will, trust or other disposition, a disposition of property to 1 of the persons (the *possible beneficiary*) is dependent on the possible beneficiary surviving another of the persons (the *specified person*); and
 - (b) under the will, trust or other disposition, there is a further disposition of the property to another person (the *substitute beneficiary*) if the possible beneficiary does not survive the specified person, either at all or by a stated period; and
 - (c) apart from this section, the further disposition to the substitute beneficiary would fail because of lack of proof that the possible beneficiary did not survive the specified person, either at all or by the stated period;
- for the purposes of the further disposition to the substitute beneficiary, the possible beneficiary is taken not to have survived the specified person.
- ‘(2) Subsection (1) may be re-applied, with necessary changes.
- ‘(3) Subsection (1) or (2) does not apply if a contrary intention appears in the will, trust or other disposition.

‘344F Gifts made in contemplation of the donor’s death [NT Law of Property Act, s216(2)(b), WA Property Law Act, s120(b); R 23-7 and 23-8]

- ‘(1) A gift made in contemplation of death by any of the persons to another of the persons is of no effect.
- ‘(2) In subsection (1)—
- gift made in contemplation of death* means a gift known in law as a *donatio mortis causa*.

‘344G Insurance moneys [NT Law of Property Act, s216(2)(c), WA Property Law Act, s120(c); R 23-9 and 23-10]

- ‘(1) This section applies if—
- (a) the life of any of the persons is insured under a policy of life or accident insurance; and
- (b) 1 or more of the other persons would, on surviving the insured person, be entitled (other than under a will or the application of the rules of intestacy) to the proceeds or a part of the proceeds payable under the policy.
- ‘(2) The proceeds are to be distributed as if the insured person had survived the other person or each of the other persons and had died immediately afterwards.
- ‘(3) Subsection (2) is subject to a contrary intention appearing in the instrument governing the distribution of the proceeds under the policy.

‘344H Joint property [NT Law of Property Act, s216(2)(d), WA Property Law Act, s120(d); R 23-11 and 23-12]

‘Any property that is owned jointly and exclusively by any 2 or more of the persons is to devolve as if it were owned by them as tenants in common in equal shares when they died.

[s 801]

‘344I Gifts to survivor of identified beneficiaries [NT Law of Property Act, s216(2)(e), WA Property Law Act, s120(e); R 23-13 and 23-14]

- ‘(1) This section applies if, under a will, trust or other disposition, property would have devolved or passed, whether by operation of statute or otherwise, to any of 2 or more possible beneficiaries, who are from among the persons who die or are presumed dead, if any of the possible beneficiaries could be shown to have survived the other or others of them.
- ‘(2) The disposition takes effect as if the property were given to the possible beneficiaries as tenants in common in equal shares.
- ‘(3) Subsection (2) is subject to a contrary intention appearing in the will, trust or other disposition.
- ‘(4) Subsection (2) does not apply if section 344G or 344J applies.

‘344J Property the subject of a power of appointment [NT Law of Property Act, s216(2)(f), WA Property Law Act, s120(f); R 23-15 and 23-16]

- ‘(1) This section applies if a power of appointment could have been exercised over property, whether by operation of statute or otherwise, by any 2 or more of the persons who die or are presumed dead if any of them could be shown to have survived the other or others of them.
- ‘(2) The power of appointment may be exercised as if—
 - (a) an equal share of the property had been set apart for appointment by each person (the *appointable property*); and
 - (b) each person had the power of appointment over his or her appointable property.
- ‘(3) If a person mentioned in subsection (2)(b) does not exercise the power of appointment over his or her appointable property, the appointable property is to devolve in the way in which the property would have devolved if the person had

survived the other or others but not exercised the power of appointment.

- ‘(4) Subsections (2) and (3) are subject to a contrary intention appearing in the instrument creating the power of appointment.
- ‘(5) Subsections (2) and (3) do not apply if section 344G applies.

‘344K Property left to survivor of 2 or more of testator’s issue [NT Law of Property Act, s216(2)(g), WA Property Law Act, s120(g); R 23-17 and 23-18]

- ‘(1) This section applies if—
 - (a) property is disposed of, or appointed, by will to the survivor of 2 or more of the testator’s issue; and
 - (b) all or the last survivors of the issue are from among the persons who die or are presumed dead.
- ‘(2) For the purpose of [insert local equivalent of the *Succession Act 1981* (Qld), section 33N], the disposition or appointment takes effect as if it were in equal shares to the survivors who leave issue who survive the testator for 30 days.

Example—

T, the testator, leaves her estate to the survivor of her children A, B, C and D. A predeceases T and B, C and D. B, C and D predecease T in circumstances where it is not clear who was the last survivor of B, C and D. B did not leave issue but both C and D left issue who survive T by 30 days. The effect of subsection (2) is that the disposition takes effect as if it were in equal shares to C and D.

- ‘(3) Subsection (2) is subject to a contrary intention appearing in the will.

‘344L Application of rules if testator and issue die or are presumed dead [NT Law of Property Act, s216(2)(h), WA Property Law Act, s120(h); R 23-19 and 23-20]

- ‘(1) This section applies if the persons who die or are presumed dead include a testator and 1 or more of his or her issue.

[s 801]

- ‘(2) For the purpose of [insert local equivalent of the *Succession Act 1981* (Qld), section 33N], the testator is taken to have survived all of his or her issue who die or are presumed dead and to have died immediately afterwards.

Drafter’s note: For jurisdictions that do not yet have the equivalent of s 40 of the model Wills Bill, an adjustment may be needed. See 23.235 in the Law Reform Report.

- ‘(3) Subsection (2) is subject to a contrary intention appearing in the will.

‘344M Presumption of last resort [NT Law of Property Act, s217, WA Property Law Act, s120(i); R 23-21]

- ‘(1) This section applies if no other rule stated in this part applies to circumstances to which this part applies.
- ‘(2) The deaths or presumed deaths or deaths and presumed deaths are taken to have happened in order of seniority so that the younger is taken to have survived the elder.

‘344N Re Benjamin orders [NT Law of Property Act, s218; R 23-26]

‘Nothing in this part prevents the distribution of the estate of a deceased person if a beneficiary can not be found and there is no evidence that the beneficiary predeceased the testator.

Note—

See *Re Benjamin* [1902] 1 Ch 723.’.

**Schedule 1 Priority of persons to letters of
administration with the will
annexed**

section 321(2)

- 1 a trustee of the residuary estate
- 2 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
- 3 a beneficiary of a specific or pecuniary legacy
- 4 anyone else the Supreme Court may appoint, including a
creditor of the deceased person's estate

Schedule 2 Priority of persons to letters of administration on intestacy

section 322(2)

- 1 a surviving spouse of the deceased person
- 2 the deceased person's children
- 3 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
- 4 the deceased person's parents
- 5 the deceased person's brothers and sisters
- 6 the issue of a 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
- 7 the deceased person's grandparents
- 8 the brothers and sisters of the deceased person's parents
- 9 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
- 10 the [public trustee]
- 11 anyone else the Supreme Court may appoint, including a creditor of the deceased person's estate

Schedule 3 Dictionary

section 102

administrator, of a deceased person's estate, means the person to whom a grant of letters of administration of the deceased's estate has been made by the Supreme Court.

administrator by representation means a person who is an administrator by representation as provided under section 338(1).

approved form means a form approved for use under this Act under section 619.

brother see section 103.

ceases to have effect means ceases to have effect under section 335(2)(c).

claim, for chapter 4, part 7, see section 417.

claimant—

(a) for chapter 4, part 7—see section 417.

(b) for chapter 6, part 1, division 2—see section 605.

class 1 property see section 502(1)(a).³

class 2 property see section 502(1)(b).

class 3 property see section 502(1)(c).

court, for chapter 6, part 1, division 2, see section 605.

CPI, for chapter 3, part 6, see section 325.

CPI indexed, for chapter 3, part 6, see section 325.

death includes—

(a) an inference of death made by the Supreme Court; and

³ Section 502 (Payment of debts)

- (b) a declaration made by the Supreme Court that the common law presumption of death is satisfied.

debts include funeral, testamentary and administration expenses, and other liabilities payable out of the estate of a deceased person.

deceased person includes—

- (a) a person whose death is inferred by the Supreme Court; and
- (b) a person in relation to whom the Supreme Court declares the common law presumption of death to be satisfied.

deceased personal representative, for chapter 3, part 8, see section 337.

dispose, of property, for chapter 3, part 13, see section 367.

disposition, in relation to a will, includes—

- (a) any gift of property under the will; and
- (b) the creation by the will of a power of appointment affecting property; and
- (c) the exercise by the will of a power of appointment affecting property.

domestic partnership means a relationship (other than marriage) between the deceased person and another person—

- (a) that is a [de facto relationship/domestic partnership/civil union] within the meaning of the [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 [insert the name of the local legislation dealing with registration of de facto

relationships; or if there is no such legislation, omit this subparagraph].

election to administer means an election to administer filed in the Supreme Court under section 327 or 331.

Drafter's note: Consequential amendments may be needed to other legislation that presently provides for an election to administer. See, in Qld, the *Public Trustee Act 1978* and the *Trustee Companies Act 1968*.

encumbered property, for chapter 5, part 2, division 4, see section 505.

estate, of a deceased person—

- (a) includes, generally, a part of the deceased person's estate; and
- (b) for chapter 4, part 6—see section 413; and
- (c) for chapter 4, part 7—see section 417; and
- (d) for chapter 4, part 8—see section 423; and
- (e) for chapter 4, part 9—see section 427; and
- (f) for chapter 4, part 10—see section 430.

executor by representation includes a person who is an executor by representation as provided under section 338(1).

executor or administrator by representation means an executor by representation or an administrator by representation.

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).

foreign jurisdiction means—

- (a) an interstate jurisdiction; or
- (b) an overseas jurisdiction.

grant of representation—

- (a) means, generally, any of the following—
 - (i) a grant of probate made by the Supreme Court;
 - (ii) a grant of letters of administration made by the Supreme Court;
 - (iii) [an order to administer] made by the Supreme Court;

- (iv) an election to administer filed in the Supreme Court; and
- (b) for chapter 3, part 1, division 2—see section 308; and
- (c) for chapter 3, part 8—see section 337.

holder, of a grant of representation or a foreign grant of representation of a deceased person's estate, means—

- (a) for a grant of representation—the person to whom the grant of representation is made; or
- (b) for a foreign grant of representation—the person appointed or authorised to collect and administer, under a law of a foreign jurisdiction, any part of the deceased's estate in the foreign jurisdiction in which the foreign grant of representation was made.

interstate election to administer, a deceased person's estate, means an instrument filed in a court of an interstate jurisdiction that, on being filed, is of the same general effect in the interstate jurisdiction as an election to administer filed in this jurisdiction.

interstate grant of representation means—

- (a) a grant of probate made by a court in an interstate jurisdiction; or
- (b) a grant of letters of administration made by a court in an interstate jurisdiction; or
- (c) another instrument, other than an interstate election to administer, made by a court in an interstate jurisdiction that is of the same general effect in that jurisdiction as [an order to administer] in this jurisdiction.

interstate jurisdiction means a State [or Territory], other than this jurisdiction.

intestate, in relation to a deceased person, means without leaving a will, or leaving a will that does not effectively dispose of the whole or part of the deceased's estate.

issue, of a deceased person, includes a person—

- (a) who is born after a period of gestation in the uterus that commenced before the deceased person's death; and
- (b) who survives for at least 30 days after the birth.

last personal representative, for chapter 3, part 6, division 3, see section 330(a).

lawful authority, for chapter 3, part 9, see section 346.

letters of administration means letters of administration with or without the will annexed, and whether made for general, special or limited purposes.

made, in relation to a grant of representation or a foreign grant of representation, means made, granted or issued by, or filed in, a court.

overseas election to administer, a deceased person's estate, means an instrument filed in a court of an overseas jurisdiction that, on being filed, is of the same general effect in the overseas jurisdiction as an election to administer filed in this jurisdiction.

overseas jurisdiction means a jurisdiction outside Australia, or a part of the jurisdiction.

pecuniary legacy includes—

- (a) an annuity; and
- (b) a general legacy; and
- (c) a demonstrative legacy, to the extent it is not discharged out of the specific property on which it is charged; and
- (d) any other general direction by a testator for the payment of an amount, including, for example, if a legacy is directed to be paid free of all duties, the payment of any duties to which the legacy is subject.

personal representative—

- (a) means, generally, 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; and
- (b) for chapter 4, part 6—see section 413; and

- (c) for chapter 4, part 7—see section 417; and
- (d) for chapter 4, part 8—see section 423; and
- (e) for chapter 4, part 9—see section 427; and
- (f) for chapter 4, part 10—see section 430.

preceding calendar year, for chapter 3, part 6, see section 325.

prescribed amount, for chapter 3, part 6, see section 325.

prescribed person, for chapter 4, part 8, see section 423.

prescribed provision, for chapter 3, part 9, see section 346.

professional administrator means—

- (a) the [public trustee]; or
- (b) a trustee company within the meaning of the [insert local equivalent of the *Trustee Companies Act 1968* (Qld)]; or
- (c) an Australian legal practitioner within the meaning of the [insert local equivalent of the *Legal Profession Act 2007* (Qld)].

property includes real and personal property and any estate or interest in the property and any thing in action and any other right.

Drafter's note: This definition may be unnecessary in some jurisdictions. See, for example, the definition *property* in the *Acts Interpretation Act 1954* (Qld), s 36.

property debt, for chapter 5, part 2, division 4, see section 505.

[public trustee] means [insert appropriate definition].

Drafter's note: In Victoria, the reference to public trustee is likely to be State Trustees.

reasonably believes means believes on grounds that are reasonable in the circumstances.

registrar means a registrar of the Supreme Court.

residuary estate, of a deceased person, means—

- (a) if the deceased left a will, either or both of the following—
 - (i) property in the deceased's estate that is not effectively disposed of by the deceased's will;
 - (ii) property in the deceased's estate that is not specifically given by the deceased's will but is included in a residuary disposition, by either a specific or general description; or
- (b) if the deceased did not leave a will, the whole of the deceased's estate.

revoke, a grant of representation of a deceased person's estate, includes recall the grant of representation.

rules of court means the [insert local equivalent of the *Uniform Civil Procedure Rules 1999 (Qld)*].

sister see section 103.

spouse, of a deceased person, is a person—

- (a) who was married to the deceased person immediately before the deceased person's death; or
- (b) who was a party to a domestic partnership with the deceased person immediately before the deceased person's death.

substitute decision-maker, for chapter 3, part 9, see section 346.

this jurisdiction means [Queensland].

vests, in a person, means devolves to and vests in the person.

will includes a codicil and any other testamentary disposition.