



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

Report
Volume 2

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**

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

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

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

Previous publications in this project:

Wills

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

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

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

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

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

Family provision

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

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

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

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

Intestacy

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

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

Administration of estates

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

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

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

Miscellaneous

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

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Abbreviations

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Chapter 14

The liability of a personal representative

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LIABILITY FOR NEGLIGENCE OF DUTY

Existing legislative provisions

14.1 The *Succession Act 1981* (Qld) contains a specific provision, section 52(2), that deals with a personal representative's liability for neglect of duty. Section 52 provides:³

52 The duties of personal representatives

- (1) The personal representative of a deceased person shall be under a duty to—
 - (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
 - (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court; and
 - (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
 - (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be; and
 - (e) pay interest upon any general legacy—
 - (i) from the first anniversary of the death of the testator until payment of the legacy; or
 - (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy;

at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.

- (2) If the personal representative neglects to perform his or her duties as aforesaid the court may, upon the application of any person aggrieved by such neglect, make such order as it thinks fit including an order for damages and an order requiring the personal representative to pay interest on such sums of money as have been in the personal representative's hands and the costs of the application.

14.2 The inclusion of this provision was recommended by the Queensland Law Reform Commission in its 1978 Report. Although the Commission expressed some doubts about whether a provision dealing with liability for

³

The duties specified in s 52(1) of the *Succession Act 1981* (Qld) are considered in Chapter 11 of this Report.

neglect was necessary, it considered it desirable to state expressly that the personal representative's liability extended to the payment of interest.⁴

14.3 The relief that may be ordered under section 52(2) is not limited to an order for damages and the payment of interest. The court may make 'such order as it thinks fit'.

14.4 The scope of the orders that may be made under the provision is demonstrated by the decision in *Re Hill*.⁵ In that case, the deceased's son was the sole executor and beneficiary under his mother's will. Within two months of his mother's death, he procured the transmission to himself of his mother's home, which was the main asset of her estate. As a result, when his sister applied for an order for provision out of the mother's estate, the Court held that there was no 'estate' left in respect of which a family provision order could operate, notwithstanding that the application for family provision had been made within time. Although the Court could not make a family provision order, it considered it appropriate to make an order under section 52(2) of the *Succession Act 1981* (Qld) that the son transfer to his sister a one-third interest in the property that was now registered in his name, on the basis that that interest equated with what the Court considered to be the sister's claim on their mother's bounty.

Discussion Paper

14.5 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld).⁶

14.6 The National Committee queried whether the reference in section 52(2) to 'neglect' was sufficiently broad. In that respect, it noted that section 43(3) of the *Administration and Probate Act 1935* (Tas), which applies in a different context,⁷ imposes liability for 'breach of trust, negligence or wilful default'.⁸ The general view of the National Committee, however, was that the reference to 'neglect' would encompass these concepts.⁹

⁴ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 36.

⁵ Unreported, Supreme Court of Queensland, Carter J, 17 June 1988.

⁶ *Administration of Estates Discussion Paper* (1999) QLRC 73; NSWLRC 107 (Proposal 31).

⁷ Under s 43(2) of the *Administration and Probate Act 1935* (Tas) the court may empower a personal representative to postpone the realisation of the deceased's estate or to carry on the deceased's business. Section 43(3) provides that a personal representative acting in pursuance of leave given under that section is not answerable for consequent loss, 'except in case of breach of trust, negligence, or wilful default'.

⁸ *Administration of Estates Discussion Paper* (1999) QLRC 72; NSWLRC [8.55].

⁹ Ibid, QLRC 72; NSWLRC [8.56].

14.7 The National Committee also expressed the view, although it was not the subject of a specific proposal, that it would be inappropriate for the model provision based on section 52(2) to be subject to a contrary intention in a will exempting an executor from liability for negligence.¹⁰

Submissions

14.8 There was general support in the submissions for the inclusion of a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld).¹¹

14.9 The Bar Association of Queensland commented that the provision provides a 'speedy and appropriate remedy in a wide variety of circumstances', referring to the decision in *Re Hill*.¹²

14.10 The National Council of Women of Queensland agreed with the National Committee's proposal, but also suggested that a personal representative's liability under the model provision should not be affected by any contrary intention expressed by the will.

14.11 The Queensland and New South Wales Law Societies, although generally supporting the National Committee's proposal, both suggested that the words 'as aforesaid', which appear in section 52(2) should be omitted from the model provision,¹³ presumably, so that the provision is not restricted to neglect in respect of the specific duties mentioned in section 52(1) of the Act.

14.12 Only the Public Trustee of South Australia did not support the National Committee's proposal that the model legislation should include a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld). In her view, the common law is sufficient.¹⁴

The National Committee's view

14.13 In the National Committee's view, section 52(2) of the *Succession Act 1981* (Qld) is a useful provision, as it enables the court to make a wide range of orders in circumstances where a personal representative has not performed his or her duties. A provision to that effect should therefore be included in the model legislation.

14.14 However, the National Committee is concerned that the current reference in section 52(2) to a personal representative who 'neglects to perform his or her duties' might be read narrowly to refer only to a personal

¹⁰ Ibid, QLRC 72; NSWLRC [8.57].

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

¹² Submission 1.

¹³ Submissions 8, 15.

¹⁴ Submission 4.

representative who has been 'negligent' in the performance of his or her duties. To avoid that ambiguity, the model provision that is based on section 52(2) should instead refer to a personal representative who 'fails' to perform his or his duties.

14.15 The National Committee also notes that two respondents suggested that the words 'as aforesaid' should be omitted from the model provision that is based on section 52(2) of the *Succession Act 1981* (Qld).¹⁵ The National Committee agrees that the scope of the model provision should not be restricted to a failure by a personal representative to perform those duties that are prescribed by the model legislation, but should apply in respect of a failure to perform any duty. Given the breadth of the duties encompassed in section 52(1) and in the model provisions that are based on that section, this approach also has the advantage of avoiding arguments about whether or not the failure to perform a particular duty constitutes a failure to perform one of the duties prescribed by the model legislation.

14.16 Although this proposal has the effect of widening the power that the court presently has under section 52(2) of the *Succession Act 1981* (Qld), the court still retains its discretion under the applicable trustee legislation to relieve a personal representative from personal liability for the breach if it is of the view that the personal representative has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which the personal representative committed the breach of trust.¹⁶

14.17 The National Committee notes that one respondent commented that the model provision should not be affected by any contrary intention expressed in the will.¹⁷ Although the National Committee agrees with that general proposition, it does not consider it necessary for the model legislation to contain a provision to that effect. In the National Committee's view, it is not possible for a testator, by will, to relieve his or her executor of the obligation to comply with various duties that are imposed by statute; nor is it possible for an executor to provide that a statutory provision enabling the court to make an order in respect of the executor's failure to perform his or her duties is not to apply to the executor appointed by the testator's will.

¹⁵ See [14.11] above.

¹⁶ *Trustee Act 1925* (ACT) s 85; *Trustee Act 1925* (NSW) s 85; *Trustee Act* (NT) s 49A; *Trusts Act 1973* (Qld) s 76; *Trustee Act 1936* (SA) s 56; *Trustee Act 1898* (Tas) s 50; *Trustee Act 1958* (Vic) s 67; *Trustees Act 1962* (WA) s 75. As explained at [13.2] in vol 1 of this Report, the trustee legislation in all jurisdictions defines 'trustee' to include a personal representative.

¹⁷ See [14.10] above.

LIABILITY FOR WASTE OR CONVERSION

Existing legislative provisions

14.18 Five jurisdictions have legislative provisions, based on two seventeenth-century Imperial statutes,¹⁸ that deal with the liability of a personal representative for the waste or conversion of property committed by the deceased person in his or her capacity as personal representative.¹⁹

14.19 The Queensland provision, section 52A of the *Succession Act 1981* (Qld), provides:

52A Liability of executors for waste

Where a personal representative in his or her own wrong wastes or converts to his or her own use any part of the estate of the deceased person and dies, his or her personal representative shall to the extent of the available assets of the defaulter be liable and chargeable in respect of such waste or conversion in the same manner as the defaulter would have been if living.

14.20 Section 52A ensures that, where a personal representative in his or her own wrong²⁰ wastes or converts property that is part of the estate of a deceased person and dies, the personal representative of the deceased defaulter is liable, to the extent of the assets of the defaulter, in respect of the waste or conversion.

14.21 The provisions in the other jurisdictions have the same effect, but are slightly broader in their operation. Whereas the Queensland provision applies only where the person who committed the waste or conversion was a personal representative in his or her own wrong, the provisions in the other jurisdictions apply, in addition, where the person who committed the waste or conversion was a properly constituted personal representative.²¹

14.22 The administration legislation of the Northern Territory, South Australia and Western Australia does not contain a similar provision. However, it would seem that the original Imperial Acts continue to apply in these jurisdictions,

¹⁸ 30 Chas II c 7 (1678); 4 W & M c 24 s 12 (1692). The substance of the provision was contained in the 1678 Act. Section 11 of the 1692 Act made the earlier Act perpetual.

¹⁹ *Administration and Probate Act 1929* (ACT) s 74B; *Imperial Acts Application Act 1969* (NSW) s 15; *Succession Act 1981* (Qld) s 52A; *Administration and Probate Act 1935* (Tas) s 30; *Administration and Probate Act 1958* (Vic) s 33(2).

²⁰ Such a person is commonly referred to as an executor de son tort (that is — a person who purports to administer an estate without having been appointed as executor by a will or as administrator under a grant).

²¹ *Administration and Probate Act 1929* (ACT) s 74B; *Imperial Acts Application Act 1969* (NSW) s 15; *Administration and Probate Act 1935* (Tas) s 30; *Administration and Probate Act 1958* (Vic) s 33(2).

having been received into their law on settlement.²²

14.23 At the time the original Imperial statutes were enacted, an action in tort did not generally survive against the estate of a deceased person. This meant that, where a personal representative committed a tort against the estate of a deceased person, such as the waste or conversion of property, and then died, an action could not be brought against the estate of the deceased personal representative who had committed the tort.

14.24 Lee suggests that, in light of the existing legislative provisions providing for the survival of causes of actions on a person's death,²³ section 52A of the *Succession Act 1981* (Qld) 'would appear to be otiose'.²⁴ This view has been endorsed by the Law Reform Commission of Western Australia, which recommended that, as that State has similar legislation dealing with the survival of actions against the estate of a deceased person, the Imperial statute that is still in force in Western Australia²⁵ should be repealed without being replaced.²⁶

Discussion Paper

14.25 In the Discussion Paper, the National Committee proposed that the model legislation should not include a provision to the effect of section 52A of the *Succession Act 1981* (Qld).²⁷ In the National Committee's view, the effect of section 52A was, at most, only declaratory, and the section was no longer needed given the legislation in all jurisdictions dealing with the survival of actions.²⁸

²² The original Imperial Acts continued to apply in England until they were repealed by the *Administration of Estates Act 1925* (UK) s 56, sch 2. They therefore became part of the law of South Australia and Western Australia when those States were settled, respectively, on 28 December 1836 and 1 June 1829: see *Acts Interpretation Act 1915* (SA) s 4A; *Interpretation Act 1984* (WA) s 73. It would appear that the Acts also became part of the law of the Northern Territory when the Territory was annexed to South Australia: see *Sources of the Law Act* (NT) ss 2, 3. For a discussion of the application of the Imperial Acts in Western Australia, see Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia*, Report, Project No 75 (1994).

²³ See, for example, s 66 of the *Succession Act 1981* (Qld) and the equivalent provisions in the other Australian jurisdictions, which are considered in Chapter 26 of this Report.

²⁴ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [9.290] note 83. *Succession Act 1981* (Qld) s 52A was not part of that Act as originally enacted, but was inserted by the *Imperial Acts Application Act 1984* (Qld) s 13.

²⁵ See [14.22] above.

²⁶ Law Reform Commission of Western Australia, *United Kingdom Statutes in Force in Western Australia*, Report, Project No 75 (1994) 55, referring to WA Lee, *Manual of Queensland Succession Law* (3rd ed, 1991) [924] note 67. See now AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [9.290] note 83.

²⁷ *Administration of Estates Discussion Paper* (1999) QLRC 75; NSWLRC 110 (Proposal 32).

²⁸ *Ibid*, QLRC 74–5; NSWLRC [8.63].

Submissions

14.26 The National Committee's proposal was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.²⁹

The National Committee's view

14.27 The National Committee remains of the view that, in light of the specific legislation providing for the survival of actions, the model legislation should not include a provision to the effect of section 52A of the *Succession Act 1981* (Qld).

14.28 Further, the National Committee is of the view that those jurisdictions that presently include such a provision in their legislation should repeal the provision.

NEGLECT OR REFUSAL TO TRANSFER OR CONVEY LAND OR HAND OVER LEGACIES

Existing legislative provisions

14.29 The legislation in the ACT, New South Wales, the Northern Territory and Western Australia contains a provision that enables a summary application to be made seeking the payment by an executor or administrator of a legacy or the conveyance by an executor or administrator of devised land.³⁰

14.30 Section 84 of the *Probate and Administration Act 1898* (NSW) provides:

84 Application for legacy etc

If the executor or administrator, after requesting in writing, neglects or refuses to:

- (a) sign such acknowledgment,³¹ or
- (b) execute a conveyance of land devised to the devisee, or
- (c) pay or hand over to the person entitled any legacy or residuary bequest,

²⁹ Submissions 1, 3, 11, 12, 14, 15.

³⁰ *Administration and Probate Act 1929* (ACT) s 57; *Probate and Administration Act 1898* (NSW) s 84; *Administration and Probate Act* (NT) s 88; *Administration Act 1903* (WA) s 42.

³¹ The reference to 'such acknowledgment' refers to the procedure under s 83 of the *Probate and Administration Act 1898* (NSW), which enables a personal representative, instead of executing a conveyance of old system land, to sign an acknowledgment in the prescribed form. See [12.137]–[12.138] in vol 1 of this Report.

the Court may, on the application of such devisee or person, make such order in the matter as it may think fit. (note added)

14.31 The ACT, Northern Territory and Western Australian provisions are in similar terms to the New South Wales provision, except that:

- the Northern Territory and Western Australian provisions omit what appears as paragraph (a) of the New South Wales provision; and
- the ACT provision (like the Queensland rule set out below) provides expressly that the applicant may call on the executor or administrator to show cause why he or she should not comply with the request.

14.32 In Queensland, the equivalent provision is located in the court rules. Rule 643 of the *Uniform Civil Procedure Rules 1999* (Qld) provides:

643 Relief against neglect or refusal by executor, administrator or trustee

- (1) This rule applies if an executor, administrator or trustee neglects or refuses to comply with a beneficiary's written request—
 - (a) to apply for and take all necessary steps to register the transmission of any real or leasehold estate; or
 - (b) if the executor, administrator or trustee has or is entitled to the legal estate in the land—to convey or transfer the land to the person entitled to it; or
 - (c) to pay or hand over any legacy or residuary bequest to the person entitled to it.
- (2) The beneficiary may apply by application for an order calling on the executor, administrator or trustee to show cause why the person should not comply with the request.
- (3) The court may direct that the proceedings the court considers appropriate be taken against the executor, administrator or trustee.

14.33 In addition to the provision found in the ACT legislation,³² the ACT court rules include a rule in similar terms to rule 643 of the *Uniform Civil Procedure Rules 1999* (Qld).³³

14.34 The purpose of section 84 of the *Probate and Administration Act 1898* (NSW) and its counterparts in the other jurisdictions is:³⁴

³² *Administration and Probate Act 1929* (ACT) s 57.

³³ *Court Procedures Rules 2006* (ACT) r 3115. The rule is stated to have been based on r 643 of the *Uniform Civil Procedure Rules 1999* (Qld).

³⁴ *In the Will of York* (1894) 15 LR (NSW) B & P 24, 25 (Manning J), referring to s 21 of the *Probate Act of 1890 Amendment Act 1893* (NSW), which was in virtually the same terms as the current New South Wales provision.

to enable legatees and others to whom information was denied or payment refused to obtain that information, and in simple cases to obtain payment by means of a summary application ... , instead of their being driven in every case to submit calmly or to enter on expensive litigation in the shape of an administration suit.

14.35 The section provides 'speedy and inexpensive relief for legatees and devisees in clear cases where there [is] obviously no reason for non-compliance with the request'.³⁵ However, an application under the section 'cannot be used as a substitute for an administration suit'.³⁶ Accordingly, the court has no power to make an order under the section 'unless the evidence shows that the applicant is clearly entitled to the legacy sought and that there are liquid assets available for payment of it'.³⁷

14.36 Although the ACT, New South Wales and Northern Territory provisions refer to the neglect or refusal to execute a 'conveyance' of land to a devisee,³⁸ it has been held that the reference to a conveyance includes a transfer of land under the real property legislation.³⁹ The Western Australian provision and the Queensland rule both refer expressly to the conveyance 'or transfer' of land.⁴⁰

14.37 The ACT, New South Wales, Northern Territory and Western Australian provisions are expressed to apply where the relevant request is made to an executor or administrator, and make no reference to a request made to a trustee.⁴¹ It has been held in relation to the New South Wales provision that, once a person who has been appointed as executor and trustee under a will holds property as a trustee, rather than by virtue of the office of executor, the court cannot make an order under the provision.⁴²

14.38 The ACT and Queensland rules have a broader operation, as they are expressed to apply where the relevant request is made to an executor, administrator or trustee.

Discussion Paper

14.39 In the Discussion Paper, the National Committee proposed that the model legislation should not include a provision to the effect of section 84 of the

³⁵ *In the Will of Gannon* (1915) 15 SR (NSW) 251, 255 (Street J).

³⁶ *Re Anderson* (1953) 53 SR (NSW) 520, 522 (Myers AJ).

³⁷ *Ibid.*

³⁸ *Administration and Probate Act 1929* (ACT) s 57(b); *Probate and Administration Act 1898* (NSW) s 84(b); *Administration and Probate Act* (NT) s 88(a).

³⁹ *In the Will of Paten* (1896) 17 LR (NSW) B & P 90, 91 (AH Simpson J).

⁴⁰ *Uniform Civil Procedure Rules 1999* (Qld) r 643(1)(b); *Administration Act 1903* (WA) s 42(a).

⁴¹ *Administration and Probate Act 1929* (ACT) s 57; *Probate and Administration Act 1898* (NSW) s 84; *Administration and Probate Act* (NT) s 88; *Administration Act 1903* (WA) s 42.

⁴² *In the Will of Clinton* (1910) 10 SR (NSW) 465, 468–9 (Cullen CJ).

Probate and Administration Act 1898 (NSW). It suggested that, if such a provision were considered necessary by individual jurisdictions, it should be included in their court rules.⁴³

Submissions

14.40 All the submissions that addressed this issue agreed with the National Committee's proposal.⁴⁴

14.41 An academic expert in succession law commented:⁴⁵

Procedures for resolving disputes or difficulties with personal representatives should be governed by Rules. Such matters are not part of the general law of succession.

14.42 Although the ACT Law Society supported the National Committee's proposal, it suggested that the inclusion of a provision to the effect of section 84 of the *Probate and Administration Act 1898* (NSW) would do no harm.⁴⁶

The National Committee's view

14.43 In the National Committee's view, the model legislation should not contain a provision to the effect of section 84 of the *Probate and Administration Act 1898* (NSW). The effect of the provision is to provide a means of summary relief for a beneficiary who is being denied the disposition to which he or she is entitled. It is therefore appropriate that such a provision be located in court rules, where the provisions dealing with other forms of summary judgment are located.

14.44 The National Committee considers, however, that the mechanism contained in section 84 of the *Probate and Administration Act 1898* (NSW) is a useful one, and therefore recommends that each jurisdiction should include in its court rules a specific provision dealing with the payment or transfer of legacies that are being withheld.

14.45 The relevant rule should be based on rule 643 of the *Uniform Civil Procedure Rules 1999* (Qld),⁴⁷ rather than on section 84 of the *Probate and Administration Act 1898* (NSW). As noted previously, the Queensland rule has a wider application as a result of its specific reference to a 'trustee'.

⁴³ *Administration of Estates Discussion Paper* (1999) QLRC 77; NSWLRC 112 (Proposal 33).

⁴⁴ Submissions 1, 3, 8, 11, 12, 13, 15.

⁴⁵ Submission 12.

⁴⁶ Submission 14.

⁴⁷ *Uniform Civil Procedure Rules 1999* (Qld) r 643 is set out at [14.32] above.

14.46 The National Committee acknowledges that it may be that an order that could be made under rule 643 of the Queensland rules could, in any event, be made under section 52(2) of the *Succession Act 1981* (Qld),⁴⁸ which provides that the court 'may make such order as it thinks fit'. Although that might be possible, the National Committee is nevertheless of the view that a rule to the effect of rule 643 provides a simple solution in a clear cut case of a personal representative's failure to transfer a legacy, and that it is therefore desirable to include a specific rule dealing with this situation.

LIABILITY OF AN ATTORNEY-ADMINISTRATOR FOR A FOREIGN PRINCIPAL

Introduction

14.47 Where the executor named in a will, or the person entitled to letters of administration, does not reside within the jurisdiction in which authority to administer the deceased's estate is required, there are several ways in which the person may obtain the requisite authority.

14.48 First, the person may apply for a grant directly, despite his or her absence from the jurisdiction.⁴⁹ Secondly, if the person has already been appointed as executor or administrator under a grant in another jurisdiction, it may be possible, depending on the country in which the grant was made, to apply to have the grant resealed in the relevant jurisdiction.⁵⁰ Thirdly, the person may, by power of attorney,⁵¹ appoint an attorney within the relevant jurisdiction to obtain letters of administration in that jurisdiction.⁵²

48 *Succession Act 1981* (Qld) s 52 is set out at [14.1] above.

49 In Chapter 3 of this Report, the National Committee has recommended that the model legislation include provisions to the effect of s 6 of the *Succession Act 1981* (Qld). Section 6(2) of the *Succession Act 1981* (Qld) provides that the court may make a grant to a person 'notwithstanding ... that the person to whom the grant is made is not resident or domiciled in Queensland'.

50 The countries whose grants may be resealed are considered in Chapter 32 of this Report.

51 A power of attorney conferring on the attorney general powers is sufficient (*In the Goods of Barker* [1891] P 251), as is the conferral of a power 'to prosecute all actions, suits and proceedings whatsoever' and 'to appear for me and my person to represent before all Courts ... as occasion may require and my attorneys think fit' (*In the Estate of Jones* (1900) 21 LR (NSW) B & P 35). Note, however, that in South Australia, a general power of attorney does not confer authority to perform functions that the donor has as a trustee or personal representative: *In the Estate of Rogowski* [2007] SASC 161, [25] (Gray J), referring to the *Powers of Attorney and Agency Act 1994* (SA) s 5(4). The effect of that Act is that the attorney must be expressly authorised to take a grant: *In the Estate of Rogowski* [2007] SASC 161, [25] (Gray J).

52 This third option would be particularly relevant where the foreign principal has no grant outside the relevant jurisdiction (which means that resealing is not an option) or where, although the foreign principal has a grant, the grant is made in a jurisdiction whose grants are not capable of being resealed: see RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [72.05].

14.49 In the last of these situations, the grant ‘is expressed to be “for the use and benefit of” the principal, and is expressed to be limited until the principal applies for and obtains a grant’.⁵³ The limitation is expressed in these terms:⁵⁴

to avoid doubts as to whether, upon the principal returning to seek a grant (but before obtaining one), the attorney administration grant might lapse. Thus the grant remains in force until the grant is made to the principal.

14.50 A grant to an attorney of the person entitled (that is, to an attorney-administrator) is therefore a type of limited grant.⁵⁵

14.51 The court has an inherent jurisdiction to make a grant to an attorney-administrator,⁵⁶ whether or not the principal (that is, the donor of the power) has obtained a grant in another jurisdiction.⁵⁷ However, it is the court’s practice to make a grant to an attorney-administrator only if the principal is outside the jurisdiction.⁵⁸

14.52 Further, as explained earlier in this Report, the administration legislation in all Australian jurisdictions except Queensland and Victoria includes a provision enabling the court, where the person entitled to a grant is out of the jurisdiction, to make a grant to the attorney appointed under a power of attorney by the person entitled.⁵⁹ In Queensland, the relevant provision is found in the court rules.⁶⁰

14.53 In Chapter 4, the National Committee has expressed the view that it is more appropriate for the provisions dealing with specific types of limited or special grants to be located in the court rules of the jurisdictions, rather than in their legislation. Accordingly, the model legislation does not include a provision dealing with the court’s power to make a grant to the attorney of the person entitled. Nevertheless, this section of the chapter examines the liability of an attorney-administrator, and considers whether the model legislation should

⁵³ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [72.14].

⁵⁴ Ibid. But see r 611(3) of *Uniform Civil Procedure Rules 1999* (Qld), which provides that ‘if the donor of the power later applies for a grant, the grant to the attorney ends’. The effect of the Queensland rule is that the grant to the attorney-administrator may come to an end before a new grant is made to the principal.

⁵⁵ *In the Estate of Rogowski* [2007] SASC 161, [18] (Gray J).

⁵⁶ *Perpetual Trustee Co Ltd v Satchell* (1939) 39 SR (NSW) 335, 342–3 (Davidson J).

⁵⁷ *In the Will of Soper* (1879) 5 VLR (IP & M) 79.

⁵⁸ *In the Goods of Burch* (1861) 2 Sw & Tr 139; 164 ER 946. In Queensland, however, there is an exception to this rule. See *Uniform Civil Procedure Rules 1999* (Qld) r 611(4), which provides:

611 Grant to attorney of absent person or person without prior right

...

(4) The court may also make a grant to the donee of a power of attorney given by a person residing in Queensland who is entitled to a grant.

⁵⁹ See [4.240] in vol 1 of this Report.

⁶⁰ See [4.242]–[4.243] in vol 1 of this Report.

include a provision dealing with the liability of an attorney-administrator who pays the balance of the estate to his or her foreign principal.

Same liabilities as an administrator

14.54 An attorney who is granted administration of an estate for the use and benefit of a foreign principal is subject to the same liabilities as if he or she had obtained a grant in his or her own right.⁶¹

Now it has been determined that, when administration is granted to a person as nominee of a party abroad, who is entitled to administration, such administrator is, as to the claims of third parties, administrator to all intents and purposes, exactly as if the person entitled to administration had himself obtained it. [His Honor here referred to the judgment in *Chambers v Bicknell* (2 Hare, 538).] That is a clear decision that the person to whom administration is granted, on the nomination of the party entitled to it, is full administrator, exactly as if he had obtained administration in his own right, as regards the claims of other persons.

14.55 Accordingly, an attorney-administrator must perform the duties of an administrator, such as the filing and passing of accounts, even if the foreign principal has purported to release the administrator from that duty.⁶²

Notwithstanding the form of the grant, the administrator's duty is to administer the estate according to the terms of the will, as he, in his petition for the grant, has undertaken to do. His liability to account is therefore to the beneficiaries under the will, and a release from the persons named in the will as executors from passing accounts is quite irrelevant ...

14.56 An attorney-administrator may be sued by persons beneficially interested in the estate, and is not simply accountable to his or her principal as an agent.⁶³ In *In the Estate of Weiss*,⁶⁴ Scarman J commented:⁶⁵

I accept that an attorney, once constituted administrator, is liable to all claims by persons who are entitled to claim against the estate. The right of a party beneficially interested in a deceased's estate to institute an administration action against an attorney-administrator was recognised in *Chambers v Bicknell*, a decision which has been followed in *In Re Rendell* and other cases. (notes omitted)

⁶¹ *Re Dewell* (1858) 4 Drewry 269, 272; 62 ER 104, 105 (Kindersley VC), cited with approval in *Re Rendell* [1901] 1 Ch 230, 232 (Cozens-Hardy J). *The Probate Rules* 2004 (SA) r 41.04, which applies where an attorney obtains an original grant, or the resealing of a grant, is declaratory of this principle:

41.04 Every attorney who makes application for a grant or for the re-sealing of any grant on behalf of an executor or administrator shall be liable to make and file all estate and administration accounts, and to render all particulars and notices of succession and to file all succession accounts under any Act now or hereafter in force, and to pay all fees and duties, and shall be subject to the same liabilities and penalties as if the grant had been originally made by the Court to such attorney.

⁶² *Re Cooke's Will* (1899) 9 QLJ 133, 134 (Griffith CJ).

⁶³ *Chambers v Bicknell* (1843) 2 Hare 536, 539; 67 ER 222, 223 (Wigram VC).

⁶⁴ [1962] P 136.

⁶⁵ *Ibid* 142.

Power of an attorney-administrator to remit the balance of the estate to, or at the direction of, the foreign principal

14.57 As a general proposition, a personal representative is under a duty to distribute the deceased's estate, and will be relieved of his or her liability in respect of distributed property only if he or she makes the distribution to a person who is capable at law of giving a good discharge to the personal representative.⁶⁶

14.58 A question that arises in relation to the liability of an attorney-administrator is whether such an administrator may receive a good discharge from, and therefore may safely pay the balance of the estate to, the foreign principal by whom he or she was appointed or whether, because an attorney-administrator is said to have the same liabilities as an ordinary administrator, he or she must personally distribute the estate to the beneficiaries.

14.59 To a large extent, the answer to this question depends on whether the foreign principal has obtained a grant in the jurisdiction in which the deceased died domiciled or, if the legal system of that jurisdiction does not recognise executors and administrators as such, the foreign principal is nevertheless charged by the laws of that jurisdiction with the duties and functions that, under our legal system, are imposed on executors and administrators.

Paying the balance of the estate to the foreign principal

14.60 Ordinarily, if the foreign principal has been appointed under a grant and is therefore constituted as the principal administrator of the deceased's estate, an attorney-administrator may be justified in paying over the balance of the estate, after payment of the administration expenses and local debts of which he or she has notice, to the foreign principal.⁶⁷ In *In the Estate of Weiss*,⁶⁸ Scarman J suggested that:⁶⁹

Distribution to the beneficiaries, though it may in special circumstances become the duty of the attorney-administrator, is better left in most cases to the principal administrator in the country of the domicile of the deceased.

14.61 In some situations, a foreign principal will not have been appointed as an executor or administrator because the legal system of the relevant country does not make provision for the appointment of executors and administrators. It has been held that, if the foreign principal 'is the person who under the law of the domicile is bound to perform the functions which are imposed by our law

⁶⁶ See, for example, the discussion at [13.32]–[13.61] in vol 1 of this Report about the options available to a personal representative who holds property on trust for a minor beneficiary.

⁶⁷ *Re Manifold* [1962] 1 Ch 1, 12, 20 (Buckley J).

⁶⁸ [1962] P 136.

⁶⁹ *Ibid* 144.

upon an executor or administrator,' the court is also free to authorise the attorney-administrator to pay the balance of the estate.⁷⁰

14.62 However, if the foreign principal has not obtained a grant, or is not otherwise charged under the law of the domicile with the administration of the deceased's estate, the attorney-administrator will not be relieved of the duty to distribute the estate to the beneficiaries by paying the balance of the estate to the foreign principal, as in these circumstances the foreign principal is unable to give a good discharge to the attorney-administrator. In *Re Rendell*,⁷¹ the intestate's widow, who resided in the United States, appointed an attorney in England to obtain letters of administration for her use and benefit. The widow had not obtained a grant of her husband's estate in the United States or elsewhere. A question arose as to whether the attorney-administrator in England could safely hand over the property of the deceased that had come into his hands to the intestate's widow in the United States, or whether it was the attorney-administrator's duty personally to distribute the property among the intestate's next of kin. The Court held that, as the widow could not give a valid discharge to the attorney-administrator, the attorney-administrator was responsible for the due administration of the estate.⁷²

The plaintiff is a person who has been constituted by the Probate Division administrator of the estate of the deceased. He has taken an oath in common form to administer according to law all the estate of the deceased. ... [The intestate's widow] is not the legal personal representative of the deceased either in the United States or elsewhere. Until she takes out administration she can only claim here as a person beneficially entitled to a share of the estate of the deceased. Her position, as widow of the deceased, is that there is no portion of the property of the deceased in England or elsewhere for which she can give a good receipt. Can I hold it is the duty of the administrator to hand the assets over to one of the class of persons entitled, who has not clothed herself here or elsewhere with the character of legal personal representative? I think not. ... That being so, in my opinion the plaintiff could not get a good receipt if he handed over the assets to the widow.

14.63 Even if the foreign principal has obtained a grant, an attorney-administrator will not be bound in every case to pay the balance of the estate to the foreign principal.⁷³ In *Re Manifold*,⁷⁴ the deceased made a will in 1957 that was admitted to probate in Cyprus, where she was domiciled at the time of her death. She also made a will in 1958 that purported to revoke the 1957 will. The 1958 will was validly executed according to English law, but not according to Cypriot law. The English attorney-administrators of the executor in Cyprus were granted letters of administration with the 1958 will annexed. They subsequently brought proceedings for a determination of whether they were at liberty to pay

⁷⁰ *Re Achilopoulos* [1928] 1 Ch 433, 444–5 (Tomlin J).

⁷¹ [1901] 1 Ch 230.

⁷² *Ibid* 231–2 (Cozens-Hardy J).

⁷³ *Re Manifold* [1962] 1 Ch 1, 12 (Buckley J).

⁷⁴ [1962] 1 Ch 1.

the balance of the estate, after the payment of funeral and administration expenses and debts of which they had notice, to the executor appointed in Cyprus, or whether they ought to apply those assets in accordance with the dispositions contained in the 1958 will. Because the executor in Cyprus was unable, under Cypriot law, to give effect to the dispositions contained in the 1958 will annexed to the English grant, and would have been required by Cypriot law to distribute the estate according to the 1957 will, the Court held that the attorney-administrators should not hand the balance of the estate to the executor in Cyprus, but should instead distribute the balance of the estate in England in accordance with the terms of the 1958 will.⁷⁵

Paying the balance of the estate at the direction of the foreign principal

14.64 The question may also arise as to whether an attorney-administrator is entitled, on the instructions of the foreign principal, to pay the balance of the estate to a third person.

14.65 In *In the Estate of Weiss*,⁷⁶ the foreign principal was entrusted, by order of a Czechoslovakian court, with the administration of his wife's estate and gave a direction for the English attorney-administrator to pay the balance of the English estate to a nominated person. The attorney-administrator complied with this request, and a person claiming to be a beneficiary subsequently brought proceedings alleging that the attorney-administrator had breached his duties by paying the balance of the estate as directed by the foreign principal. Scarman J held that there is no 'invariable rule that it is contrary to law for an attorney-administrator to act upon the instructions of his principal when those instructions are to deliver the balance of the estate in his hands to a third person'.⁷⁷ His Honour acknowledged, however, that, in some circumstances, an attorney-administrator may not be justified in acting on those instructions.⁷⁸

If he has notice of any limitation upon the power of his principal so to instruct him, or has any reason to believe that the effect of compliance with the instruction will be to deprive creditors or beneficiaries of their respective entitlements or otherwise cause loss to the estate, he may well be failing in his duty if he does not seek the directions of the court. If he be attorney to a foreign principal, the court in a proper case might well decide to retain the administration under its control. Whether or not the transfer of the net estate to a person other than the principal upon the principal's order is a breach of the attorney-administrator's duty must depend, in my judgment, upon circumstances.

⁷⁵ Ibid 19, 20 (Buckley J).

⁷⁶ [1962] P 136.

⁷⁷ Ibid 144.

⁷⁸ Ibid 144–5.

Issues arising in relation to these principles

14.66 Commentators on the New South Wales legislation suggest that the principles outlined above may cause problems:⁷⁹

Clearly, these rules create problems. It is not clear what is meant by 'debts' or 'claims'. Would family provision claims qualify? Further, there will be conflict of laws problems if the rules governing distribution under the local law differ from the rules under the foreign law. In such a case, the effect of remitting the asset or its proceeds to the foreign representative in accordance with *Re Achilopoulos* [1928] 1 Ch 433 and *Estate of Weiss* [1962] P 136 would be to defeat the local conflict laws principles. It seems that, where this result would follow, the court will not permit the assets to be remitted to the foreign representative, but will instead retain control of the assets and see that the administration among foreign recipients follows strict conflict rules. (note omitted).

14.67 An attorney-administrator who is in any doubt about how to proceed should seek the court's advice:⁸⁰

Doubt may be raised as to whether foreign claims of which he or she has notice must be provided for, and as to whether to remit local assets to the foreign principal, either because it is not clear whether the foreign representative is directly and presently entitled to administer the estate, or because distribution under local law differs from distribution under the foreign laws.

Discussion Paper

14.68 In the Discussion Paper, the National Committee referred to legislative provisions in Victoria and New Zealand that deal, in different situations, with the liability of an attorney of a personal representative.

14.69 Section 86 of the *Administration and Probate Act 1958* (Vic) applies where a person authorised under a power of attorney obtains the resealing of a foreign grant (but not where an attorney is authorised to apply for an original grant). It provides:

86 Administrator under power of attorney

Notwithstanding anything contained in this Act a person duly authorized by power of attorney under the provisions of this Part who—

- (a) has obtained the seal of the Court to any probate or letters of administration or grant or order;

* * * * *

⁷⁹ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [72.17].

⁸⁰ Ibid [72.18]. Applications for the court's advice and directions are considered in Chapter 20 of this Report.

- (c) has satisfied or provided for the debts and claims of all persons resident in Victoria of whose debts or claims he has had notice (whether before or after notice given by him as required by the *Trustee Act 1958*)—

may pay over or transfer to or as directed by the executor or administrator of the estate in the country in which the deceased was domiciled at the date of his death or to or as directed by the donor of the power of attorney the balance of the estate without seeing to the application thereof and without incurring any liability in regard to such payment or transfer and shall duly account to such executor or administrator or donor (as the case may require) for his administration.

14.70 Section 86 enables the attorney, in specified circumstances, to pay or transfer the balance of the estate to, or as directed by, either the executor or administrator of the estate in the deceased's domicile (who may not have given the power of attorney and who, in the case of an executor, may not have obtained a grant) or the donor of the power of attorney (who may have obtained the grant in a jurisdiction other than that in which the deceased was domiciled at the time of death).⁸¹

14.71 In Chapter 34 of this Report, which deals with the effect of resealing, the National Committee has recommended the inclusion in the model legislation of a provision based generally on section 86 of the *Administration and Probate Act 1958* (Vic), but modified so that the attorney may pay or transfer the balance of the estate to the donor of the power of attorney, but not to the executor or administrator in the domicile if that person is not also the donor of the power of attorney.⁸² As observed in that chapter, because a person who obtains the resealing of a grant is taken to be for all purposes the personal representative in the jurisdiction, in the absence of a provision to the effect of section 86, an attorney who obtained the resealing of a grant would always be required to distribute the estate personally and could never transfer the balance of the estate to the personal representative in the deceased's domicile or to the donor of the power. For that reason, the National Committee has recommended that the model legislation should enable the attorney, after satisfying or providing for the debts and claims of persons resident in the jurisdiction of whose debts or claims the attorney has notice, to pay or transfer the balance of the estate to the donor of the power of attorney.

14.72 The other provision to which the National Committee referred in the Discussion Paper was section 42 of the *Administration Act 1969* (NZ). That section applies to the specific situation under consideration in this chapter — namely, where a person obtains an original grant as the attorney or agent of an administrator who is absent from the jurisdiction.

⁸¹ See RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 138. This issue is considered further at [34.33]–[34.39] in vol 3 of this Report.

⁸² See [34.46]–[34.47] and Recommendation 34-3 in vol 3 of this Report.

14.73 Section 42 of the *Administration Act 1969* (NZ) provides:

42 Liability of agent of administrator

No person appointed an administrator upon an application made by him as the attorney or agent for an administrator absent from New Zealand shall be liable to account or pay money, or transfer property, to any one in respect of his administratorship excepting only to the administrator whose attorney or agent he was, or to any person who, after his appointment as administrator upon an application so made, is appointed administrator of the same estate.

14.74 The term 'administrator' is defined in the *Administration Act 1969* (NZ) to mean a person to whom 'administration' is granted.⁸³ 'Administration' is in turn defined to mean a grant of probate or letters of administration.⁸⁴ Accordingly, section 42 will apply only if the foreign principal has been appointed under a grant.

14.75 In *In the Estate of Tancred*,⁸⁵ an applicant for letters of administration as attorney for foreign executors sought a variation in the form of the administration bond to reflect the fact that, under the legislation, the applicant was required to account only to the absent executor or administrator by whom the applicant had been appointed as an attorney. Denniston J commented:⁸⁶

It is contended here that section 19 [the precursor to section 42 of the current Act] goes a step further than the English law as above stated, and takes away any right of those entitled to the estate to require payment by the attorney to them direct. It is argued that it is unreasonable that an attorney who is bound to hand over the funds to his principal should be required to enter into a bond upon the terms of which he and his sureties might be held responsible for their due administration by the principal, and that in view of section 19 of the New Zealand Act this should not now be required in New Zealand.

I think this contention is sound. The only person to whom an administrator who is within the terms of section 19 is liable to account is the executor or administrator whose attorney he was, or any person who after his appointment as such attorney is appointed executor or administrator of the same estate.

14.76 In the Discussion Paper, the National Committee observed that the Victorian and New Zealand provisions 'differ markedly' in their approaches and that the New Zealand provision 'does not attempt to follow the case law'.⁸⁷

14.77 The National Committee did not make a preliminary proposal about the liability of attorney-administrators, but instead sought submissions on whether the model legislation should include a provision to the effect of either section 42

83 *Administration Act 1969* (NZ) s 2(1).

84 *Administration Act 1969* (NZ) s 2(1).

85 (1913) 32 NZLR 991.

86 *Ibid* 993.

87 *Administration of Estates Discussion Paper* (1999) QLRC 121; NSWLRC [8.201].

of the *Administration Act 1969* (NZ) or section 86 of the *Administration and Probate Act 1958* (Vic) in relation to both grants and the resealing of grants.⁸⁸

Submissions

14.78 There was some support in the submissions for a provision dealing with the liability of an attorney-administrator.

14.79 The Queensland Law Society expressed the following view, although it did not state whether it favoured a provision to the effect of section 86 of the *Administration and Probate Act 1958* (Vic) or section 42 of the *Administration Act 1969* (NZ).⁸⁹

The Committee sees some benefit in including such a provision because the primary obligation has to lie with the personal representative in terms of obligations in administering the estate and if the personal representative appoints an attorney in [a] foreign jurisdiction to do a particular act then surely the attorney should not have all the obligations of a personal representative laid on him but need only carry out his instructions and then the obligation then reverts back on the personal representative.

14.80 The Public Trustee of South Australia, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia favoured a provision to the effect of section 86 of the *Administration and Probate Act 1958* (Vic),⁹⁰ on the basis that that provision is consistent with the case law. The Trustee Corporations Association of Australia commented:⁹¹

The Association is of the view that the model legislation should include a provision along the lines of the Victorian provision but should cover both a grant and a reseal of a grant.

The Victorian provision is preferred because it follows case law and clearly empowers the attorney to satisfy debts and claims in the jurisdiction of the attorney, thereby enhancing the efficiency of administration.

14.81 An academic expert in succession law also expressed some support for the approach found in the Victorian provision:⁹²

This is an interesting but difficult question. We have to make up our minds whether the attorney is merely an attorney and therefore only answerable to his or her principal; or whether, as a petitioner to the Court, the attorney is subject to its probate jurisdiction. The New Zealand legislation seems to adopt the former view; but the Victorian the latter. ... On the whole I prefer the Victorian

88 Ibid, QLRC 121–2; NSWLRC [8.205].

89 Submission 8.

90 Submissions 4, 6, 7.

91 Submission 6.

92 Submission 12.

provision. It would not do if assets in jurisdiction A could be removed to jurisdiction B if that might deprive claimants in A from recovering debts or making family provision claims. Also is there a requirement that such an attorney be domiciled in the State so as to be subject to its jurisdiction *in personam*? I suspect that there should be.

14.82 However, the ACT Law Society was of the view that the inclusion of a provision in the model legislation was unnecessary.⁹³

No. The use of such a section would probably not be brought to the attention of the Registrar whose main task appears to be the making of grants of representation. The suggestion seems unnecessary as the Power of Attorney would normally include indemnity of the attorney.

The National Committee's view

14.83 In the National Committee's view, the model legislation should not include a provision prescribing the circumstances in which an attorney-administrator may pay or transfer the balance of the estate to his or her foreign principal and be discharged from further liability. As explained earlier in this chapter, an attorney-administrator may generally take this course, provided the foreign principal holds a grant of probate or letters of administration in the jurisdiction in which the deceased died domiciled or is otherwise charged under the legal system of that jurisdiction with the duties and functions of an executor or administrator.

14.84 To the extent that an executor or administrator may be unsure whether, in the circumstances of a particular case, it is proper to pay or transfer the balance of the estate to the foreign principal, the executor or administrator may apply to the court for advice and directions. The National Committee considers it desirable that, if there is some factor that raises a doubt in the executor or administrator about the propriety of remitting the balance of the estate to the foreign principal, the matter should be the subject of judicial scrutiny.

14.85 Although the National Committee has recommended, in Chapter 34 of this Report, that the model legislation should include a modified version of section 86 of the *Administration and Probate Act 1958* (Vic), the purpose of that recommendation has been to place an attorney who obtains the resealing of a grant in generally the same position as an attorney-administrator for a foreign principal. In the absence of the proposed provision, an attorney who obtained the resealing of a grant would have no power to pay or transfer the balance of the estate to the donor of the power, but would be required personally to see to the distribution of the estate.

14.86 Further, the codification of the circumstances in which an attorney-administrator may pay or transfer the balance of the estate to the foreign principal raises issues that do not arise in relation to the payment or transfer by

an attorney who obtains the resealing of a grant. This means that it would not be possible simply to base a provision for attorney-administrators on the provision proposed in Chapter 34.

14.87 First, the model provision proposed in Chapter 34 enables an attorney who obtains the resealing of a grant to pay or transfer the balance of the estate to the donor of the power of attorney, who will always have been appointed under a grant (that is, the grant that has been resealed). However, that is not necessarily the case where an attorney-administrator obtains a grant, especially if the foreign principal is charged with the administration of the deceased's estate in a jurisdiction that does not recognise executors and administrators. It would be necessary for the model legislation to address the circumstances in which an attorney-administrator may pay or transfer the balance of the estate to a foreign principal in those circumstances.

14.88 Secondly, when an attorney obtains the resealing of a grant of probate, the grant that is resealed is the same grant under which the foreign principal (that is, the donor) has been appointed. However, as has been observed earlier in this chapter, in the case of an attorney-administrator, there is the potential, where different jurisdictions have different execution requirements for wills, for an attorney-administrator and a foreign principal to be granted probate of different wills.⁹⁴

RECOMMENDATIONS

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:⁹⁵

- (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;⁹⁶ and**

⁹⁴ See the discussion of *Re Manifold* [1962] 1 Ch 1 at [14.63] above.

⁹⁵ See [14.13] above.

⁹⁶ See [14.14] above.

- (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.⁹⁷

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).⁹⁸
- 14-3 Those jurisdictions that have a provision to the effect of section 52A of the *Succession Act 1981* (Qld)⁹⁹ should repeal their respective provisions.¹⁰⁰
- 14-4 The model legislation should not include a provision to the effect of section 84 of the *Probate and Administration Act 1898* (NSW).¹⁰¹
- 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).¹⁰²
- 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.¹⁰³

97 See [14.15] above.

98 See [14.27] above.

99 See note 19 above.

100 See [14.28] above.

101 See [14.43] above.

102 See [14.44]–[14.46] above.

103 See [14.83]–[14.88] above.

Chapter 15

Assets for the payment of debts

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INTRODUCTION

15.1 The law in relation to the payment of debts affects the manner in which the assets comprising a deceased person's estate are distributed to creditors and beneficiaries. Where an estate is insolvent — that is, where there are insufficient assets in the estate to pay all the debts — it determines the order in which the various debts of the estate are paid. This may result in some creditors being paid in full, while others receive only a part payment or, perhaps, nothing. Where an estate is solvent, the question of priority among creditors does not arise, as there are sufficient assets in the estate to ensure that all debts are paid in full. However, the law in relation to the payment of debts determines the order in which particular assets are used to pay the debts of the estate. The application of these rules may affect the distributions that beneficiaries ultimately receive.

15.2 This chapter examines what property of a deceased person should be an asset for the payment of debts. The payment of debts in insolvent and solvent estates is examined, respectively, in Chapters 16 and 17 of this Report.

EXISTING LEGISLATIVE PROVISIONS

15.3 The legislation in all Australian States and Territories specifies what property of a deceased person constitutes assets for the payment of debts.¹⁰⁴

Real and personal property

15.4 In all jurisdictions, the legislation ensures that the real, as well as the personal, property of a deceased person can be used to pay the debts of the deceased.¹⁰⁵

Property held beneficially by a deceased person

15.5 Property held by a deceased person on trust has never been assets in the hands of his or her personal representative for the payment of debts.¹⁰⁶ The legislation in most jurisdictions provides that only property that was held

¹⁰⁴ The scope of what is considered to be 'assets for the payment of debts' has important consequences when a creditor's action is brought against a personal representative. Although a personal representative is obliged to pay the debts of the estate, he or she may be able to plead the defence of *plene administravit*. That defence, which is open to the personal representative of a deceased person in a creditor's action for recovery of a debt of the deceased, is to the effect that the personal representative has fully administered the estate and is not holding any assets that could satisfy the claim: see LexisNexis, *Encyclopaedic Australian Legal Dictionary*, definition of '*plene administravit*'. A plea of *plene administravit* will not protect a personal representative if he or she has wrongly parted with the assets: *Brown v Holt* [1961] VR 435.

¹⁰⁵ *Administration and Probate Act 1929* (ACT) ss 41(1), 41A(1); *Probate and Administration Act 1898* (NSW) ss 46(1), 46A(1); *Administration and Probate Act* (NT) ss 54(1), 55(1); *Succession Act 1981* (Qld) s 56; *Administration and Probate Act 1919* (SA) s 46(2); *Administration and Probate Act 1935* (Tas) s 32(1); *Administration and Probate Act 1958* (Vic) s 37; *Administration Act 1903* (WA) s 10(1).

¹⁰⁶ *Deering v Torrington* (1704) 1 Salk 79; 91 ER 75. See generally JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [49–03].

beneficially by a deceased person can be used for the payment of debts, although there are some differences as to how this is expressed in the legislation.

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

15.6 The legislation in the ACT, New South Wales, the Northern Territory, Tasmania and Victoria provides that both the real and personal property of a deceased person, to the extent of his or her beneficial interest in that property, are assets for the payment of the deceased's debts and liabilities.¹⁰⁷

Queensland

15.7 The Queensland legislation also has the effect of limiting the payment of debts to property held beneficially by a deceased person, although the relevant provision is framed in slightly different terms from those in the jurisdictions referred to above. Section 56 of the *Succession Act 1981* (Qld) provides:

56 Property of deceased assets for the payment of debts

- (1) The property of a deceased person which on his or her death devolves to and vests in his or her executor or the public trustee is assets for the payment of his or her debts and any disposition by will inconsistent with this enactment is void as against creditors, and the court shall, if necessary, administer the property for the purposes of the payment of the debts.
- (2) This section shall take effect without prejudice to the rights of mortgagees or other encumbrancees.

15.8 Although section 56(1) does not contain an express reference to property held beneficially by a deceased person, that limitation is incorporated by the reference in the section to property which on the deceased person's death 'devolves to and vests in his or her executor or the public trustee'. Section 45(1) of the *Succession Act 1981* (Qld), which deals with the vesting of property on the death of a person, provides expressly that section 45 does not apply to property of which the deceased was trustee.¹⁰⁸

South Australia, Western Australia

15.9 In South Australia and Western Australia, the legislation is less comprehensive.

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Administration and Probate Act 1929 (ACT) s 41A(1); *Probate and Administration Act 1898* (NSW) s 46A(1); *Administration and Probate Act* (NT) s 55(1); *Administration and Probate Act 1935* (Tas) s 32(1); *Administration and Probate Act 1958* (Vic) s 37.

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Succession Act 1981 (Qld) s 45 is set out at [10.24] in vol 1 of this Report.

15.10 The South Australian legislation provides that land¹⁰⁹ passes to and vests in the owner's personal representative subject to any trust affecting it,¹¹⁰ and that such land 'and the proceeds thereof, if sold, shall for all purposes be assets in his hands, and disposable and distributable for the payment of the debts and liabilities of the owner'.¹¹¹

15.11 In Western Australia, although the provision dealing with assets for the payment of debts does not expressly exclude property held by the deceased person on trust,¹¹² the legislation does provide that real estate held by any person in trust shall vest subject to the trust affecting that property.¹¹³

Property appointed by will in the exercise of a general power of appointment

15.12 In the ACT, New South Wales, the Northern Territory, Tasmania and Victoria, the legislation provides expressly that the real and personal property disposed of by a deceased person's will in exercise of a general power are assets for the payment of the deceased's debts and liabilities.¹¹⁴

Effect on rights of mortgagees

15.13 Section 56(2) of the *Succession Act 1981* (Qld) provides:

56 Property of deceased assets for the payment of debts

...

- (2) This section shall take effect without prejudice to the rights of mortgagees or other encumbrancees.

15.14 Similar provisions are found in the Tasmanian and Victorian legislation.¹¹⁵

¹⁰⁹ *Administration and Probate Act 1919* (SA) s 49 provides that:

land means and includes messuages, lands, tenements, rents, and hereditaments, whether corporeal or incorporeal and any share, estate, and interest in them, or any of them, whether the same is a freehold or chattel interest; and any possibility, right, or title of entry or action, whether the same is in possession, reversion, remainder, or contingency; ...

¹¹⁰ *Administration and Probate Act 1919* (SA) s 46(1).

¹¹¹ *Administration and Probate Act 1919* (SA) s 46(2).

¹¹² *Administration Act 1903* (WA) s 10.

¹¹³ *Administration Act 1903* (WA) s 9.

¹¹⁴ *Administration and Probate Act 1929* (ACT) s 41A(1); *Probate and Administration Act 1898* (NSW) s 46A(1); *Administration and Probate Act* (NT) s 55(1); *Administration and Probate Act 1935* (Tas) s 32(1); *Administration and Probate Act 1958* (Vic) s 37. This issue is discussed in more detail at [15.21]–[15.31] below.

¹¹⁵ *Administration and Probate Act 1935* (Tas) s 32(1); *Administration and Probate Act 1958* (Vic) s 37.

ISSUES FOR CONSIDERATION

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

- whether the model provision dealing with assets for the payment of debts should generally be based on section 56 of the *Succession Act 1981* (Qld);
- whether the model provision should provide expressly that property appointed by a deceased person's will in exercise of a general power of appointment is to be assets for the payment of the deceased's debts; and
- whether the model provision should provide expressly that it does not affect the rights of mortgagees.

Adoption of the Queensland provision

15.16 Section 56(1) of the *Succession Act 1981* (Qld) ensures that both the real and personal property of a deceased person, to the extent of his or her beneficial interest in that property, are assets for the payment of debts.

Discussion Paper

15.17 In the Discussion Paper, the National Committee proposed that a provision to the effect of section 56(1) of the *Succession Act 1981* (Qld) should be included in the model legislation.¹¹⁶

Submissions

15.18 All the submissions that addressed this issue agreed with the National Committee's proposal. This was the view of the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, and the ACT and New South Wales Law Societies.¹¹⁷

The National Committee's view

15.19 The National Committee is of the view that a provision to the general effect of section 56(1) of the *Succession Act 1981* (Qld) should be included in the model legislation. That provision, in combination with the model provision that is based on section 45(1) of the *Succession Act 1981* (Qld), will ensure that property of which a deceased person was a trustee will not be an asset for the payment of the debts of the deceased's estate.

¹¹⁶ *Administration of Estates Discussion Paper* (1999) QLRC 191; NSWLRC 275 (Proposal 71).

¹¹⁷ Submissions 1, 8, 11, 14, 15.

15.20 However, because section 56(1) is framed in terms of property that vests, *on* the death of a person, in his or her executor or in the public trustee, it is important to ensure that any property that vests *after* the death of a deceased person in his or her personal representative will also be an asset for the payment of the debts of the deceased's estate. Accordingly, the model legislation should also provide that property to which a deceased person's personal representative becomes entitled, in the capacity of personal representative, after the deceased's death is an asset for the payment of the debts of the deceased's estate.

Property the subject of a general power of appointment

The position at common law

15.21 At common law, when a testator by will exercises a general power of appointment,¹¹⁸ the property so appointed does not vest in the testator's executor.¹¹⁹ Nevertheless, property appointed by will in exercise of a general power of appointment can 'become liable for so much of the testator's debts as the testator's estate is insufficient to satisfy'.¹²⁰ This principle has been said to be based on the view that:¹²¹

equity ... assumed that a man in debt, who might have used the power to pay his debts, could not really mean to exercise it so as to benefit a volunteer and leave his debts unpaid.

15.22 Where, however, the power of appointment has not been exercised, the property in respect of which the deceased held the power cannot be applied in payment of the deceased's debts. Instead, the property passes 'to those entitled to it in default of appointment to be held for their own benefit'.¹²²

Existing legislative provisions

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

15.23 As explained earlier,¹²³ the legislation in the ACT, New South Wales, the Northern Territory, Tasmania and Victoria provides expressly that the real and personal property disposed of by a deceased person's will in exercise of a

¹¹⁸ For an explanation of general powers of appointment see [10.148] in vol 1 of this Report.

¹¹⁹ *O'Grady v Wilmot* [1916] 2 AC 231, 263 (Lord Atkinson). Note, however, that the legislation in a number of Australian jurisdictions now provides that property in respect of which a deceased person has by will exercised a general power of appointment devolves to and vests in the deceased's personal representative. These provisions are considered at [10.152]–[10.159] in vol 1 of this Report.

¹²⁰ *O'Grady v Wilmot* [1916] 2 AC 231, 245 (Lord Buckmaster LC). See also *Fleming v Buchanan* (1853) 3 De GM & G 976; 43 ER 382.

¹²¹ *O'Grady v Wilmot* [1916] 2 AC 231, 270 (Lord Sumner). See also at 248 (Lord Buckmaster LC), 264 (Lord Atkinson).

¹²² *Ibid* 260 (Lord Atkinson).

¹²³ See [15.12] above.

general power of appointment are assets for the payment of the deceased person's debts and liabilities.¹²⁴

Queensland

15.24 In Queensland, section 56(1) of the *Succession Act 1981* (Qld) does not refer expressly to property appointed by will in exercise of a general power of appointment.¹²⁵ As noted previously, section 56(1) provides that the property of a deceased person that, on the person's death, vests in his or her executor or in the public trustee is assets for the payment of the person's debts.¹²⁶

15.25 However, the Queensland statutory order for the application of assets for the payment of debts in a solvent estate, which is set out in section 59(1) of the *Succession Act 1981* (Qld), is drafted on the basis that property appointed by a deceased person's will in exercise of a general power of appointment is available for the payment of his or her debts. Property of this kind is specifically mentioned in Classes 2 and 3 of that order, which provide:

59 Payment of debts in the case of solvent estates

- (1) Where the estate of a deceased person is solvent the estate shall, subject to this Act, be applicable towards the discharge of the debts payable thereout in the following order, namely—

class 1— ...

class 2—property comprising the residuary estate of the deceased including property in respect of which any residuary disposition operates as the execution of a general power of appointment;

class 3—property specifically devised or bequeathed including property specifically appointed under a general power of appointment and any legacy charged on property so devised bequeathed or appointed;

... (emphasis added)

15.26 The reference in class 2 to 'property in respect of which any residuary disposition operates as the execution of a general power of appointment' is a reference to the effect of section 33J of the *Succession Act 1981* (Qld).¹²⁷

15.27 To reduce the likelihood that a general power of appointment will not be exercised, section 33J of the *Succession Act 1981* (Qld) provides that, unless a contrary intention appears by will, certain kinds of dispositions that are

¹²⁴ *Administration and Probate Act 1929* (ACT) s 41A(1); *Probate and Administration Act 1898* (NSW) s 46A(1); *Administration and Probate Act* (NT) s 55(1); *Administration and Probate Act 1935* (Tas) s 32(1); *Administration and Probate Act 1958* (Vic) s 37.

¹²⁵ Section 56 of the *Succession Act 1981* (Qld) is set out at [15.7] above.

¹²⁶ See [15.7]–[15.8] above.

¹²⁷ See the discussion of this provision at [17.32], [17.85]–[17.88] below.

commonly found in wills automatically operate as an exercise of the power of appointment:¹²⁸

33J What a general disposition of property includes

- (1) A general disposition of all of the testator's property—
 - (a) includes any property over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (2) A general disposition of all of the testator's property of a particular description—
 - (a) includes any property of that description over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (3) A general disposition of the residue of the testator's property—
 - (a) includes any property over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (4) A general disposition of the residue of the testator's property of a particular description—
 - (a) includes any property of that description over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (5) Subsection (1), (2), (3) or (4) does not apply if a contrary intention appears in the will.

15.28 Consequently, where a general power of appointment is impliedly exercised by a residuary disposition in a will, the property the subject of the power falls within class 2 of the order of application of assets towards the payment of debts in a solvent estate.

15.29 However, the relationship between section 59(1) and section 56(1) is not entirely clear. In particular, if the property is specifically, rather than impliedly, appointed by will or the will does not contain a residuary disposition, the basis on which the appointed property becomes liable as an asset for the payment of debts is not clear. However, as noted above, such property has always been available in equity to pay debts where the estate is otherwise

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Similar provisions are found in all other Australian jurisdictions: see *Wills Act 1968* (ACT) s 26(2); *Succession Act 2006* (NSW) s 37; *Wills Act* (NT) s 35; *Wills Act 1936* (SA) s 30; *Wills Act 2008* (Tas) s 50; *Wills Act 1997* (Vic) s 41; *Wills Act 1970* (WA) s 26(1)(d).

insufficient.¹²⁹ Although section 56(1) of the *Succession Act 1981* (Qld) specifies what property constitutes assets for the payment of debts, it does not exclude the operation of equitable principles that might enable recourse to other property.

South Australia, Western Australia

15.30 There is no reference in the South Australian or Western Australian provisions to property appointed by a deceased person's will in exercise of a general power of appointment.¹³⁰ However, in accordance with the equitable principle discussed above, such property would still be liable to be used to discharge the deceased's debts if the deceased's estate were otherwise insufficient.¹³¹

The National Committee's view

15.31 Earlier in this chapter, the National Committee has recommended that the model legislation should include a provision to the effect of section 56(1) of the *Succession Act 1981* (Qld), which provides that the property of a deceased person that, on his or her death, vests in his or her executor or the public trustee is an asset for the payment of his or her debts.¹³² Further, in Chapter 10 of this Report, the National Committee has recommended that the model legislation should provide that, for the purpose of the provisions dealing with the vesting of property, a testator is taken to have been entitled, at his or her death, to any interest in property passing under a gift contained in his or her will that operates as an appointment under a general power to appoint by will.¹³³ The combined effect of these two recommendations is that property appointed by a deceased person's will in exercise of a general power of appointment will be an asset for the payment of debts.

Effect on rights of mortgagees

15.32 As noted above, section 56(2) of the *Succession Act 1981* (Qld), like its Victorian and Tasmanian counterparts, is expressed not to prejudice the rights of mortgagees or other encumbrancees.¹³⁴

Discussion Paper

15.33 In the Discussion Paper, the National Committee expressed the view that provisions to the effect of section 56(2) of the *Succession Act 1981* (Qld)

¹²⁹ See [15.21] above.

¹³⁰ *Administration and Probate Act 1919* (SA) s 46(2); *Administration Act 1903* (WA) s 10(1).

¹³¹ See [15.21] above.

¹³² See [15.19] above.

¹³³ See Recommendation 10-18 in vol 1 of this Report.

¹³⁴ See [15.13]–[15.14] above.

were declaratory only, and could therefore be omitted from the model legislation.¹³⁵

Submissions

15.34 None of the submissions commented specifically on whether the model provision dealing with assets for the payment of debts should address the rights of mortgagees.

The National Committee's view

15.35 The effect of section 56(1) of the *Succession Act 1981* (Qld) is that the property referred to by that section constitutes assets for the payment of debts. The section does not purport to affect the manner in which those assets are required to be applied by the personal representative in the discharge of secured debts.

15.36 On further consideration, however, the National Committee is of the view that, although a provision to the effect of section 56(2) of the *Succession Act 1981* (Qld) is not strictly necessary,¹³⁶ the inclusion of such a provision in the model legislation is nevertheless desirable as it provides a clear statement about the effect of the model provision concerning assets for the payment of debts.

RECOMMENDATIONS

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;**

¹³⁵

Administration of Estates Discussion Paper (1999) QLRC 190; NSWLRC [15.9].

¹³⁶

The National Committee notes that there is no similar provision in the legislation in the ACT, New South Wales, the Northern Territory, South Australia or Western Australia.

- (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.¹³⁷**

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.¹³⁸ 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).

¹³⁷ See [15.19]–[15.20], [15.35]–[15.36] above.

¹³⁸ See [15.31] above.

Chapter 16

Payment of debts in an insolvent estate

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INTRODUCTION

16.1 If a bankrupt¹³⁹ dies before he or she is discharged from the bankruptcy, the bankruptcy proceedings continue, unless the court directs otherwise, as if the person were alive.¹⁴⁰

16.2 The situation may arise, however, where a person who has been served with a creditor's petition dies before a sequestration order is made. In those circumstances, an order may be made for the administration of the person's estate under Part XI of the *Bankruptcy Act 1966* (Cth).¹⁴¹

16.3 Yet a third situation may arise, where the estate of a deceased person is insolvent or becomes insolvent, but proceedings were not initiated under the *Bankruptcy Act 1966* (Cth) before the person's death. In this situation, there are two regimes under which the estate may be administered. A petition may be presented for the administration of the estate under Part XI of the *Bankruptcy Act 1966* (Cth). Alternatively, the estate may be administered under the law of the relevant State or Territory.

16.4 It is not the role of the National Committee to review the provisions of the *Bankruptcy Act 1966* (Cth). However, because of the relationship between the State and Territory provisions dealing with the administration of insolvent estates and those of the *Bankruptcy Act 1966* (Cth), a review of the State and Territory provisions necessarily entails an examination of how the insolvent estates of deceased persons are administered under the *Bankruptcy Act 1966* (Cth).

ADMINISTRATION UNDER PART XI OF THE *BANKRUPTCY ACT 1966* (CTH)

Persons entitled to present a petition

16.5 A petition for an order for the administration of the estate of a deceased person under Part XI of the *Bankruptcy Act 1966* (Cth) may be presented by the creditor or creditors of a deceased person¹⁴² or by 'a person administering the estate of a deceased person'.¹⁴³

¹³⁹ A 'bankrupt' is a person 'against whose estate a sequestration order has been made' or 'who has become a bankrupt by virtue of the presentation of a debtor's petition': *Bankruptcy Act 1966* (Cth) s 5(1).

¹⁴⁰ *Bankruptcy Act 1966* (Cth) s 63.

¹⁴¹ *Bankruptcy Act 1966* (Cth) s 245. Administration of an insolvent estate under pt XI of the *Bankruptcy Act 1966* (Cth) is discussed at [16.5]–[16.33] below.

¹⁴² *Bankruptcy Act 1966* (Cth) s 244.

¹⁴³ *Bankruptcy Act 1966* (Cth) s 247. The expression 'a person administering the estate of a deceased person' has been held to apply to 'a person who is in fact administering an estate, notwithstanding that such person is not, or is not proved to be, the legal personal representative': *Re Estate of Madden* (1969) 13 FLR 1, 2 (Gibbs J).

Presentation of petition by a creditor

16.6 For a creditor's petition to be presented, one or more of the following circumstances must exist:¹⁴⁴

- a debt of not less than \$2000 was owing at the time of the deceased person's death to a creditor, or debts totalling not less than that amount were owing to two or more creditors;
- a debt incurred by the deceased person's personal representative of not less than \$2000 is owing to a creditor, or debts so incurred totalling not less than that amount are owing to two or more creditors;
- a debt of not less than \$2000 or debts totalling not less than that amount, which the deceased person would have been liable to pay to the creditor or creditors if he or she had not died, becomes or become owing after the deceased's death.

16.7 The debt or debts must be for a liquidated sum and must be payable immediately or at a certain future time.¹⁴⁵

16.8 In addition, a relevant Australian connection must be established with the deceased person.¹⁴⁶

Presentation of petition by a person administering the estate of a deceased person

16.9 Where a petition is presented by a person administering the estate of a deceased person, there is no requirement that there be debts of a certain value owing to creditors of the deceased person or to creditors of the deceased person's estate.

16.10 It is, however, necessary for a relevant Australian connection to be established with the deceased person.¹⁴⁷

Effect of an order for the administration of an estate under Part XI

16.11 When an order is made for the administration of the estate of a deceased person under Part XI of the *Bankruptcy Act 1966* (Cth), the divisible

¹⁴⁴ *Bankruptcy Act 1966* (Cth) s 244(1).

¹⁴⁵ *Bankruptcy Act 1966* (Cth) s 244(6)(a).

¹⁴⁶ A petition must not be brought unless, at the time of his or her death, the deceased person was personally present or ordinarily resident in Australia, had a dwelling-house or place of business in Australia, was carrying on business in Australia, either personally or by means of an agent or manager, or was a member of a firm or partnership carrying on business in Australia by means of a partner or partners, or of an agent or manager: *Bankruptcy Act 1966* (Cth) s 244(6)(b).

¹⁴⁷ *Bankruptcy Act 1966* (Cth) s 247(2). The possible connecting factors are identical to those listed in s 244(6)(b) of the *Bankruptcy Act 1966* (Cth), which are set out at note 146 above.

property of the estate¹⁴⁸ vests immediately in the Official Trustee or, in certain circumstances, in a registered trustee.¹⁴⁹ After-acquired property of the estate vests as soon as it is acquired by the estate in the Official Trustee or registered trustee, as the case may be.¹⁵⁰ Such property is divisible among the creditors of the deceased person and the creditors of his or her estate in accordance with the Act.¹⁵¹

16.12 Section 248(1) of the *Bankruptcy Act 1966* (Cth) provides that certain specified provisions of the Act apply, in some cases with slight modifications,¹⁵² to the administration of an estate under Part XI of the Act. Included among the many provisions that apply are those that deal with:

- the proof of debts;¹⁵³
- the order of payment of debts;¹⁵⁴ and
- property available for the payment of debts.¹⁵⁵

¹⁴⁸ See *Bankruptcy Act 1966* (Cth) s 249(6), (7), (8).

¹⁴⁹ *Bankruptcy Act 1966* (Cth) s 249(1)(a).

¹⁵⁰ *Bankruptcy Act 1966* (Cth) s 249(1)(b).

¹⁵¹ See *Bankruptcy Act 1966* (Cth) s 249(1).

¹⁵² Section 248(3) of the *Bankruptcy Act 1966* (Cth) has the effect that references to certain matters relevant to a bankruptcy are to be read as having another meaning for the purposes of the administration of the estate of a deceased person under pt XI of the Act. The section provides:

Subject to the regulations, in the application of the provisions specified in subsection (1) in relation to proceedings under this Part and the administration of estates of deceased persons under this Part:

- (a) a reference to a sequestration order shall be read as a reference to an order for administration of an estate under this Part;
- (b) a reference to bankruptcy shall be read as a reference to administration under this Part;
- (c) a reference to the property of the bankrupt shall be read as a reference to the divisible property of the estate as defined by subsection 249(6);
- (d) a reference to the date of the bankruptcy or to the date on which a person became a bankrupt shall be read as a reference to the date on which the order for administration under this Part was made;
- (da) a reference to the commencement of the bankruptcy shall be read as a reference to the time at which administration of the estate under this Part is, by virtue of section 247A, to be deemed to have commenced;
- (e) a reference to a bankrupt shall be read as a reference to a deceased person in respect of whose estate an order for administration under this Part has been made and as including a reference to the estate of that deceased person; and
- (f) a reference to the trustee of the estate of a bankrupt shall be read as a reference to the trustee of the estate of a deceased person in respect of whose estate an order for administration under this Part has been made.

Other modifications are found in the *Bankruptcy Regulations 1996* (Cth): see *Bankruptcy Regulations 1996* (Cth) reg 11.02, sch 7.

¹⁵³ *Bankruptcy Act 1966* (Cth) ss 82–107.

¹⁵⁴ *Bankruptcy Act 1966* (Cth) ss 108–114.

¹⁵⁵ *Bankruptcy Act 1966* (Cth) ss 117–128.

16.13 These provisions are discussed briefly below.

Debts and liabilities provable

16.14 The *Bankruptcy Act 1966* (Cth) provides that certain debts and liabilities are ‘provable’ in bankruptcy. Section 82(1), as modified in its application to the administration of an estate under Part XI of the Act, provides:¹⁵⁶

82 Debts provable in bankruptcy

- (1) Subject to this Division, all debts and liabilities, present or future, certain or contingent, to which the estate of a deceased person was subject at the date of the order for the administration of the estate, or to which the estate may become subject because of an obligation incurred before that date, are provable in the administration of the estate.

Exclusions

16.15 Section 82(2) of the *Bankruptcy Act 1966* (Cth), as modified in its application to the administration of an estate under Part XI of the Act, provides that certain demands in the nature of unliquidated damages are not provable:¹⁵⁷

82 Debts provable in bankruptcy

...

- (2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in an administration under Part XI of the Act.

16.16 Section 82 also provides that the following statutory payments are not provable:

- penalties or fines imposed by a court in respect of an offence against a law, whether a law of the Commonwealth or not;¹⁵⁸
- an amount payable under an order made under section 1317G of the *Corporations Act 2001* (Cth);¹⁵⁹

¹⁵⁶ *Bankruptcy Act 1966* (Cth) s 82(1), as modified by the *Bankruptcy Regulations 1996* (Cth) reg 11.02, sch 7 item 18.1.

¹⁵⁷ *Bankruptcy Act 1966* (Cth) ss 82(2), 248(3)(b). Section 82(2) is considered at [16.94]–[16.105] below.

¹⁵⁸ *Bankruptcy Act 1966* (Cth) s 82(3).

¹⁵⁹ *Bankruptcy Act 1966* (Cth) s 82(3AA). Under s 1317G of the *Corporations Act 2001* (Cth), a court may, in specified circumstances, order a person to pay a pecuniary penalty to the Commonwealth.

- a debt incurred under Part 4-1 of the *Higher Education Support Act 2003* (Cth);¹⁶⁰ and
- an amount payable under an order made under a proceeds of crime law.¹⁶¹

Availability of set-off

16.17 At its simplest, set-off is a mechanism by which one party can apply a debt owed to him or her by another party to discharge all or part of a debt that he or she owes to that other party.¹⁶² As a result, either the debt is completely discharged, or a sum remains which represents the balance of the debt owed by one of the parties to the other.¹⁶³

16.18 Set-off is available under section 86 of the *Bankruptcy Act 1966* (Cth). Accordingly, where there have been mutual credits, mutual debts or other mutual dealings between a deceased person whose estate is being administered under Part XI of the *Bankruptcy Act 1966* (Cth) and a person claiming to prove a debt in the administration of that estate, the sum due from the one party must be set-off against any sum due from the other party, and only the balance of the account may be claimed.¹⁶⁴

Order of payment of debts

Bankruptcy Act 1966 (Cth)

16.19 The *Bankruptcy Act 1966* (Cth) provides that, with the exception of certain payments to which it gives priority, all debts proved in an administration

¹⁶⁰ *Bankruptcy Act 1966* (Cth) s 82(3AB). Part 4-1 of the *Higher Education Support Act 2003* (Cth) deals with the repayment of student loans made under Chapter 3 of that Act.

¹⁶¹ *Bankruptcy Act 1966* (Cth) s 82(3A). 'Proceeds of crime law' means the *Proceeds of Crime Act 2002* (Cth), the *Proceeds of Crime Act 1987* (Cth) or a law of a State or of a self-governing Territory that is declared by the *Proceeds of Crime Regulations 2002* (Cth) to be a law that corresponds to the *Proceeds of Crime Act 2002* (Cth); *Bankruptcy Act 1966* (Cth) s 5 (definitions of 'proceeds of crime law', 'corresponding law'); *Proceeds of Crime Act 2002* (Cth) s 338, dictionary (definition of 'corresponding law').

If property of a deceased person is subject to, or is subject to the payment of, a 'proceeds of crime order' (which may be a restraining order, a forfeiture order or a pecuniary penalty order) that is made *before* the date of the order for administration under pt XI, that property does not vest in the Official Trustee or registered trustee while that order is in force, and is not therefore divisible among the creditors of the deceased person or of his or her estate: *Bankruptcy Act 1966* (Cth) ss 5(1) (definition of 'proceeds of crime order'), 58A(1), (2), 116, 249(1), (6)–(8). Similarly, if property of a deceased person becomes subject to, or subject to the payment of, a proceeds of crime order *on or after* the date of the order for administration under pt XI, the property must not be applied to pay the debts of the deceased person or of his or her estate while the order is in force: *Bankruptcy Act 1966* (Cth) ss 5(1) (definition of 'proceeds of crime order'), 114A, 116, 249(1), (6)–(8). The effect of these provisions is to take the affected property outside the bankruptcy regime and to give the satisfaction of a proceeds of crime order priority over the payment of provable debts and other payments that would otherwise have priority under s 109 of the *Bankruptcy Act 1966* (Cth).

¹⁶² For a detailed examination of the applicable principles, see New South Wales Law Reform Commission, *Set-off*, Report No 94 (2000).

¹⁶³ See MB Hapgood, 'Rights of Set-off as Security' in FW Neate (ed), *Using Set-off as Security* (1990) 22.

¹⁶⁴ *Bankruptcy Act 1966* (Cth) ss 86(1), 248(1), (3).

under Part XI rank equally.¹⁶⁵ The Act further provides that, if the estate of the deceased person is insufficient to meet all those debts in full, they are to be paid proportionately.¹⁶⁶

16.20 The payments to which priority is given are prescribed by section 109 of the Act.

16.21 Under section 109(1) the payment of ‘proper funeral and testamentary expenses’ of an estate being administered under Part XI ranks third,¹⁶⁷ being preceded by:

- the taxed costs of the petitioning creditor or the trustee of the deceased person’s estate and the costs, charges and expenses of the administration under Part XI, including the remuneration and expenses of the trustee and the costs of any audit carried out under section 175;¹⁶⁸ and
- in the case of an administration under Part XI that occurs within two months after a personal insolvency agreement executed by the deceased person in respect of whose estate an order for administration under Part XI has been made, or a composition or scheme of arrangement accepted by the deceased person’s creditors, has been set aside or terminated — the liabilities, commitments, expenses or remuneration referred to in section 114 of the Act.¹⁶⁹

16.22 The priorities prescribed by section 109(1) of the *Bankruptcy Act 1966* (Cth) may, however, be affected by other legislative provisions. In fact, section 109(1A) of the Act provides that section 109(1) has effect subject to:

- section 50 of the *Child Support (Registration and Collection) Act 1988* (Cth); and
- former sections 221YHJ(3), (4) and (5), 221YHZD(3), (4) and (5) and 221YU of the *Income Tax Assessment Act 1936* (Cth).

Child Support (Registration and Collection) Act 1988 (Cth)

16.23 Section 50(1) of the *Child Support (Registration and Collection) Act 1988* (Cth) provides that, where an employer has made deductions under the

¹⁶⁵ *Bankruptcy Act 1966* (Cth) ss 108, 248(1), (3)(b).

¹⁶⁶ *Bankruptcy Act 1966* (Cth) ss 108, 248(1), (3)(e).

¹⁶⁷ *Bankruptcy Act 1966* (Cth) s 109(1)(d). Note that s 109(1)(b) of the *Bankruptcy Act 1966* (Cth) does not apply to the administration of an estate under pt XI of the *Bankruptcy Act 1966* (Cth): *Bankruptcy Act 1966* (Cth) s 248(1), *Bankruptcy Regulations 1996* (Cth) reg 11.02, sch 7 item 23.2.

¹⁶⁸ *Bankruptcy Act 1966* (Cth) ss 109(1)(a), 248(1), (3)(b), *Bankruptcy Regulations 1996* (Cth) reg 11.02, sch 7 item 23.1

¹⁶⁹ *Bankruptcy Act 1966* (Cth) ss 109(1)(c), 248(1), (3)(b), (e).

Act of an amount that is payable to the Child Support Registrar, and the property of the employer has become vested in a trustee,¹⁷⁰ the trustee is liable to pay that amount to the Registrar.

16.24 Section 50(2) provides that, notwithstanding any other law of the Commonwealth or any law of a State or Territory, an amount payable by a trustee under section 50(1) 'has priority over all other debts (other than amounts payable under former subsection 221YHJD(3) of the *Income Tax Assessment Act 1936*), whether preferential, secured or unsecured'.¹⁷¹ Section 50(2)(b) further provides that, where an amount is payable under section 221YHJD(3) of the *Income Tax Assessment Act 1936* (Cth), the amount payable by the trustee to the Registrar ranks equally with that amount.¹⁷²

16.25 However, the *Child Support (Registration and Collection) Act 1988* (Cth) provides that, where a trustee of an estate of a bankrupt is liable to pay an amount to the Registrar under section 50(1), section 50(2) of the Act does not have the effect that the amount is payable in priority to any costs, charges or expenses of the administration of the employer's estate in bankruptcy (including the costs of a creditor or other person on whose petition the sequestration order was made) that are lawfully payable out of the assets of the estate.¹⁷³

Income Tax Assessment Act 1936 (Cth)

16.26 The former sections of the *Income Tax Assessment Act 1936* (Cth) to which section 109 of the *Bankruptcy Act 1966* (Cth) is subject — sections 221YHJ, 221YHJD and 221YU — provide that, where a person has deducted a particular amount before 1 June 1993 and the property of that person has become vested in a trustee,¹⁷⁴ the trustee is liable to pay that amount to the Commissioner of Taxation.¹⁷⁵

16.27 Sections 221YHJ(4)(a), 221YHJD(4) and 221YU(2) generally provide that, notwithstanding anything contained in any law of the Commonwealth, or in any law of a State or Territory, the amount payable by the trustee to the Commissioner has priority over all other debts whether preferential, secured or unsecured.

¹⁷⁰ The term 'trustee' is defined to include 'an executor, administrator or other personal representative of a deceased person': *Child Support (Registration and Collection) Act 1988* (Cth) s 4(1) (definition of 'trustee' (para (b))).

¹⁷¹ *Child Support (Registration and Collection) Act 1988* (Cth) s 50(2)(a).

¹⁷² *Child Support (Registration and Collection) Act 1988* (Cth) s 50(2)(b).

¹⁷³ *Child Support (Registration and Collection) Act 1988* (Cth) s 50(3).

¹⁷⁴ The term 'trustee' is defined to include 'an executor or administrator': *Income Tax Assessment Act 1936* (Cth) s 6(1).

¹⁷⁵ *Income Tax Assessment Act 1936* (Cth) ss 221YHJ(3), 221YHJD(3), 221YU(1).

16.28 Section 221YHJ(4)(a) is subject to an exception, however, if an amount is also payable by a trustee to the Commissioner under section 221YHZD(3). In that case, the amount payable under section 221YHJ(3) does not have priority over the amount payable under section 221YHZD(3). Instead, the two amounts rank equally, in priority to all other debts, whether preferential, secured or unsecured.¹⁷⁶

16.29 Because section 221YU(2) provides that an amount payable under that section 'has priority over all other debts (other than debts payable to the Commissioner), whether preferential, secured or unsecured', an amount payable under that section will have a lower priority for payment than an amount payable under sections 221YHJ(3) or 221YHZD(3).

16.30 Each of the former sections provides that, where a trustee of an estate of a bankrupt is liable to pay an amount to the Commissioner under that section, the section does not have the effect that the amount is payable in priority to any costs, charges or expenses of the administration of the estate (including the costs of a creditor or other person on whose petition the sequestration order was made) that are lawfully payable out of the assets of the estate.¹⁷⁷

Effective order of priority

16.31 As a result of the various provisions discussed above, the effective order of priority of debts, as far as the payment of funeral and testamentary expenses is concerned, is:

- (1) the costs, charges, or expenses of the administration of the estate under Part XI of the *Bankruptcy Act 1966* (Cth);
- (2) if an amount is payable under section 50 of the *Child Support (Registration and Collection) Act 1988* (Cth) and under sections 221YHJ(3) and 221YHZD(3) of the *Income Tax Assessment Act 1936* (Cth) — those amounts, which all rank equally;¹⁷⁸
- (3) any amounts payable under section 221YU of the *Income Tax Assessment Act 1936* (Cth);
- (4) in the case of the administration of an estate under Part XI that occurs within two months after a personal insolvency agreement or a composition or scheme of arrangement has been set aside or terminated — the liabilities, commitments, expenses or remuneration referred to in section 114 of the *Bankruptcy Act 1966* (Cth);

¹⁷⁶ *Income Tax Assessment Act 1936* (Cth) s 221YHJ(4)(b).

¹⁷⁷ *Income Tax Assessment Act 1936* (Cth) ss 221YHJ(5), 221YHZD(5), 221YU(3).

¹⁷⁸ Note, however, that neither s 50(2) of the *Child Support (Registration and Collection) Act 1988* (Cth) nor s 221YHJ(4) of the *Income Tax Assessment Act 1936* (Cth) refers to the relationship between amounts payable under those two sections.

- (5) proper funeral and testamentary expenses.

16.32 The *Bankruptcy Act 1966* (Cth) is expressed to bind the Crown 'in right of the Commonwealth, of each of the States and of the Northern Territory'.¹⁷⁹ The effect of this provision, in conjunction with the provisions dealing with the order of payment of debts in bankruptcy, is that the common law priority given to Crown debts¹⁸⁰ is generally abolished.¹⁸¹

Property available for the payment of debts

16.33 A number of provisions of the *Bankruptcy Act 1966* (Cth) have the potential to swell the estate of a bankrupt, thereby increasing the property that is available for the payment of debts. By virtue of section 248(1) of the Act,¹⁸² several of these provisions apply where the estate of a deceased person is being administered under Part XI.¹⁸³

ADMINISTRATION UNDER STATE OR TERRITORY LAW

16.34 The fact that an estate is insolvent does not necessarily mean that it will be administered under the provisions of the *Bankruptcy Act 1966* (Cth). One of the requirements for presenting a petition under that Act may not be present.¹⁸⁴ Alternatively, it may simply be the case that no-one takes the step of presenting a petition for administration under Part XI.

16.35 Administration under the *Bankruptcy Act 1966* (Cth) may be advantageous where the deceased had entered into transactions that may be set aside under that Act.¹⁸⁵ However, where an insolvent estate does not involve transactions of that kind, it may be that there is no particular advantage in administering the estate under Part XI of that Act.

179 *Bankruptcy Act 1966* (Cth) s 8.

180 See [16.38] below.

181 Although Crown debts do not have priority by that reason alone, various Acts give priority to specific payments. See the discussion at [16.22]–[16.31] above of the priority given to certain amounts owing under the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Income Tax Assessment Act 1936* (Cth).

182 See [16.12] above.

183 For example, s 120(1) of the *Bankruptcy Act 1966* (Cth) provides that a transfer of property by a person who later becomes a bankrupt (the transferor) to another person (the transferee) is void against the trustee in the transferor's bankruptcy if the transfer took place within five years of the commencement of the bankruptcy and the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property. The transfer will not, however, be void if the transfer took place more than two years before the commencement of the bankruptcy, and the transferee proves that, at the time of the transfer, the transferor was solvent: *Bankruptcy Act 1966* (Cth) s 120(3)(b). See also *Bankruptcy Act 1966* (Cth) ss 121 (Transfers to defeat creditors), 122 (Avoidance of preferences).

184 See [16.6]–[16.10] above.

185 See [16.33] above.

16.36 The law of the relevant State or Territory governs the administration of an insolvent estate that is not being administered under the *Bankruptcy Act 1966* (Cth).

Historical background

16.37 Historically, although the ecclesiastical courts had jurisdiction to grant probate and letters of administration, debts due by the deceased were enforced in the common law courts.¹⁸⁶

16.38 At common law, there was an established order of priority for the payment of debts. Reasonable funeral and testamentary expenses had priority over all other debts.¹⁸⁷ Next, the 'Crown had priority over the subject in respect of specialties and debts of record'.¹⁸⁸ In respect of other Crown debts, the Crown 'had priority over the debts of the subject of equal degree'.¹⁸⁹ Subject to the payment of these debts, debts were payable in the following order:¹⁹⁰

- (1) Debts to which particular statutes give priority.
- (2) Judgments in Courts of Record.
- (3) Recognizances and statutes, e.g., statutes merchant.¹⁹¹
- (4) Debts by specialty.¹⁹²
- (5) Debts by simple contract. (notes added)

¹⁸⁶ El Sykes, *Payment of Debts by Executors in Queensland* (1955) 1.

¹⁸⁷ *Tugwell v Heyman* (1812) 3 Camp 298; 170 ER 1389; *R v Wade* (1817) 5 Price 621; 146 ER 713. See also Sir W Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol II, 511; El Sykes, *Payment of Debts by Executors in Queensland* (1955) 8.

¹⁸⁸ *Attorney-General v Jackson* [1932] AC 365, 375 (Lord Tomlin).

¹⁸⁹ Ibid.

¹⁹⁰ Ibid 376. See also *Saddington v Saddington* (1904) 4 SR (NSW) 341, 343 (AH Simpson CJ in Eq). These debts were payable out of what were described as 'legal assets', which consisted of those assets that vested in the personal representative by virtue of his or her office: *Cook v Gregson* (1856) 3 Drew 547; 61 ER 1012. See also El Sykes, *Payment of Debts by Executors in Queensland* (1955) 5.

¹⁹¹ A recognisance is an acknowledgment of a debt due to the Crown, which is defeasible upon the happening of a certain event. It has been said to resemble a bond: see *Stroud's Judicial Dictionary of Words and Phrases* (7th ed, 2006) vol 3, 2308.

A statute merchant was also a type of security for a debt acknowledged to be due. It was originally permitted only among traders for the benefit of commerce, and was entered into before the chief magistrate or mayor of a trading town, pursuant to the statutes 13 Edw I and 27 Edw II c 9. In satisfaction of the debt, the debtor could be imprisoned, the debtor's goods could be seized, and the land of the debtor could be delivered to a creditor, who became a tenant by statute merchant, and could hold the land to satisfy the debt from the rent or profit from it: see Sir W Blackstone, *Commentaries on the Laws of England* (15th ed, 1809) vol II, 160–1.

¹⁹² Ordinarily, a specialty debt is a debt secured by a promise contained in a deed: LexisNexis, *Encyclopaedic Australian Legal Dictionary*, definition of 'specialty' (at 17 March 2009).

16.39 A different regime applied, however, if an administration decree or order had been made with respect to an estate.¹⁹³ In those circumstances, equitable assets were available for the payment of debts.¹⁹⁴ Moreover, although legal assets were applied according to the common law order, equitable assets (apart from the priority given to funeral and testamentary expenses and Crown debts) were applied proportionately without regard to the classifications described above.¹⁹⁵

16.40 In England, the *Supreme Court of Judicature Act 1875* (Eng) made an important change to the order in which debts were payable when an insolvent estate was administered by the court. Section 10 of that Act imported the bankruptcy rules ‘as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities’.¹⁹⁶ Corresponding legislation was passed in a number of Australian States.¹⁹⁷ As a result of this legislation, the order of payment of debts in an insolvent estate that was subject to an administration order was to a large extent assimilated with the order that applied when an insolvent estate was being formally administered under the bankruptcy legislation.

16.41 However, section 10 of the *Supreme Court of Judicature Act 1875* (Eng) and the corresponding provisions applied only if an insolvent estate was subject to an administration order.¹⁹⁸ If an insolvent estate was being administered by a personal representative ‘out of court’, as was the more

¹⁹³ If an administration order was made, ‘the Court itself assumed control of the assets of the deceased, brought all the creditors before it and either it or the executor acting under its control and direction attended to the payment of creditors in due priority and the ultimate distribution to beneficiaries’: El Sykes, *Payment of Debts by Executors in Queensland* (1955) 4. Sykes notes that, although the ‘common law had a system of rules regulating priorities’, it lacked a ‘system of court administration by which all claimants could be brought before the court so that all claims could be satisfied in a fair and equitable manner as far as the assets extended, and by which a system of payment of debts in due priority could be directly enjoined by the court’: El Sykes, *Payment of Debts by Executors in Queensland* (1955) 4.

¹⁹⁴ El Sykes, *Payment of Debts by Executors in Queensland* (1955) 5–6. See, for example, the discussion at [15.21] above of the availability in equity of property appointed by will in exercise of a general power of appointment.

¹⁹⁵ El Sykes, *Payment of Debts by Executors in Queensland* (1955) 8–9.

¹⁹⁶ Section 10 of the *Supreme Court of Judicature Act 1875* (Eng), which repealed and replaced s 25(1) of the *Supreme Court of Judicature Act 1873* (Eng), did not expressly import the bankruptcy rules as to ‘the priorities of debts and liabilities’. The issue of whether these priorities applied where an insolvent estate was being administered by the court was the subject of a number of conflicting decisions, which are examined in *Re Moat* (1897) QLJ 42. Ultimately, the English Court of Appeal held in *Re Whitaker* [1901] 1 Ch 9 that the bankruptcy rules as to the priorities of debts and liabilities were imported by s 10 of the *Supreme Court of Judicature Act 1875* (Eng). In *Re Moat* (1897) QLJ 42 the Full Court of the Supreme Court of Queensland came to the same view in relation to the corresponding Queensland provision (*Judicature Act 1876* (Qld) s 5(1)).

¹⁹⁷ See, for example, *Conveyancing Act 1919* (NSW) s 8; *Judicature Act 1876* (Qld) s 5(1); *Supreme Court Civil Procedure Act 1932* (Tas) s 11(1); *Judicature Act 1883* (Vic) s 9(1); *Supreme Court Act 1880* (WA) s 8(1).

¹⁹⁸ *Re Laycock* [1919] 1 Ch 241, 248 (Astbury J).

common practice, the common law rules as to the priority of debts still applied, subject to any statutory modifications that were made to those rules.¹⁹⁹

Existing legislative provisions

16.42 The legislation in each Australian State and Territory provides for the payment of debts where an estate is insolvent, but is not being administered under the provisions of the *Bankruptcy Act 1966* (Cth).

Australian jurisdictions other than South Australia

16.43 The provisions in the legislation of all Australian jurisdictions except South Australia are expressed in fairly similar terms.²⁰⁰ Section 57 of the *Succession Act 1981* (Qld) provides:

57 Payment of debts in the case of insolvent estates

Where the estate of a deceased person is insolvent—

- (a) the funeral, testamentary and administration expenses have priority; and
- (b) subject as aforesaid and to this Act, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the administration of estates of deceased persons in bankruptcy.

16.44 The legislation in these jurisdictions specifically imports the rules as to various matters from the *Bankruptcy Act 1966* (Cth), even though the estate is not being formally administered under that Act. The particular bankruptcy rules referred to in section 57(b) of the *Succession Act 1981* (Qld) are also imported by the corresponding provisions in New South Wales, Tasmania, Victoria and Western Australia.²⁰¹ However, the equivalent provisions in the ACT and the Northern Territory omit the reference to ‘debts and liabilities provable’.²⁰²

¹⁹⁹ These modifications are examined at [16.135]–[16.143] below.

²⁰⁰ *Administration and Probate Act 1929* (ACT) s 41C(2), sch 4 pt 4.2; *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt 1; *Administration and Probate Act* (NT) s 57(2), sch 4 pt 2; *Succession Act 1981* (Qld) s 57(b); *Administration and Probate Act 1935* (Tas) s 34(1), sch 2 pt 1; *Administration and Probate Act 1958* (Vic) s 39(1), sch 2 pt 1; *Administration Act 1903* (WA) s 10A(1), sch 5. The differences among these provisions are considered at [16.81]–[16.84], [16.89]–[16.90], [16.94]–[16.98], [16.106], [16.116]–[16.130], [16.137]–[16.143] below.

²⁰¹ *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt 1; *Administration and Probate Act 1935* (Tas) s 34(1), sch 2 pt 1; *Administration and Probate Act 1958* (Vic) s 39(1), sch 2 pt 1; *Administration Act 1903* (WA) s 10A(1), sch 5.

²⁰² *Administration and Probate Act 1929* (ACT) s 41C(2), sch 4 pt 4.2; *Administration and Probate Act* (NT) s 57(2), sch 4 pt 2.

16.45 Significantly, the order of payment of debts in these jurisdictions applies regardless of whether the estate is being administered as the result of an administration order or is being administered by a personal representative out of court. It has been said of the equivalent provision in the English legislation:²⁰³

As the new Act applies the bankruptcy rules to the whole area of administration, i.e., both in Court and out of Court, there cannot be any case of an insolvent estate where the administration will be governed by any other rules.

In all cases all debts (with the exceptions to which priority is given) must be paid *pari passu*.²⁰⁴ ... there has been a complete alteration by statute of the priorities, and therefore of the degrees of debts in the whole field of insolvency ... (note added)

16.46 In each of these jurisdictions, the legislation is expressed to give priority to the payment of 'funeral, testamentary and administration expenses'.²⁰⁵ Any assets remaining after the payment of the funeral, testamentary and administration expenses are to be distributed according to the bankruptcy rules with respect to 'the priorities of debts and liabilities'.²⁰⁶

16.47 Previously in this chapter it was explained that the *Bankruptcy Act 1966* (Cth) includes several provisions under which certain transactions can be set aside, thereby increasing the estate that is available for distribution to creditors.²⁰⁷ Although some of those provisions apply where an insolvent estate is being administered under Part XI of the *Bankruptcy Act 1966* (Cth),²⁰⁸ none of those provisions is imported by the administration legislation of any of the States or Territories.

South Australia

16.48 The South Australian legislation contains quite a different regime for the administration of insolvent estates.

16.49 Under the legislation, a personal representative or creditor of a deceased person may file with the registrar 'a declaration that he believes the estate of the deceased to be insufficient for the payment of its liabilities'.²⁰⁹

²⁰³ *Attorney-General v Jackson* [1932] AC 365, 384–5 (Lord Tomlin). This decision concerned s 34(1) and sch 1 pt 1 of the *Administration of Estates Act 1925* (UK). Those provisions have since been repealed. See now *Insolvency Act 1986* (UK) s 421(1), *Administration of Insolvent Estates of Deceased Persons Order 1986* (UK) Art 4(1).

²⁰⁴ This is a requirement that the debts are to be paid proportionately.

²⁰⁵ Although s 109(1) of the *Bankruptcy Act 1966* (Cth) refers to 'funeral and testamentary expenses', it has been held that administration expenses are included in the general expression of 'testamentary expenses': *Sharp v Lush* (1879) 10 Ch D 468.

²⁰⁶ See note 200 above and *Bankruptcy Act 1966* (Cth) ss 108–114.

²⁰⁷ See [16.33] above.

²⁰⁸ See note 155 above.

²⁰⁹ *Administration and Probate Act 1919* (SA) s 60(1).

Where the declaration has been filed by a creditor, the Act provides for the giving of various notices to the personal representative, depending on whether the declaration is filed before or after the grant is made.²¹⁰

16.50 Where a personal representative has filed a declaration to this effect, or has been served with the relevant notice advising that a declaration to this effect has been filed by a creditor, the personal representative must administer the estate:²¹¹

so far as concerns the payment of liabilities in the same manner so far as practicable as it would have been administered for the benefit of creditors under a decree of the Supreme Court.

16.51 This is a reference to the manner in which the Court would administer an insolvent estate that was subject to an administration order.

16.52 The legislation further provides that, where a personal representative is administering an estate following the filing of a declaration of insolvency or where the court is administering an insolvent estate:²¹²

the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as are in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt.

16.53 Although this provision is similar to the provisions in the other Australian jurisdictions, it does not confer priority on the funeral, testamentary and administration expenses. Further, although the provision imports most of the bankruptcy rules that are imported by the provisions in the other Australian jurisdictions, it omits the reference found in the other jurisdictions to the rules in relation to 'the priorities of debts and liabilities'.²¹³

16.54 The most significant difference, however, between the South Australian legislation and the legislation of the other Australian jurisdictions is that the South Australian legislation still allows for the possibility of administration out of court according to the common law rules for the administration of insolvent estates.²¹⁴ Although the legislation provides a mechanism for an insolvent

210 *Administration and Probate Act 1919* (SA) s 60(2), (3).

211 *Administration and Probate Act 1919* (SA) s 60(4).

212 *Administration and Probate Act 1919* (SA) s 61(1). This section also applies where the public trustee is administering an estate under s 9 of the *Public Trustee Act 1995* (SA) and the estate proves to be insufficient for the payment in full of the debts and liabilities of the deceased and in any administration by the court of the assets of any deceased person whose estate is insufficient for the payment in full of the debts and liabilities of the deceased.

213 The effect of this omission is discussed at note 196 above.

214 These common law rules are discussed at [16.38] above. The application of these rules would, of course, be subject to any statutory modifications that have been made to them over time. See, for example, s 62(b) of the *Administration and Probate Act 1919* (SA), which provides that a judgment creditor does not, by reason of the judgment, have priority over other creditors.

estate to be administered out of court in the same manner as an insolvent estate being administered under an administration order — that is, by the filing of a declaration of insolvency — that procedure is not mandatory. If a personal representative or creditor does not take that step, it would appear that section 61 of the *Administration and Probate Act 1919* (SA) has no application, and that the estate must be administered according to the common law rules,²¹⁵ subject to any statutory modifications made to those rules.

ISSUES FOR CONSIDERATION

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

- whether the model legislation should include provisions governing the administration of an insolvent estate;
- how the circumstances in which the model provisions are to apply should be expressed;
- whether the model provisions should be expressed to apply subject to the provisions of the *Bankruptcy Act 1966* (Cth);
- whether the model provisions should provide a single order for the payment of debts in an insolvent estate;
- the extent to which administration under the model provisions should be assimilated with administration under the *Bankruptcy Act 1966* (Cth);
- whether various provisions of the *Bankruptcy Act 1966* (Cth), if imported into the model legislation, need to be adapted in order to apply to the administration of an insolvent estate outside the provisions of the *Bankruptcy Act 1966* (Cth);
- whether a demand for unliquidated damages arising otherwise than by a contract, promise or breach of trust should be provable;
- the priority that should be given to the payment of funeral, testamentary and administration expenses;
- whether the model provisions should bind the Crown and so abolish any general priority of Crown debts;
- whether the model legislation should include provisions to abolish the common law priority of specialty debts and judgment debts.

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See Law Reform Commission of Western Australia, *Administration of Deceased Estates: Administration of Deceased Insolvent Estates*, Working Paper, Project No 34 Pt III (1977) [77].

The need for provisions governing the administration of insolvent estates

Discussion Paper

16.56 In the Discussion Paper, the National Committee expressed the view that it was necessary to retain State and Territory provisions in some form, as the *Bankruptcy Act 1966* (Cth) will not always cover the field.²¹⁶

Submissions

16.57 Only two respondents commented directly on this issue.²¹⁷

16.58 The ACT Law Society agreed with the National Committee's preliminary view. It commented that there are situations where the *Bankruptcy Act 1966* (Cth) may not be used for the administration of an insolvent estate, and that it is therefore necessary for State and Territory legislation to apply to cover these situations.²¹⁸

16.59 The Queensland Law Society, on the other hand, suggested that legislation should be introduced to avoid the need to continue with two parallel regimes.²¹⁹

it might be better to ... introduce into the State legislation some facility to enable the personal representative, testate or intestate, and with or without a grant, or any person who would take a benefit if the estate was not insolvent, to present a petition. It would seem that the Bankruptcy rules will reimburse that person for the presentation of the petition and then that person can bow out of the picture. In those circumstances, the State legislation need not maintain a separate regime but would simply provide the mechanism whereby the Bankruptcy procedure is set in motion.

16.60 The submissions received from the other respondents who addressed the issue of the payment of debts in an insolvent estate assumed the continued existence of State and Territory legislation providing for the payment of debts where the estate was not being administered under the provisions of the *Bankruptcy Act 1966* (Cth).²²⁰

The National Committee's view

16.61 As explained earlier, it is already possible under the *Bankruptcy Act 1966* (Cth) for the personal representative of a deceased person to present a petition for the administration of the deceased's estate under Part XI of the

²¹⁶ *Administration of Estates Discussion Paper* (1999) QLRC 194; NSWLRC [15.20].

²¹⁷ Submissions 8, 14.

²¹⁸ Submission 14.

²¹⁹ Submission 8.

²²⁰ Submissions 1, 2, 11, 12, 15.

Bankruptcy Act 1966 (Cth).²²¹ According to the Queensland Law Society's submission, it should also be possible for a potential beneficiary of the estate to present a petition. Given, however, that in the case of an insolvent estate no distribution will be made to any beneficiaries, it is unlikely that a person named as a beneficiary under the deceased's will or a person who, if the estate were solvent, would be a beneficiary according to the relevant intestacy rules, would wish to apply for the administration of the estate.

16.62 The Queensland Law Society's suggestion for avoiding two parallel regimes would work only if it were made mandatory for an insolvent estate to be administered under the *Bankruptcy Act 1966* (Cth). The Law Society observed that a person presenting a petition for the administration of an estate would be reimbursed for his or her costs.²²² Given that those costs will be paid out of an already insolvent estate, the issue to be decided is whether it is in the interests of the creditors, not all of whom will be paid in full, for the additional costs of administration under the *Bankruptcy Act 1966* (Cth) to be incurred in every case.

16.63 The Law Reform Commission of Western Australia commented on a similar issue when it was reviewing the administration of insolvent estates.²²³ Although the Western Australian Commission acknowledged that it would be an advantage to have 'only one way of administering a deceased insolvent estate', it was nevertheless conscious of the expense and delay that would result from such a system:²²⁴

it creates a degree of formality which may be unnecessary in a large number of estates, particularly smaller estates where there is not likely to be any substantial gain from the creditor's point of view in investigating antecedent transactions. The formality will add to the expense of administering the estate and delay.

16.64 Although the *Bankruptcy Act 1966* (Cth) includes a regime for the administration of insolvent estates, it does not make it mandatory for a personal representative to apply for the administration of an insolvent estate under that Act. For that reason, the National Committee is of the view that it is essential for the model legislation to include a regime for the administration of those insolvent estates that are not being administered under the *Bankruptcy Act 1966* (Cth). The model legislation should provide that the relevant provisions apply if the estate of a deceased person is insolvent and is not being administered under the *Bankruptcy Act 1966* (Cth).

²²¹ See [16.5], [16.9]–[16.10] above.

²²² Submission 8.

²²³ The issue considered by the Law Reform Commission of Western Australia was whether the rules contained in pt XI of the *Bankruptcy Act 1966* (Cth) should be adopted in their entirety and apply in every case where a person dies insolvent: Law Reform Commission of Western Australia, *Administration of Deceased Estates: Administration of Deceased Insolvent Estates*, Working Paper, Project No 34 Pt III (1977) [86].

²²⁴ Law Reform Commission of Western Australia, *Administration of Deceased Estates: Administration of Deceased Insolvent Estates*, Working Paper, Project No 34 Pt III (1977) [86].

Expression of the circumstances in which the model provisions should apply

16.65 The provisions in Queensland, Tasmania, Victoria and Western Australia are simply expressed to apply where the estate of a deceased person is 'insolvent' or 'not solvent'.²²⁵

16.66 The New South Wales provision, which is expressed to apply where the estate is 'insolvent', provides that:²²⁶

insolvent means insufficient for the payment in full of the debts and liabilities of the deceased.

16.67 The ACT and Northern Territory provisions are expressed to apply where the estate 'is insufficient for the payment in full of the expenses, debts and liabilities payable from the estate'.²²⁷

16.68 These differences in the drafting of the various provisions raise the issue of whether the model provisions dealing with the payment of debts in an insolvent estate should simply be expressed to apply where an estate is 'insolvent', or whether the model provisions should follow the provisions in the Territories or the provision in New South Wales and refer expressly to the insufficiency of the estate for the payment in full of the debts and liabilities of the estate.

The National Committee's view

16.69 In the National Committee's view, the model provisions dealing with the payment of debts in an insolvent estate should follow the ACT and Northern Territory legislation. They should therefore be expressed to apply where the estate is insufficient for the payment in full of the expenses, debts and liabilities from the estate.

Express reference to the applicability of the *Bankruptcy Act 1966* (Cth)

16.70 Section 109 of the *Australian Constitution* provides that, when a law of a State is inconsistent with a law of the Commonwealth, 'the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. Consequently, where an insolvent estate is being administered under the *Bankruptcy Act 1966* (Cth), the provisions of the relevant State or Territory legislation that deal with the administration of insolvent estates have no application.

²²⁵ *Succession Act 1981* (Qld) s 57; *Administration and Probate Act 1935* (Tas) s 34(1); *Administration and Probate Act 1958* (Vic) s 39(1); *Administration Act 1903* (WA) s 10A(1).

²²⁶ *Probate and Administration Act 1898* (NSW) s 46C(1), (3).

²²⁷ *Administration and Probate Act 1929* (ACT) s 41C(2); *Administration and Probate Act* (NT) s 57(2).

16.71 Nevertheless, the ACT, New South Wales and Northern Territory provisions that deal with the administration of insolvent estates are expressed to apply subject to the provisions of the *Bankruptcy Act 1966* (Cth).²²⁸ For example, section 46C(1) of the *Probate and Administration Act 1898* (NSW) provides:

46C Administration of assets

- (1) Where the estate of a deceased person is insolvent the deceased person's real and personal estate shall, subject to the provisions of the *Bankruptcy Act 1966* of the Parliament of the Commonwealth, be administered in accordance with the rules set out in Part 1 of the Third Schedule. (emphasis added)

16.72 This raises the issue of whether the model provision in relation to the administration of insolvent estates should be expressed to apply 'subject to the provisions of the *Bankruptcy Act 1966* (Cth)'.

Discussion Paper

16.73 In the Discussion Paper, the National Committee sought submissions on whether the model provision dealing with the payment of debts in an insolvent estate should be expressed to apply 'subject to the *Bankruptcy Act 1966* (Cth)'.²²⁹

Submissions

16.74 The three respondents who addressed this issue — the Bar Association of Queensland and the ACT and New South Wales Law Societies — all favoured the inclusion of this phrase in the model provision.²³⁰

The National Committee's view

16.75 Irrespective of whether the model provisions dealing with the administration of insolvent estates are expressed to apply 'subject to the provisions of the *Bankruptcy Act 1966* (Cth)', the model provisions will have no application if the insolvent estate of a deceased person is being administered under the *Bankruptcy Act 1966* (Cth).

16.76 The National Committee has recommended earlier in this chapter that the model legislation should include a provision that states expressly that the provisions dealing with the administration of insolvent estates apply if the deceased person's estate is not being administered under the *Bankruptcy Act 1966* (Cth).²³¹ That provision will serve to alert people to the potential

²²⁸ *Administration and Probate Act 1929* (ACT) s 41C(2); *Probate and Administration Act 1898* (NSW) s 46C(1); *Administration and Probate Act* (NT) s 57(2).

²²⁹ *Administration of Estates Discussion Paper* (1999) QLRC 194; NSWLRC 280.

²³⁰ Submissions 1, 14, 15.

²³¹ See [16.64] above.

application of the *Bankruptcy Act 1966* (Cth). In light of the decision to include an express provision in those terms, the National Committee does not consider it necessary to provide, additionally, that the model provisions dealing with the payment of debts in an insolvent estate apply 'subject to the provisions of the *Bankruptcy Act 1966* (Cth)'.

A single order of priority for the payment of debts in an insolvent estate

16.77 In all Australian jurisdictions except South Australia, there is a single order of priority for the payment of debts in an insolvent estate, regardless of whether the estate is being administered under an administration order by the court or out of court by a personal representative.²³²

16.78 As explained above, the South Australian legislation does not exclude the operation of the common law rules about the order in which debts are payable in an insolvent estate.²³³ As a result, if an insolvent estate is being administered out of court by a personal representative, and neither the personal representative nor a creditor has filed a declaration of insolvency in relation to the estate, the common law rules will apply to the administration of the estate (subject to any statutory modifications that have been made to those rules).²³⁴

The National Committee's view

16.79 The National Committee considers it desirable for the model legislation to simplify, to the greatest extent possible, the order for the payment of debts in an insolvent estate. In its view, the dual system that operates as a result of the South Australian legislation is unnecessarily complex. The National Committee also considers it to be anomalous that the applicable order of priority of debts should depend on the manner in which the estate is being administered.

16.80 The National Committee is therefore of the view that the model legislation should follow the position adopted in all Australian jurisdictions except South Australia, so that the legislation prescribes the order in which the debts of an insolvent estate are to be paid, irrespective of the manner in which the estate is being administered.

Assimilation of administration under the model legislation with administration under the *Bankruptcy Act 1966* (Cth)

16.81 If the model legislation is to include provisions dealing with the payment of debts in an insolvent estate that is not being administered under the provisions of the *Bankruptcy Act 1966* (Cth), the question arises as to the extent to which the two regimes should be assimilated.

²³² See [16.43]–[16.47] above.

²³³ See [16.48]–[16.54] above.

²³⁴ See [16.54] above.

16.82 Under existing State and Territory legislation, assimilation is broadly achieved by importing the bankruptcy rules with respect to the following matters:²³⁵

- the respective rights of secured and unsecured creditors;
- debts and liabilities provable;²³⁶
- the valuation of annuities and future and contingent liabilities; and
- the priorities of debts and liabilities.²³⁷

16.83 In all jurisdictions except Queensland, the relevant provision refers to the rules that apply in relation to the assets of ‘persons adjudged bankrupt’.²³⁸ The Queensland provision, however, refers to the rules that apply to ‘the administration of estates of deceased persons in bankruptcy’.²³⁹ As explained above, where an insolvent estate is administered under Part XI of the *Bankruptcy Act 1966* (Cth), some of the general provisions of the Act are modified in their application to the administration of that estate.²⁴⁰ Consequently, the Queensland provision imports the modified provisions, rather than the provisions in the original form that would apply in the case of a bankruptcy.

16.84 There is a further difference in the manner in which the various bankruptcy rules are imported under the existing legislation. The legislation in Queensland, South Australia and Victoria refers to the bankruptcy rules as may

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Administration and Probate Act 1929 (ACT) s 41C(2), sch 4 pt 4.2 para 2; *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt 1 para 2; *Administration and Probate Act* (NT) s 57(2), sch 4 pt 2 para 2; *Succession Act 1981* (Qld) s 57(b); *Administration and Probate Act 1919* (SA) s 61(1); *Administration and Probate Act 1935* (Tas) s 34(1), sch 2 pt 1 para 2; *Administration and Probate Act 1958* (Vic) s 39(1), sch 2 pt 1 para 2; *Administration Act 1903* (WA) s 10A(1), sch 5 para 3. See, however, notes 236 and 237 below in relation to the position in the ACT, the Northern Territory and South Australia, which do not import all of these provisions.

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The bankruptcy rules in relation to debts and liabilities provable are found in ss 82–107 of the *Bankruptcy Act 1966* (Cth). As a result, the right of set-off, which is found in s 86 of the *Bankruptcy Act 1966* (Cth), applies where an insolvent estate is being administered under State legislation. The effect of s 86 of the *Bankruptcy Act 1966* (Cth) is considered at [16.18] above.

As noted at [16.44] above, the legislation in the ACT and the Northern Territory omits the reference found in the legislation of the States to ‘debts and liabilities provable’. In the Northern Territory, set-off is available as the result of the operation in the Territory of the two Imperial Statutes of Set-off (2 Geo II c 22 (1729) s 13; 8 Geo II c 24 (1735) ss 4, 5): see *Sources of the Law Act* (NT) ss 2, 3.

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Although the South Australian legislation omits the reference to ‘the priorities of debts and liabilities’, it has been held in relation to similar legislation that those priorities are nevertheless imported: see note 196 above.

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Administration and Probate Act 1929 (ACT) s 41C(2), sch 4 pt 4.2 para 2; *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt 1 para 2; *Administration and Probate Act* (NT) s 57(2), sch 4 pt 2 para 2; *Administration and Probate Act 1919* (SA) s 61(1); *Administration and Probate Act 1935* (Tas) s 34(1), sch 2 pt 1 para 2; *Administration and Probate Act 1958* (Vic) s 39(1), sch 2 pt 1 para 2; *Administration Act 1903* (WA) s 10A(1), sch 5 para 3.

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Succession Act 1981 (Qld) s 57(b).

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See [16.12] above.

be in force ‘for the time being’.²⁴¹ The legislation in the ACT, New South Wales, the Northern Territory, Tasmania and Western Australia is expressed in more specific terms, and refers to the bankruptcy rules that are in force at the death of the deceased person.²⁴²

The National Committee’s view

16.85 In the National Committee’s view, subject to what is proposed below in relation to demands for certain types of unliquidated damages,²⁴³ the model legislation should follow the approach that has been adopted in the existing legislation of most Australian jurisdictions and import the bankruptcy rules with respect to:

- the respective rights of secured and unsecured creditors;
- debts and liabilities provable;
- the valuation of annuities and future and contingent liabilities; and
- the priorities of debts and liabilities.

16.86 The National Committee is of the view that, by importing these rules into the model legislation, the administration of insolvent estates will continue to be largely assimilated with the position under the *Bankruptcy Act 1966* (Cth).

16.87 However, the National Committee is of the view that, in relation to the bankruptcy rules specified, the model legislation should follow the Queensland legislation and import the rules as modified in their application to the administration of the estates of deceased persons in bankruptcy, rather than the rules that apply to the estates of persons merely adjudged to be bankrupt. This has the advantage that the rules that are imported are framed in terms that are more appropriate in the context of the administration of the estate of a deceased person.

16.88 The National Committee is also of the view that the model legislation should provide expressly that the bankruptcy rules imported are those in force at the death of the deceased person. This expression provides more certainty than the reference found in some jurisdictions to the bankruptcy rules ‘in force for the time being’.

²⁴¹ *Succession Act 1981* (Qld) s 57(b); *Administration and Probate Act 1919* (SA) s 61(1); *Administration and Probate Act 1958* (Vic) s 39(1), sch 2 pt 1 para 2.

²⁴² *Administration and Probate Act 1929* (ACT) s 41C(2), sch 4 pt 4.2 para 2; *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt 1 para 2; *Administration and Probate Act* (NT) s 57(2), sch 4 pt 2 para 2; *Administration and Probate Act 1935* (Tas) s 34(1), sch 2 pt 1 para 2; *Administration Act 1903* (WA) s 10A(1), sch 5 para 3.

²⁴³ See [16.94]–[16.105] below.

Adaptation of various bankruptcy rules to administration under the model legislation

16.89 As the National Committee has decided that the model legislation should import various provisions from the *Bankruptcy Act 1966* (Cth), it is necessary to consider whether those provisions need to be adapted in order to apply to the administration of an insolvent estate under the model legislation. Generally, the imported provisions would apply as if the deceased person were a person in respect of whose estate an order had been made under Part XI of the *Bankruptcy Act 1966* (Cth). However, there may be difficulty in applying specific provisions that refer to a date for which there is no equivalent date when an estate is being administered outside the provisions of the *Bankruptcy Act 1966* (Cth).

16.90 In the ACT, New South Wales and the Northern Territory, the legislation provides that, in the application of the bankruptcy rules that are imported, the date of the death of the deceased person is to be substituted for the date of the sequestration order.²⁴⁴ This provision assists in adapting the bankruptcy rules to the administration of the estate of a deceased person under the particular State or Territory legislation. Given that, in these circumstances, no sequestration order has been made, a reference to the date of the sequestration order would arguably be meaningless in the absence of such a provision.

Submissions

16.91 Although the National Committee did not specifically seek submissions on the extent to which the model legislation should adapt the imported bankruptcy rules, the Public Trustee of New South Wales commented that the New South Wales provision dealing with insolvent estates provides a good model, as the date of the sequestration order is taken to refer to the date of the deceased's death.²⁴⁵

The National Committee's view

16.92 The National Committee has proposed earlier that the model legislation should follow the Queensland legislation, which imports the bankruptcy rules that apply 'with respect to the administration of estates of deceased persons in bankruptcy', rather than the rules that apply to the estates of persons adjudged to be bankrupt.²⁴⁶ As section 248(3)(a) of the *Bankruptcy Act 1966* (Cth) provides that a reference to a sequestration order is to be read as a reference to an order for administration of an estate under Part XI of that Act,²⁴⁷ it will not

²⁴⁴ *Administration and Probate Act 1929* (ACT) s 41C(2), sch 4 pt 4.2 para 3; *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt 1 para 2; *Administration and Probate Act* (NT) s 57(2), sch 4 pt 2 para 3.

²⁴⁵ Submission 11.

²⁴⁶ See [16.87] above.

²⁴⁷ See note 152 above.

be necessary for the model legislation to provide that, in relation to the provisions imported from the *Bankruptcy Act 1966* (Cth), a reference to the date of the sequestration order is to be read as the date of the deceased's death.

16.93 However, as some of the imported provisions will refer to the date on which the order for administration under Part XI was made or to the date on which that administration commenced,²⁴⁸ the model legislation should provide that, in the application of the imported provisions, a reference to:

- the date on which the order for administration under Part XI is made; or
- the date on which the administration under Part XI is deemed to have commenced;

is to be read as a reference to the date of death of the deceased person.

Demands for unliquidated damages arising otherwise than by a contract, promise or breach of trust

16.94 As explained earlier in this chapter, the *Bankruptcy Act 1966* (Cth) prescribes which debts and liabilities are provable in bankruptcy.²⁴⁹

16.95 Section 82(2) of the Act, as it applies to the administration of an estate under Part XI, provides:

82 Debts provable in bankruptcy

...

- (2) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust are not provable in an administration under Part XI of the Act.

16.96 It has been observed that this provision can produce 'anomalous results':²⁵⁰

For example, where passengers in a bus are injured owing to the proprietor's negligence, those who have contracts with the bus proprietor can prove in the latter's bankruptcy for damages for breach of contract, but the other passengers cannot prove since their claims are in tort.

²⁴⁸ See, for example, *Bankruptcy Act 1966* (Cth) s 82(1), as modified in its application to the administration of an estate under pt XI of that Act. The modified form of s 82(1) is set out at [16.14] above.

²⁴⁹ See [16.14]–[16.18] above.

²⁵⁰ D Rose, *Lewis' Australian Bankruptcy Law* (11th ed, 1999) 111. Note, however, that s 117 of the *Bankruptcy Act 1966* (Cth) provides that, where a bankrupt is or was insured under a contract of insurance against liabilities to third parties and a liability against which he or she was so insured has been incurred, the right of the bankrupt to indemnity under the policy vests in the trustee and any amount received by the trustee from the insurer must be paid to the third party to whom the liability has been incurred.

16.97 This will be the situation in New South Wales, Queensland, South Australia, Tasmania, and Victoria, which simply import the bankruptcy rules in relation to 'debts and liabilities provable'.²⁵¹

16.98 In Western Australia, a slightly different approach has been adopted. Although the legislation generally imports the bankruptcy rules as to debts and liabilities provable,²⁵² the application of those rules is modified by the following provision:²⁵³

Rules as to payment of debts and liabilities of insolvent estates

...

2. A demand, in respect of which proceedings are maintainable against an estate, shall be provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

16.99 A similar provision exists in the English legislation.²⁵⁴

16.100 The Western Australian provision, which was inserted in 1984,²⁵⁵ implemented a recommendation made by the Law Reform Commission of Western Australia in its 1978 Report on deceased insolvent estates.²⁵⁶ In that Report, the Western Australian Commission compared the effect of the exclusion of unliquidated claims in an ordinary bankruptcy with the situation where the estate of a deceased person is being administered under Part XI:²⁵⁷

²⁵¹ *Probate and Administration Act 1898* (NSW) s 46C(1), sch 3 pt 1 para 2; *Succession Act 1981* (Qld) s 57(b); *Administration and Probate Act 1919* (SA) s 61(1); *Administration and Probate Act 1935* (Tas) s 34(1), sch 2 pt 1 para 2; *Administration and Probate Act 1958* (Vic) s 39(1), sch 2 pt 1 para 2.

As previously explained, the bankruptcy rules in relation to 'debts and liabilities provable' are not imported by the ACT or Northern Territory legislation: see *Administration and Probate Act 1929* (ACT) s 41C(2), sch 4 pt 4.2; *Administration and Probate Act* (NT) s 57(2), sch 4 pt 2.

²⁵² *Administration Act 1903* (WA) s 10A(1), sch 5 para 3.

²⁵³ *Administration Act 1903* (WA) s 10A(1), sch 5 para 2.

²⁵⁴ Generally, the bankruptcy provisions as to 'debts and liabilities provable' apply where the estate of a deceased person is insolvent and is being administered otherwise than in bankruptcy: *Insolvency Act 1986* (UK) s 421(1), *Administration of Insolvent Estates of Deceased Persons Order 1986* (UK) Art 4(1). However, s 1(6) of the *Law Reform (Miscellaneous Provisions) Act 1934* (UK) provides:

In the event of the insolvency of an estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

²⁵⁵ *Acts Amendment (Insolvent Estates) Act 1984* (WA) s 8.

²⁵⁶ Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates*, Report, Project No 34 Pt III (1978) [3.1(a)].

²⁵⁷ *Ibid* [2.8].

If a person becomes bankrupt during his lifetime he is, on his discharge, released only from his liability for debts which were provable in bankruptcy.²⁵⁸ He would therefore remain liable for non-provable debts such as a claim for damages caused by his negligence. The situation is different where the claim is against a deceased insolvent estate administered in bankruptcy. In this case the exclusion of the claimant is permanent. (note in original)

16.101 The Law Reform Commission of Western Australia was of the view that there 'does not appear to be any justification for such a harsh result, which depends fortuitously on whether judgment was signed before the date of death'.²⁵⁹

16.102 The Western Australian Commission did not, however, consider the bankruptcy rules as to debts and liabilities provable to be wholly without merit. For example, it expressly agreed with the rule rejecting statute-barred debts.²⁶⁰ It therefore recommended that the *Administration Act 1903* (WA) should provide that the bankruptcy rules as to debts and liabilities provable should apply to the administration of deceased estates, except for the rule excluding claims for unliquidated sums of money.²⁶¹

The National Committee's view

16.103 When an ordinary bankrupt is discharged from a bankruptcy, the discharge operates to release the bankrupt from those debts that were provable in the bankruptcy.²⁶² Consequently, the discharged bankrupt is not released from any debts that were not provable under section 82 of the *Bankruptcy Act 1966* (Cth). However, the situation is quite different when the estate of a deceased person is being administered under Part XI of the Act. As the Law Reform Commission of Western Australia observed, in that situation, if a demand is not provable under section 82, it is in effect barred for all time, as there is no possibility of pursuing the debtor at some time in the future, as there is in the case of an ordinary bankruptcy.

²⁵⁸ *Bankruptcy Act 1966* (Cth) s 153.

²⁵⁹ Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates*, Report, Project No 34 Pt III (1978) [2.9]. See *Re Newman* (1876) 3 Ch D 494 where the English Court of Appeal held that damages in an action for tort were not provable in bankruptcy unless judgment had been signed before the date of the bankruptcy. This decision concerned a provision that was similar to s 82 of the *Bankruptcy Act 1966* (Cth).

²⁶⁰ Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates*, Report, Project No 34 Pt III (1978) [2.8]. As a general rule, it is the duty of an executor to 'protect the estate against demands which by law cannot be enforced against it' and an executor will be guilty of a *devastavit* (a default causing a loss to the creditors or beneficiaries of the estate) if he or she pays a claim that ought not to be paid: *Midgley v Midgley* [1893] 3 Ch 282, 299 (Lindley LJ), 304 (AL Smith LJ). However, there is an exception in relation to the payment of statute-barred debts. It has been held that an executor can pay a statute-barred debt and not be guilty of a *devastavit*, although the courts acknowledge that this is an anomalous exception that should not be extended to the situation where it has been judicially determined that the debt is not recoverable: *Midgley v Midgley* [1893] 3 Ch 282, 299 (Lindley LJ), 303 (Lopes LJ), 307 (AL Smith LJ). It appears, however, that a statute-barred debt is not a provable debt under the *Bankruptcy Act 1966* (Cth): see *Re Amos* (1934) 7 ABC 185, 188–9 (Lukin J).

²⁶¹ Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates*, Report, Project No 34 Pt III (1978) [2.20].

²⁶² *Bankruptcy Act 1966* (Cth) s 153.

16.104 The National Committee is therefore of the view that, although the model legislation should generally import the bankruptcy rules in relation to debts and liabilities provable,²⁶³ it should modify the operation of those rules by including a provision to the following effect:

A demand, in respect of which proceedings are maintainable against an estate, is provable in the administration of the estate, notwithstanding that it is a demand in the nature of unliquidated damages arising otherwise than by a contract, promise or breach of trust.

16.105 The National Committee acknowledges that, by including this provision, it will be possible, in the administration of an estate under the model legislation, to prove certain claims that could not be proved if an estate were being administered under Part XI of the *Bankruptcy Act 1966* (Cth). In the National Committee's view, however, this departure from the *Bankruptcy Act 1966* (Cth) is justified on the ground that, in relation to the administration of the estate of a deceased person, section 82(2) of that Act has the potential to operate unfairly.

Funeral, testamentary and administration expenses

16.106 In all Australian jurisdictions except South Australia,²⁶⁴ the legislation is expressed to give priority to the payment of funeral, testamentary and administration expenses, after which debts are paid according to the bankruptcy rules in relation to 'the priorities of debts and liabilities'.²⁶⁵

16.107 In contrast, the *Bankruptcy Act 1966* (Cth) provides that a number of specific payments have priority over the payment of 'proper funeral and testamentary expenses'.²⁶⁶

Discussion Paper

16.108 In the Discussion Paper, the National Committee sought submissions on whether the same priorities should apply regardless of whether an estate was being administered under Part XI of the *Bankruptcy Act 1966* (Cth) or under the relevant State or Territory legislation, or whether the payment of funeral, testamentary and administration expenses should have priority if an insolvent estate is being administered other than under the *Bankruptcy Act 1966* (Cth).²⁶⁷

²⁶³ See [16.85]–[16.88] above.

²⁶⁴ The South Australian legislation does not confer priority on the payment of funeral, testamentary and administration expenses: see *Administration and Probate Act 1919* (SA) s 61. Although the South Australian legislation does not expressly import the bankruptcy rules with respect to the priorities of debts and liabilities, it would appear that those rules are nevertheless imported: see note 196 above. As a result, these expenses have the same priority as accorded to them under the *Bankruptcy Act 1966* (Cth).

²⁶⁵ See [16.43], [16.46] above.

²⁶⁶ See [16.21]–[16.31] above.

²⁶⁷ *Administration of Estates Discussion Paper* (1999) QLRC 194–5; NSWLRC 280.

Submissions

16.109 The Bar Association of Queensland expressed the view that the same priorities should apply regardless of whether the estate was being administered under the *Bankruptcy Act 1966* (Cth).²⁶⁸

16.110 However, an academic expert in succession law expressed a contrary view. He commented in relation to the existing priority given to the payment of funeral, testamentary and administration expenses:²⁶⁹

If the deceased is found to be bankrupt during the course of the administration of the estate then in all probability funeral and administration expenses will have been incurred. The personal representatives must be given some protection here. ...

The estate's ability to pay creditors must be gauged after the payment of these essential expenses. Otherwise nobody would want to bury the body.

16.111 A former ACT Registrar of Probate was also of the view that funeral, testamentary and administration expenses should have priority under the model legislation.²⁷⁰

The National Committee's view

16.112 The National Committee is of the view that the model legislation should simply import the bankruptcy rules with respect to the priorities of debts and liabilities, and not purport to give overall priority to the payment of funeral, testamentary and administration expenses.²⁷¹ Although this may appear to give the payment of these expenses a lower priority than they presently have, in real terms it will result in very little, if any, change to the existing law. This is because the priority given by the legislation of the various jurisdictions to the payment of funeral, testamentary and administration expenses is, to a large degree, illusory.

16.113 As explained earlier in this chapter, the payment of certain liabilities that arise under the *Child Support (Registration and Collection) Act 1988* (Cth) and the *Income Tax Assessment Act 1936* (Cth) is expressed to have priority over all other debts of the deceased person, notwithstanding anything contained in any law of the Commonwealth, or in any law of a State or Territory.²⁷² Consequently, although the legislation of most Australian jurisdictions purports to give priority to the payment of funeral, testamentary and administration expenses, it is presently the case that, if an insolvent estate is being

²⁶⁸ Submission 1.

²⁶⁹ Submission 12.

²⁷⁰ Submission 2.

²⁷¹ This is the position under the South Australian legislation: see [16.48]–[16.53] above.

²⁷² See [16.22]–[16.31] above.

administered outside the provisions of the *Bankruptcy Act 1966* (Cth) and is subject to any liabilities that arise under the relevant provisions of the *Child Support (Registration and Collection) Act 1988* (Cth) or the relevant former provisions of the *Income Tax Assessment Act 1936* (Cth), the payment of those liabilities will have priority over the payment of funeral, testamentary and administration expenses.

16.114 The National Committee notes that, under section 109(1) of the *Bankruptcy Act 1966* (Cth), the payment of the taxed costs of the petitioning creditor or the trustee of the deceased person's estate and of the costs, charges and expenses of the administration under Part XI is expressed to have priority over the payment of funeral and testamentary expenses.²⁷³ However, if an estate is being administered under State or Territory legislation, rather than under the *Bankruptcy Act 1966* (Cth), expenses will not in fact be incurred in relation to the administration of the estate under Part XI. As a result, the priority given by section 109(1) of the *Bankruptcy Act 1966* (Cth) to the payment of these expenses over the payment of funeral and testamentary expenses is irrelevant.

16.115 The one situation in which the payment of funeral and testamentary expenses might potentially be deferred by not giving them overall priority in the model legislation is where the estate is subject to a liability of the kind referred to in section 109(1)(c) of the *Bankruptcy Act 1966* (Cth). That provision refers to the situation where administration under Part XI occurs within two months after a personal insolvency agreement executed by the deceased person or a composition or scheme of arrangement accepted by the deceased person's creditors has been set aside or terminated. In that situation, certain expenses incurred by the trustee with respect to the personal insolvency agreement, scheme or composition²⁷⁴ have priority over the funeral and testamentary expenses.²⁷⁵ Assuming that this provision applies to the situation where no order for administration under Part XI has been made, but a person has nevertheless died within two months after a personal insolvency agreement, scheme or composition is set aside or terminated,²⁷⁶ it will have the effect that the payment of certain liabilities and expenses associated with the personal insolvency agreement, scheme or composition will have priority over the payment of funeral and testamentary expenses. This situation is not likely to arise very often. In any event, the National Committee considers it more important to maintain consistency with the priorities that apply under the *Bankruptcy Act 1966* (Cth) unless there is a compelling reason to depart from those priorities.

²⁷³ *Bankruptcy Act 1966* (Cth) s 109(1)(a). See [16.20]–[16.21] above.

²⁷⁴ See *Bankruptcy Act 1966* (Cth) s 114.

²⁷⁵ *Bankruptcy Act 1966* (Cth) s 109(1)(c). See [16.20]–[16.21] above.

²⁷⁶ Strictly speaking, if an estate is being administered outside the *Bankruptcy Act 1966* (Cth), there will not have been any administration under pt XI to satisfy the requirements of s 109(1)(c) of the *Bankruptcy Act 1966* (Cth). See, however, the discussion of the adaptation of the imported bankruptcy rules at [16.89]–[16.93] above.

Crown debts

Background

16.116 As noted earlier, at common law, the Crown has priority over the subject in respect of specialties and debts of record. In respect of other Crown debts, the Crown has priority over the subject in respect of debts of equal degree.²⁷⁷

16.117 The priority of various Crown debts is a prerogative of the Crown.²⁷⁸ A prerogative of the Crown may be abolished by legislation,²⁷⁹ but legislation will be held not to abolish such a prerogative unless it does so by express words or by implication.²⁸⁰

16.118 Under the *Bankruptcy Act 1966* (Cth), all debts proved in a bankruptcy rank equally except as otherwise provided by the Act.²⁸¹ Although priority is given to certain specified debts under section 109, priority is not given to the payment of Crown debts generally. Because the *Bankruptcy Act 1966* (Cth) is expressed to bind 'the Crown in right of the Commonwealth, of each of the States and of the Northern Territory',²⁸² for the purposes of that Act, the general priority of Crown debts is, in effect, abolished.

16.119 As discussed above, insolvent estates may be administered outside the provisions of the *Bankruptcy Act 1966* (Cth). In those circumstances, the issue of whether the priority of Crown debts is abolished is more complex. The legislation of all Australian jurisdictions except South Australia expressly imports the provisions of the *Bankruptcy Act 1966* (Cth) that deal with the priorities of debts and liabilities.²⁸³ However, the issue of whether this abolishes the priority of Crown debts depends on the extent to which the legislation in each jurisdiction binds the Crown (either expressly or by implication).

²⁷⁷ See [16.38] above.

²⁷⁸ *Re Henley & Co* (1878) 9 Ch D 469, 482 (Brett LJ); *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd (In Liq)* (1940) 63 CLR 278, 301 (Dixon J).

²⁷⁹ *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 438 (Dawson, Toohey and Gaudron JJ).

²⁸⁰ It was previously the case that a prerogative could be abolished only by express words or by 'necessary' implication: *Attorney-General v De Keyser's Royal Hotel, Ltd* [1920] AC 508, 576 (Lord Parmoor); *Barton v Commonwealth* (1974) 131 CLR 477, 501 (Mason J); *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143, 167 (Wilson J, with whom Gibbs and Mason JJ agreed). However, as explained at [16.124] below, a less rigid test is now applied to determine whether a statute is intended to bind the Crown.

²⁸¹ *Bankruptcy Act 1966* (Cth) s 108.

²⁸² *Bankruptcy Act 1966* (Cth) s 8.

²⁸³ See [16.82] above. As to South Australia, see note 237 above.

16.120 In Queensland²⁸⁴ and Western Australia,²⁸⁵ the legislation (or relevant provision) is expressed to bind the Crown. Accordingly, where an insolvent estate of a deceased person is being administered outside the provisions of the *Bankruptcy Act 1966* (Cth), debts due to the Crown in right of the particular jurisdiction do not have priority over the debts of other creditors. The Queensland provision is expressed in broad terms. Section 4(2) of the *Succession Act 1981* (Qld) provides:

4 Application

(1) ...

(2) This Act binds the Crown not only in right of the State but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

16.121 In the ACT, although the *Administration and Probate Act 1929* (ACT) is not expressed to bind the Crown, it nevertheless appears that it has that effect by virtue of the *Legislation Act 2001* (ACT).²⁸⁶

16.122 The administration legislation in New South Wales, the Northern Territory, South Australia,²⁸⁷ Tasmania²⁸⁸ and Victoria does not expressly bind the Crown. Accordingly, the question arises as to whether the legislation in these jurisdictions nevertheless manifests an intention to bind the Crown.

16.123 The applicable test for determining whether an Act discloses an intention to bind the Crown depends on when the particular Act was passed. Before the High Court's decision in *Bropho v State of Western Australia*,²⁸⁹ a strict test was applied to determine whether an Act bound the Crown. An Act would bind the Crown if the Crown was expressly named in it or if there was a

²⁸⁴ *Succession Act 1981* (Qld) s 4(2).

²⁸⁵ The *Administration Act 1903* (WA) is not expressed to bind the Crown generally. However, s 10A(2) of the Act provides that s 10A, which deals with the payment of debts in an insolvent estate, binds the Crown. In its 1990 Report, the Law Reform Commission of Western Australia recommended that the Crown should be bound generally by the provisions of the *Administration Act 1903* (WA): Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.6].

²⁸⁶ *Legislation Act 2001* (ACT) s 121(1) provides: 'An Act binds everyone, including people who are not Australian citizens and all governments.'

²⁸⁷ In South Australia all Acts passed after 20 June 1990 bind the Crown unless a contrary intention appears either expressly or by implication: *Acts Interpretation Act 1915* (SA) s 20(1). That provision does not apply to the *Administration and Probate Act 1919* (SA).

²⁸⁸ *Acts Interpretation Act 1931* (Tas) s 6(6) provides:

No Act shall be binding on the Crown or derogate from any prerogative right of the Crown unless express words are included therein for that purpose.

In *Re Commissioner of Water Resources and Leighton Contractors Pty Ltd* (1990) 96 ALR 242, Byrne J held (at 244) that s 13 of the *Acts Interpretation Act 1954* (Qld), which is expressed in similar terms to s 6(6) of the *Acts Interpretation Act 1931* (Tas), 'does not mean that the Crown cannot be bound where it appears to be a necessary implication that the Crown is to be bound'. See also *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143, 167 (Wilson J, with whom Gibbs and Mason JJ agreed).

²⁸⁹ (1990) 171 CLR 1.

‘necessary implication’ that the Crown was intended to be bound.²⁹⁰ The requirement for a necessary implication was satisfied if it was ‘manifest from the very terms of the statute that it was the intention of the legislature that the Crown should be bound’.²⁹¹ It was also satisfied if it could be said that, at the time the legislation was passed, ‘it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound’.²⁹² The courts have acknowledged that the test of necessary implication was ‘not easily satisfied’.²⁹³

16.124 In *Bropho v State of Western Australia*,²⁹⁴ the High Court held that the presumption that an Act does not bind the Crown should not be treated as an inflexible rule involving a strict test of necessary implication.²⁹⁵ An Act will be held to bind the Crown if its purpose, policy and subject matter, when construed in context (which includes permissible extrinsic aids) disclose an intention that the Crown should be bound.²⁹⁶ The Court stated, however, that its decision was not intended ‘to overturn the settled construction of particular existing legislation’.²⁹⁷ In that respect, the Court acknowledged that:²⁹⁸

in the period since the *Province of Bombay Case*,²⁹⁹ the tests of ‘manifest from the very terms of the statute’ and ‘purposes of the statute being otherwise wholly frustrated’ came to be established as decisive of the question whether, in the absence of express reference, the general words of a statute bind the Crown. That being so, it may be necessary, in construing a legislative provision enacted before the publication of the decision in the present case, to take account of the fact that those tests were seen as of general application at the time when the particular provision was enacted. (note added)

16.125 The High Court suggested, however, that the authorities that preceded the Privy Council’s decision in *Province of Bombay v Municipal Corporation of the City of Bombay* did not support an inflexible approach.³⁰⁰ Subsequently, the

290 *Bradken Consolidated Ltd v Broken Hill Pty Co Ltd* (1979) 145 CLR 107, 116 (Gibbs ACJ).

291 *Ibid.*

292 *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58, 63 (Lord Macmillan, Lord Simonds, Lord du Parc, Mr MR Jayakar and Sir Madhavan Nair); *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143, 169 (Wilson J, with whom Gibbs and Mason JJ agreed).

293 *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143, 167 (Wilson J, with whom Gibbs and Mason JJ agreed).

294 (1990) 171 CLR 1.

295 *Ibid* 21–2 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

296 *Ibid.*

297 *Ibid* 22. See also at 28–9 (Brennan J).

298 *Ibid* 23 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

299 *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58.

300 *Bropho v State of Western Australia* (1990) 171 CLR 1, 22–3 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

High Court has applied a less rigid test to determine whether legislation enacted before the Privy Council's decision is intended to bind the Crown.³⁰¹

16.126 The administration legislation in the Northern Territory and Victoria was enacted after the decision in *Province of Bombay v Municipal Corporation of the City of Bombay*,³⁰² but before the High Court's decision in *Bropho v State of Western Australia*.³⁰³ It is difficult to argue that it is manifest, from the very terms of the legislation in these jurisdictions, that the Crown is intended to be bound. Certainly, it could not be said that, if the Crown were not bound, the purpose of the legislation would be wholly frustrated. With respect to the payment of debts in an insolvent estate, the legislation still serves the purpose of regulating the priority in which creditors of the deceased, other than the Crown, are entitled to be paid. It is therefore doubtful whether the priority of Crown debts is abolished in these jurisdictions.

16.127 In contrast, the relevant provisions in the legislation in New South Wales, South Australia and Tasmania were enacted before the decision in *Province of Bombay v Municipal Corporation of the City of Bombay*. Consequently, a less rigid test will be applied to determine whether the provisions in those jurisdictions bind the Crown. It is arguable that the purpose of those provisions, in importing the provisions of the *Bankruptcy Act 1966* (Cth) that govern the priorities for the payment of debts and liabilities, is to assimilate the priorities that apply under the State legislation with those that apply under the *Bankruptcy Act 1966* (Cth). Further, it is arguable that, having regard to that purpose and the fact that the priority of Crown debts is abolished under the *Bankruptcy Act 1966* (Cth), each of these States has 'implicitly bound itself to accept that loss of priority'.³⁰⁴

16.128 The discussion above is concerned with the priority of a debt owing to the Crown in right of the enacting jurisdiction. The extent to which the legislation in one jurisdiction abolishes the priority of the Crown in right of another jurisdiction raises two further issues for consideration:

- the extent to which the legislation in question discloses an intention to bind the Crown in right of another jurisdiction; and
- the extent to which the legislature of one jurisdiction has the power to bind the Crown in right of another jurisdiction.

³⁰¹ *Jacobsen v Rogers* (1995) 182 CLR 572, 586 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

³⁰² [1947] AC 58, delivered on 10 October 1946.

³⁰³ (1990) 171 CLR 1.

³⁰⁴ RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 67, where this argument is made in relation to the Victorian legislation. However, for the reasons explained at [16.126] above, it would seem to be more difficult to make this argument in relation to the Victorian legislation than in relation to the legislation in New South Wales, South Australia and Tasmania.

16.129 In relation to the first of these issues, it has been held that the presumption that the Crown is not bound by the general words of a statute 'extends beyond the Crown in right of the enacting legislature to the Crown in right of the other polities forming the federation'.³⁰⁵ The ACT and Queensland are the only two jurisdictions whose administration legislation binds the Crown in its other capacities.³⁰⁶

16.130 The second of these issues involves complex constitutional questions.³⁰⁷ It is now accepted that the Commonwealth does not have general immunity from State laws.³⁰⁸ However, the High Court has drawn a distinction between State laws of general application that govern transactions into which the Commonwealth chooses to enter and State laws that purport to modify a prerogative power of the Commonwealth.³⁰⁹ In the latter case, it seems that the Commonwealth is still immune from the State legislation.³¹⁰ As a result, it appears unlikely that State legislation can effectively abolish the priority of debts owing to the Crown in right of the Commonwealth.

The National Committee's view

16.131 The analysis of the extent to which the priority of Crown debts is abolished by the existing legislation in the Australian States and Territories demonstrates the need for the model legislation to deal clearly with this issue.³¹¹

16.132 The National Committee has earlier expressed the view that the priority for the payment of debts under the model legislation should be assimilated with the priority that applies under the *Bankruptcy Act 1966* (Cth). Accordingly, it is of the view that the model legislation should be expressed to bind the Crown, so that it is clear that the Crown's priority with respect to the payment of debts is abolished (at least in relation to the Crown in right of the enacting jurisdiction).

16.133 Although it is doubtful whether the Crown in right of one jurisdiction can abolish a Crown prerogative of another jurisdiction, the National Committee is

³⁰⁵ *Jacobsen v Rogers* (1995) 182 CLR 572, 585 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ); *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410, 444 (Dawson, Toohey and Gaudron JJ). See also G Taylor, 'Commonwealth v Western Australia and the Operation in Federal Systems of the Presumption that Statutes Do Not Apply to the Crown' (2000) 24 *Melbourne University Law Review* 77.

³⁰⁶ See [16.120]–[16.121] above. Section 10A(2) of the *Administration Act 1903* (WA) provides only that s 10 binds 'the Crown'.

³⁰⁷ For a discussion of these issues, see I Mescher, 'Wither Commonwealth Immunity' (1998) 17 *Australian Bar Review* 23; Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Report No 92 (2001) chs 27, 28.

³⁰⁸ *Re Residential Tenancies Tribunal of New South Wales and Henderson; Ex parte Defence Housing Authority* (1997) 190 CLR 410.

³⁰⁹ *Ibid* 424–7 (Brennan CJ), 438–9, 447 (Dawson, Toohey and Gaudron JJ).

³¹⁰ *Ibid* 424–6 (Brennan CJ), 440 (Dawson, Toohey and Gaudron JJ).

³¹¹ See [16.116]–[16.130] above.

nevertheless of the view that the model legislation should be expressed to bind the Crown in all its other capacities. To the extent to which it is possible to bind the Crown in another capacity (whether that is the Crown in right of another State or of another country), the legislation will do so only if it discloses that intention.

16.134 The National Committee is therefore of the view that the application of the model legislation should be expressed in the broadest terms, and that the model legislation should include a provision to the effect of section 4(2) of the *Succession Act 1981* (Qld).

Provisions abolishing various common law priorities

Background

16.135 As explained previously, in all jurisdictions except South Australia, the bankruptcy rules in relation to the priorities of debts and liabilities apply whether the estate is being administered in or out of court.³¹²

16.136 Earlier in this chapter, however, it was noted that at common law debts were payable according to a priority that was based on their classification. In some jurisdictions, legislation was passed to abolish the priority of specialty debts³¹³ and judgment debts.³¹⁴ The provisions abolishing these priorities were enacted at a time when the common law rules about the payment of debts still regulated the administration of an insolvent estate out of court.³¹⁵

Specialty debts

16.137 The legislation in all jurisdictions except Queensland³¹⁶ and Tasmania includes a provision that specifically abolishes the priority of specialty debts. The South Australian and Victorian provisions³¹⁷ are almost identical to the

³¹² See [16.43]–[16.45] above.

³¹³ The priority of specialty debts was first abolished in England by s 1 of the *Administration of Estates Act 1869* (Eng) (32 & 33 Vict c 46, known as *Hinde Palmer's Act*). Legislation based on that Act was subsequently passed in most Australian jurisdictions: see, for example, *Debts of Deceased Persons Act 1881* (NSW); *The Specialty and Simple Contract Debts Equalisation Act 1871* (Qld); *Deceased Persons Debts Act 1879* (SA); *Administration Act 1872* (Vic) s 12; *An Act to abolish the distinction as to Priority of Payment which now exists between the Specialty and Simple Contract Debts of Deceased Persons 1871* (WA) s 1. The current provisions are considered at [16.137]–[16.139] below.

³¹⁴ *Administration and Probate Act 1898* (Vic) s 8(2). In *Saddington v Saddington* (1904) 4 SR (NSW) 341, AH Simpson CJ in Eq suggested (at 345) that s 19 of the *Probate Act of 1890 Amendment Act 1893* (NSW) would operate to abolish the priority of judgment debts, as well as the priority of specialty debts: see [16.141] below.

³¹⁵ See [16.37]–[16.41] above.

³¹⁶ As noted above, the priority of specialty debts was abolished in Queensland by *The Specialty and Simple Contract Debts Equalisation Act 1871* (Qld). It was therefore not necessary for the *Succession Act 1981* (Qld) to include a similar provision.

³¹⁷ *Administration and Probate Act 1919* (SA) s 59(1); *Administration and Probate Act 1958* (Vic) s 36(1).

original English legislation that abolished this priority (Hinde Palmer's Act).³¹⁸ The Victorian provision is expressed in the following terms:³¹⁹

36 Creditors to stand in equal degree

- (1) In the administration of the estate of any person no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond deed or other instrument under seal or is otherwise made or constituted a specialty debt, but all the creditors of such person as well specialty as simple contract shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable any statute or law to the contrary notwithstanding: Provided that this Part shall not prejudice or affect any lien charge or other security which any creditor may hold or be entitled to for payment of his debt.

16.138 A provision in similar terms was originally enacted in New South Wales in 1881.³²⁰ In 1893, however, the New South Wales provision was replaced by a provision having a wider effect.³²¹ The 1893 provision was subsequently re-enacted as section 82 of the *Probate and Administration Act 1898* (NSW), which provides, in part:

82 All debts to stand in equal degree, and retainer abolished

- (1) In the administration of the estate of every person dying after the passing of this Act, all the creditors of every description of such person shall be treated as standing in equal degree and be paid accordingly out of the assets of such deceased person whether such assets are legal or equitable, any statute or law to the contrary notwithstanding.
- ...
- (3) This Act shall not prejudice or affect any mortgage, lien, charge, or other security which any creditor may hold or be entitled to for payment of the debt concerned.
- (4) Nothing herein contained shall affect the provisions of any Acts protecting life assurance or other policies against creditors.

16.139 Provisions corresponding to section 82 of the *Probate and Administration Act 1898* (NSW) are found in the ACT, Northern Territory and Western Australian legislation.³²²

³¹⁸ See note 313 above.

³¹⁹ *Administration and Probate Act 1958* (Vic) s 36(1).

³²⁰ See *Debts of Deceased Persons Act 1881* (NSW).

³²¹ *Probate Act of 1890 Amendment Act 1893* (NSW) s 19.

³²² *Administration and Probate Act 1929* (ACT) s 55(1), (3), (4); *Administration and Probate Act* (NT) s 87(1), (2), (4); *Administration Act 1903* (WA) s 23.

Judgment debts

16.140 The legislation in South Australia and Victoria contains a provision that expressly abolishes the priority of judgment debts.³²³

16.141 It has been suggested that, in New South Wales, section 82(1) of the *Probate and Administration Act 1898* (NSW)³²⁴ has a wider effect than Hinde Palmer's Act, which simply abolished the priority of specialty debts, and that section 82(1) also has the effect of abolishing the priority of judgment debts:³²⁵

It seems to me the natural meaning of the words 'all creditors of every description' is all creditors of every kind whether judgment or specialty or simple contract creditors, etc. ... It may be said that the words 'creditors of every description' include secured creditors, and that according to this construction secured and unsecured creditors are placed on the same footing. If the words stood alone I think this might be so, but then the Legislature guards against this by the proviso: 'Provided always that this Act shall not prejudice or affect any mortgage, lien, charge, or other security which any creditor may hold or be entitled to for payment of his debt.' This seems to me a strong indication of intention that the words 'creditors of every description' were regarded as having a wide meaning.

16.142 On this basis, it would appear that the New South Wales provision and the corresponding provisions in the ACT, the Northern Territory and Western Australia³²⁶ abolish not only the priority of specialty debts, but also the priority of judgment debts.

16.143 The inclusion of provisions of this kind in the existing legislation of most Australian jurisdictions raises the issue of whether the model legislation should include provisions that abolish the common law priority in relation to specialty and judgment debts, or whether, given that the common law rules themselves are to have no application under the model legislation,³²⁷ it is unnecessary for the model legislation to expressly abolish those common law priorities.³²⁸

323 *Administration and Probate Act 1919* (SA) s 62(b); *Administration and Probate Act 1958* (Vic) s 36(2).

324 *Probate and Administration Act 1898* (NSW) s 82(1) is set out at [16.138] above.

325 *Saddington v Saddington* (1904) 4 SR (NSW) 341, 344, 345–6 (AH Simpson CJ in Eq).

326 See note 322 above.

327 See [16.77]–[16.80] above.

328 The effect of the bankruptcy rules on the priority of a judgment debt was considered by the Full Court of the Supreme Court of Queensland in *Re Moat* (1897) QLJ 42. In that case, an order had been made for the administration of an insolvent estate. The estate was therefore to be administered in accordance with s 5(1) of the *Judicature Act 1876* (Qld), which the Court held imported the bankruptcy rules in relation to the priorities of debts and liabilities. Griffith CJ and Cooper J held (at 45) that, as a result, the judgment debt did not have priority. Real J dissented, holding (at 47) that s 5(1) of the *Judicature Act 1876* (Qld) did not deprive the judgment debt of its priority. His Honour placed considerable reliance on *Smith v Morgan* (1880) 5 CPD 337. However, *Smith v Morgan* was not followed by the English Court of Appeal in *Re Whitaker* [1901] 1 Ch 9.

The National Committee's view

16.144 As the model legislation is to import the priorities that apply under the *Bankruptcy Act 1966* (Cth), the common law rules with respect to the payment of debts will have no application. The National Committee is therefore of the view that it is unnecessary to include any of the provisions that were enacted to abolish the particular common law priorities in relation to the payment of specialty and judgment debts.

THE RIGHT TO PREFER CREDITORS AND THE RIGHT OF RETAINER

The nature of a personal representative's right to prefer creditors and right of retainer

The right to prefer creditors

16.145 Although, at common law, a personal representative was required to pay debts in a particular order,³²⁹ he or she was entitled, among creditors of equal degree, to pay one creditor in preference to another.³³⁰ It has been suggested that the rationale for the right was that it allowed a personal representative to start paying debts even though the full liability of the estate had not been determined.³³¹ In these circumstances:³³²

If the estate should ultimately prove to be insolvent the payments made will be effective and proper because they can be regarded as made in exercise of the right of preference.

16.146 However, the exercise of the right was not confined to the situation where the personal representative was unaware of the impending insolvency of the estate. As the Law Reform Commission of Western Australia observed:³³³

In practical terms, when it is known that the estate will be insolvent, it amounts to a right to decide which creditors are to receive payment in full, and which are to receive nothing.

16.147 A personal representative could not exercise the right to prefer creditors after an administration order had been made in relation to an estate.³³⁴

³²⁹ See [16.38] above.

³³⁰ *Lyttleton v Cross* (1824) 3 B & C 317; 107 ER 751.

³³¹ Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [8].

³³² *Ibid.*

³³³ Law Reform Commission of Western Australia, *Administration of Deceased Estates: Administration of Deceased Insolvent Estates*, Working Paper, Project No 34 Pt III (1977) [70].

³³⁴ *Davies v Parry* [1899] 1 Ch 602, 609 (Romer J).

The right of retainer

16.148 At common law, a personal representative was entitled to exercise a 'right of retainer', which was:³³⁵

a right on the part of the legal personal representative to retain out of legal assets³³⁶ actually or constructively in his possession any debt due to him from the deceased as against all creditors whose debts were of equal degree with or of lower degree than his own. The priority in which debts by law fell to be paid determined the degrees.³³⁷ (notes added)

16.149 The right of retainer could not be exercised against creditors of higher degree.³³⁸

16.150 The origin of the right has been said to lie in the inability of a personal representative to sue himself or herself.³³⁹

an executor having a claim against the testator's estate is not to be put in a worse position than any other creditor, who by suing and obtaining a judgment against the executor could obtain priority, while the executor not being able to sue himself could not obtain priority.

16.151 In one sense, the right of retainer might be said to be 'only a right on the part of the legal personal representative to prefer himself because he was a creditor'.³⁴⁰ However, this view has been rejected on the basis that the right of retainer could be exercised in circumstances in which the right to prefer creditors no longer applied. Whereas the right to prefer creditors ended when an administration order was made, the right of retainer was not affected by the making of such an order.³⁴¹

16.152 It has been held that the importing into the administration legislation of the bankruptcy rules in relation to priorities of debts and liabilities does not affect a personal representative's right to retain against debts of equal degree.³⁴²

335 *Attorney-General v Jackson* [1932] AC 365, 375 (Lord Tomlin).

336 See the explanation of legal assets at note 190 above.

337 The order in which debts were payable at common law is set out at [16.38] above.

338 *Re Rhoades* [1899] 2 QB 347, 354 (Lindley MR).

339 *Re Compton* (1885) 30 Ch D 15, 19 (Cotton LJ). See also *Attorney-General v Jackson* [1932] AC 365, 370 (Lord Atkin).

340 *Davies v Parry* [1899] 1 Ch 602, 609 (Romer J).

341 *Ibid*; *Attorney-General v Jackson* [1932] AC 365, 376 (Lord Tomlin).

342 *Attorney-General v Jackson* [1932] AC 365.

Existing legislative provisions

16.153 The personal representative's right to prefer creditors has been abolished in Queensland, Victoria and Western Australia.³⁴³

16.154 The personal representative's right of retainer has been abolished in all Australian jurisdictions³⁴⁴ except Tasmania.³⁴⁵

16.155 The legislation in Queensland and Western Australian provides, however, that a personal representative is exonerated in respect of certain payments made at a time when he or she had no reason to believe the deceased person's estate to be insolvent.³⁴⁶

Issues for consideration

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

- whether a personal representative's right to prefer creditors and right of retainer should be abolished;
- if so, the manner in which the model legislation should abolish these rights; and
- whether the model legislation should include a provision to exonerate a personal representative in respect of payments made at a time when he or she had no reason to believe the deceased person's estate to be insolvent.

Abolition of the rights of preference and retainer

16.157 Although the right to prefer creditors originally protected a personal representative who paid creditors before the full liabilities of the estate were known, that is no longer a valid reason for retaining the right. As the Law Commission of England and Wales commented in its Report on the rights of preference and retainer:³⁴⁷

³⁴³ *Succession Act 1981* (Qld) s 58(1); *Administration and Probate Act 1958* (Vic) s 36(3); *Administration Act 1903* (WA) s 10(4).

³⁴⁴ *Administration and Probate Act 1929* (ACT) s 55(2); *Probate and Administration Act 1898* (NSW) s 82(2); *Administration and Probate Act* (NT) s 87(2); *Succession Act 1981* (Qld) s 58(1); *Administration and Probate Act 1919* (SA) s 62(a); *Administration and Probate Act 1958* (Vic) s 36(3); *Administration Act 1903* (WA) s 10(2).

³⁴⁵ *Administration and Probate Act 1935* (Tas) s 34(2). This provision expressly preserves the personal representative's right of retainer and right to prefer creditors.

³⁴⁶ See [16.169]–[16.176] below.

³⁴⁷ Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [8].

In practice personal representatives protect themselves in another way, namely, by advertising for claims under the provisions of section 27 of the *Trustee Act 1925* which relieves them of liability if they distribute after paying those claims of which they receive notice.³⁴⁸ (note added)

16.158 Similarly, there appears to be no justification for preserving the right of retainer.³⁴⁹

The historical justification for the right of retainer is said to be to compensate the personal representative for his inability to sue the estate and thus convert his claim into a judgment debt. But a judgment debt is no longer payable in priority to others and the abolition of the right of retainer will in no way interfere with the personal representative's rights to pay his own debt *pari passu* with others. (note omitted)

Discussion Paper

16.159 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the effect of section 58(1) of the *Succession Act 1981* (Qld), which abolishes a personal representative's rights of retainer and preference.³⁵⁰

Submissions

16.160 The National Committee's proposal was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.³⁵¹

The National Committee's view

16.161 The National Committee is of the view that, with the exception of debts that have priority according to the rules imported from the *Bankruptcy Act 1966* (Cth), all debts should be paid proportionately. The rights of preference and retainer should therefore be abolished.

The manner in which the rights of preference and retainer should be abolished

16.162 Section 58(1) of the *Succession Act 1981* (Qld), which abolishes the rights of retainer and preference in that jurisdiction, simply provides:

³⁴⁸ The corresponding provisions in the various Australian jurisdictions are considered in Chapter 21 of this Report.

³⁴⁹ Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970) [8].

³⁵⁰ *Administration of Estates Discussion Paper* (1999) QLRC 198; NSWLRC 284 (Proposal 72).

³⁵¹ Submissions 1, 8, 11, 12, 14, 15.

58 Retainer, preference and the payment of debts by personal representatives

- (1) The right of retainer of a personal representative and the personal representative's right to prefer creditors are hereby abolished.

16.163 In Western Australia, where both rights are also abolished, section 10 of the *Administration Act 1903* (WA) provides:

10 Real and personal estate to be assets

...

- (2) No executor or administrator shall hereafter have or exercise any right of retainer.

...

- (4) An executor or administrator of the estate of a person ... shall not have or exercise any right to give preference as between creditors standing in equal degree.

16.164 In Victoria, section 36(3) of the *Administration and Probate Act 1958* (Vic) does not refer to the rights of preference or retainer by name, but states the principles that are to apply in the administration of an insolvent estate.³⁵²

36 Creditors to stand in equal degree

...

- (3) Every person who has obtained or obtains probate of the will or administration of the estate of a deceased person shall pay all and singular the just debts of such deceased person in due course of administration rateably and proportionably and according to the priority required by law but without preferring his own debt by reason of his having obtained such probate or administration.

16.165 The Victorian provision is regarded as abolishing both the rights of preference and retainer.³⁵³

Discussion Paper

16.166 In the Discussion Paper, the National Committee proposed in relation to the abolition of the rights of preference and retainer that, instead of simply referring to the two rights by name, the model legislation should state the effect of the principles that were being abolished.³⁵⁴

³⁵² A provision in the same terms was included in earlier legislation: see *Administration and Probate Act 1898* (Vic) s 8(1).

³⁵³ RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 58.

³⁵⁴ *Administration of Estates Discussion Paper* (1999) QLRC 198; NSWLRC 284 (Proposal 72).

Submissions

16.167 The National Committee's proposal was supported by all the submissions that commented on this issue — the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.³⁵⁵

The National Committee's view

16.168 The National Committee's view about the manner in which the rights of retainer and preference should be abolished remains unchanged. Instead of simply referring to the two principles by name, the model legislation should abolish the rights of preference and retainer by providing that:³⁵⁶

- a personal representative's right to prefer creditors and right of retainer are abolished;
- a personal representative must pay the debts of the deceased person rateably according to the priority required by law; and
- a personal representative 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.

Exoneration of personal representative in respect of certain payments

16.169 Although the rights of preference and retainer have been abolished in Queensland and Western Australia,³⁵⁷ the legislation in these jurisdictions exonerates a personal representative who pays certain creditors at a time when he or she has no reason to believe the estate to be insolvent.

16.170 Section 58(2) of the *Succession Act 1981* (Qld) provides:

58 Retainer, preference and the payment of debts by personal representatives

...

(2) Nevertheless a personal representative—

- (a) other than one mentioned in paragraph (b), who, in good faith and at a time when the personal representative has no reason to believe that the deceased's estate is insolvent, pays the debt

³⁵⁵ Submissions 1, 8, 11, 12, 14, 15.

³⁵⁶ This proposal is a combination of s 58(1) of the *Succession Act 1981* (Qld), s 36(3) of the *Administration and Probate Act 1958* (Vic) and s 10(4) of the *Administration Act 1903* (WA).

³⁵⁷ See [16.153]–[16.154] above.

of any person (including himself or herself) who is a creditor of the estate; or

- (b) to whom letters of administration have been granted solely by reason of the personal representative being a creditor and who, in good faith and at such a time pays the debt of another person who is a creditor of the estate;

shall not, if it subsequently appears that the estate is insolvent, be liable to account to a creditor of the same degree as the paid creditor for the sum so paid.

16.171 Section 10(5) of the *Administration Act 1903* (WA), which is in similar terms, provides:

10 Real and personal estate to be assets

...

- (5) Notwithstanding subsection (4), an executor or administrator who—

- (a) in good faith and at a time when he has no reason to believe that the estate of the deceased is insolvent, pays a debt, other than a debt payable to himself in his own right, of a person who is a creditor of the estate; or
- (b) not being an administrator to whom letters of administration have been granted solely by reason of his being a creditor, in good faith and at a time when he has no reason to believe that the estate of the deceased is insolvent, pays a debt payable to himself in his own right as a creditor of the estate,

shall not, if it subsequently appears that the estate is insolvent, be liable to account to a creditor of the same degree as the paid creditor for the sum so paid.

16.172 Both provisions draw a distinction between, on the one hand, a personal representative who has been appointed as an administrator solely on the basis of being a creditor of the estate³⁵⁸ and, on the other hand, any other personal representative.

16.173 A personal representative, other than one who is appointed solely on the basis of being a creditor of the estate, is given protection if he or she pays the debt of any creditor of the estate, including himself or herself:

- in good faith; and
- at a time when the personal representative has no reason to believe that the deceased's estate is insolvent.

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

16.174 A personal representative who is appointed solely on the basis of being a creditor of the estate is given similar protection. However, a personal representative appointed in these circumstances is protected only in respect of a payment made to another creditor, and not in respect of one made to himself or herself.

16.175 The Queensland provision gave effect to a recommendation made by the Queensland Law Reform Commission in its 1978 Report. It recognised that a personal representative might pay debts in good faith, and without being aware of the impending insolvency of the deceased person's estate.³⁵⁹ It recommended:³⁶⁰

If such payments are made in good faith it seems desirable that the personal representative should not thereafter be charged by other creditors who have not been paid in full. We recommend the adoption of the English provision in this respect.

16.176 The Law Reform Commission of Western Australia made a similar recommendation:³⁶¹

a statutory defence should be provided to enable [the personal representative] to pay any debt, including his own (except where he is administering the estate solely by reason of his being a creditor), as long as he does so in good faith and at a time when he has no reason to believe that the estate is insolvent.

16.177 Both the Queensland and Western Australian provisions are based on section 10 of the *Administration of Estates Act 1971* (UK),³⁶² which draws the same distinction between administrators appointed on the basis of being a creditor of the estate and other personal representatives. The English provision was generally based on a recommendation made by the Law Commission of England and Wales in its 1970 Report on the rights of preference and retainer.³⁶³ Although the Law Commission was generally of the view that a personal representative's right to prefer creditors should be abolished, it nevertheless suggested that the right performed one useful function, which should be preserved in any legislation abolishing the right.³⁶⁴ In the view of that Commission, the right to prefer creditors 'protects a personal representative who, reasonably enough, has paid the tradesmen's bills without waiting until all

359 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 41.

360 Ibid.

361 Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates*, Report, Project No 34 Pt III (1978) [2.42].

362 See Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 41; Law Reform Commission of Western Australia, *Administration of Deceased Insolvent Estates*, Report, Project No 34 Pt III (1978) [2.42].

363 Law Commission (England and Wales), *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters*, Report No 31 (1970).

364 Ibid [8].

claims are received in response to the statutory notice for creditors'.³⁶⁵ It observed:³⁶⁶

Real hardship might be caused to small tradesmen (and indeed to the widow and children of the deceased who may be dependent on their goodwill) if debts of this sort could not be paid promptly.

16.178 Consequently, the Law Commission recommended a provision to protect:³⁶⁷

a personal representative who acting reasonably and in good faith pays another person who is a creditor of the deceased's estate at a time when the personal representative has no reason to believe that the estate is insolvent. (emphasis added)

16.179 Because of the reference to 'another person' who is a creditor, the recommended provision would not protect a personal representative who paid a debt owing to himself or herself. The Law Commission observed that the provision did not affect a personal representative's liability to account to a creditor who was entitled to priority:³⁶⁸

He will be liable to account to a creditor entitled to priority, but so he would under the present law, since the right of preference can be exercised only as between creditors of the same class, and no case has been made out for extending the present protection to cover this situation.

The National Committee's view

16.180 As stated above, the National Committee is of the view that the rights of preference and retainer should be abolished.³⁶⁹ It is nevertheless of the view that the very limited form of these rights found in the Queensland and Western Australian legislation³⁷⁰ should be preserved, so that a personal representative who pays a creditor in good faith, and at a time when he or she has no reason to believe that the deceased person's estate is insolvent, will not be liable to account to a creditor of the same degree as the creditor who has been paid. In the National Committee's view, a provision of this kind would operate in a fairly limited range of circumstances. For example, if a personal representative was simply unaware of the impending insolvency of the estate, but had not made any inquiries about the potential liabilities of the estate, it might be difficult to establish that the payment had been made 'in good faith'.

365 Ibid.

366 Ibid.

367 Ibid 18 (Draft Personal Representatives Bill cl 3(2)).

368 Ibid 19 (Explanatory Notes, cl 3).

369 See [16.161] above.

370 See [16.169]–[16.176] above.

16.181 In the National Committee's view, if some right to prefer creditors is to be preserved, it is difficult to argue that the personal representative should generally be in a worse position than other creditors. The National Committee is therefore of the view that a provision to the effect of section 58(2)(a) of the *Succession Act 1981* (Qld) should be included in the model legislation. The protection for creditors is that, whether paying his or her own debt or the debt of another creditor, the personal representative will be exonerated under the provision only if the payment is made in good faith and at a time when the personal representative has no reason to believe the estate to be insolvent.

16.182 However, in the case of a person who is appointed as administrator solely on the basis of being a creditor of the estate, the model legislation should follow section 58(2)(b) of the *Succession Act 1981* (Qld), and protect the personal representative only in respect of payments made to *other* creditors. This provides an added degree of protection to other creditors in circumstances where the personal representative may be more likely to suspect that an estate is insolvent.

RECOMMENDATIONS

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).³⁷¹

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.³⁷²

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

³⁷¹ See [16.61]–[16.64], [16.75]–[16.76], [16.79]–[16.80] above.

³⁷² See [16.69] above.

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:³⁷³

- (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 deceased³⁷⁴ under the provisions of the *Bankruptcy Act 1966 (Cth)* that apply to the administration of the estates of deceased persons in bankruptcy.³⁷⁵

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.³⁷⁶

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

³⁷³ See [16.85]–[16.86] above.

³⁷⁴ See [16.88] above.

³⁷⁵ See [16.87] above.

³⁷⁶ See [16.92]–[16.93] above.

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.³⁷⁷

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).³⁷⁸

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.³⁷⁹

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.³⁸⁰

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

- 16-9** Subject to Recommendation 16-10, the model legislation should provide that:

³⁷⁷ See [16.103]–[16.105] above.

³⁷⁸ See [16.112]–[16.115] above.

³⁷⁹ See [16.131]–[16.134] above.

³⁸⁰ See [16.144] above.

- (a) a personal representative's right to prefer creditors and a personal representative's right of retainer are abolished;³⁸¹ and
- (b) a personal representative:³⁸²
 - (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).³⁸³

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

381 See [16.161] above.

382 See [16.168] above.

383 See [16.180]–[16.182] above.

Chapter 17

Payment of debts in a solvent estate

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THE ORDER OF APPLICATION OF ASSETS

Introduction

17.1 Where an estate is solvent, there are sufficient assets in the estate to pay all debts, liabilities, funeral and testamentary expenses in full. Nevertheless, the order in which assets are applied towards the payment of these debts may have the effect that the legacies and devises³⁸⁴ made to some beneficiaries are reduced or abate as a result of the requirement to pay debts out of property the subject of the particular legacy or devise.³⁸⁵

The question is, out of which benefits left to beneficiaries must the debts be paid? The law answers this question by defining classes of assets applicable for the payment of debts in order. Assets in class 1 should first be applied, then assets in class 2 etc.

17.2 In all Australian jurisdictions except South Australia and Western Australia, the order of application of assets is prescribed by the administration legislation of the particular jurisdiction.³⁸⁶

17.3 In South Australia and Western Australia, the legislation does not prescribe an order for the application of assets. In those two jurisdictions, the applicable order is what is often described as the ‘old’ order of application of assets.

The ‘old’ order of application of assets

17.4 The old order of application of assets developed in a piecemeal fashion. It reflected attempts by the equity courts to ensure that realty could be used to pay debts.³⁸⁷ This order recognised seven classes of assets for the payment of debts. The classes of assets, which were to be applied in descending order, were:³⁸⁸

Class 1 Personalty not specifically bequeathed, the executor retaining a fund sufficient for the payment of pecuniary legacies.³⁸⁹

384 The various types of legacies and devises are explained at [18.1]–[18.10] below.

385 AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [11.40].

386 See [17.10]–[17.33] below.

387 At common law, realty did not vest in the personal representative. It vested directly in the devisee and did not generally constitute assets in the hands of the executor for the payment of debts: RA Woodman, *Administration of Assets* (2nd ed, 1978) 14. The vesting of property is considered in Chapter 10 of this Report.

388 *Calcino v Fletcher* [1969] Qd R 8, 22–3 (Hoare J). See also the discussion of these classes in RA Woodman, *Administration of Assets* (2nd ed, 1978) 13–25.

389 The payment of pecuniary legacies is considered in Chapter 18 of this Report.

- Class 2 Realty specifically appropriated for or devised in trust for (and not merely charged with) the payment of debts.
- Class 3 Realty that descended to the heir (that is, realty undisposed of by the will, which passed to the next of kin on intestacy³⁹⁰).
- Class 4 Realty devised, whether specifically or by way of residue and charged with the payment of debts, and personalty specifically bequeathed and charged with the payment of debts.
- Class 5 The fund, if any, retained to meet general pecuniary legacies.
- Class 6 Devises of realty³⁹¹ and specific, including secured demonstrative, legacies.
- Class 7 Property (realty and personalty) the subject of a general power of appointment exercised expressly by the testator.

17.5 Under this order, personalty was the primary fund for the payment of debts, with realty occupying a privileged position. Class 1 was not confined to personalty that was the subject of a residuary disposition. It also included personalty undisposed of by the will, including a lapsed share of a residuary disposition of personalty,³⁹² which passed to the intestacy beneficiaries.

17.6 In addition, Class 1 included personalty the subject of a general power of appointment where the power was exercised not by a specific appointment in the will, but by the operation of a residuary disposition in the will.³⁹³ As Lee explains:³⁹⁴

Where such power is exercised by implication of law ... it appears that any person benefiting thereunder ranks equally with those beneficiaries who take under the provisions in the will by virtue of which the power is impliedly exercised. So if the power is exercised impliedly by way of a general gift of realty or personalty, the realty or personalty impliedly appointed will share with the realty or personalty the subject of the gift the burden of paying any debts which must be paid out of that fund. (notes omitted)

³⁹⁰ RA Woodman, *Administration of Assets* (2nd ed, 1978) 20.

³⁹¹ Both specific and residuary devises of realty were included in this class: *Lancefield v Iggulden* (1874) LR 10 Ch App 136; *Re Forsyth* (1929) 29 SR (NSW) 411. Consequently, where property in this class was required for the payment of debts, specifically bequeathed personalty, specifically devised realty and realty devised by a residuary disposition contributed rateably: *Jackson v Pease* (1874) LR 19 Eq 96.

³⁹² *Trethewy v Helyar* (1876) 4 Ch D 53; *Fenton v Wills* (1877) 7 Ch D 33; *Re Kempthorne* [1930] 1 Ch 268, 298 (Lawrence LJ), commenting on the scope of Class 1 under the old order of application of assets.

³⁹³ *Re Hartley* [1900] 1 Ch 152. It is common for legislation to include provisions to facilitate the exercise of a general power of appointment. See [17.85] below. Provisions of this kind have the effect that, where a testator has a general power of appointment in respect of property that is exercisable by will, a residuary disposition in the will operates as an execution of the power. A similar provision has been recommended by the National Committee: see *Wills Report* (1997), Draft Wills Bill 1997 cl 35.

³⁹⁴ WA Lee, *Manual of Queensland Succession Law* (1st ed, 1975) § 107.

17.7 On this basis, where a general power of appointment with respect to realty was executed by the operation of a residuary devise, the realty so appointed would fall within Class 6.³⁹⁵ Class 7 was confined to property specifically appointed by the will, and not appointed by operation of a residuary devise.

17.8 The order of application of assets could be varied by the expression in the will of a contrary intention by the testator, but it was necessary for the expression to be made in very clear terms.³⁹⁶ For example, the fact that a testator charged his or her realty with the payment of debts was not a sufficient expression of a contrary intention to displace the general personal estate as the primary fund for the payment of debts. It was necessary to find by express words or necessary implication not only that the realty was charged, but also that the personalty was exonerated.³⁹⁷

17.9 As noted above, the old order of application of assets still applies in South Australia and Western Australia.

The existing statutory orders for the application of assets

17.10 The statutory orders that apply in the ACT, New South Wales, the Northern Territory and Tasmania are based on the order introduced in England by the *Administration of Estates Act 1925* (UK).³⁹⁸ Although the Victorian statutory order was also initially based on the English statutory order,³⁹⁹ the Victorian legislation was subsequently amended, with the result that it now makes some important departures from the English statutory order. In Queensland, a different approach has been taken altogether.

17.11 Although there are considerable differences among the statutory orders that apply in the various jurisdictions, they all abolish the old preference for making personalty primarily liable for the payment of debts. Within each class, realty is placed on the same footing as personalty.

17.12 The legislation in each jurisdiction provides that the statutory order may be varied by the deceased person's will.⁴⁰⁰

395 See note 391 above.

396 *Calcino v Fletcher* [1969] Qd R 8, 22 (Hoare J).

397 *Re Banks* [1905] 1 Ch 547, 549 (Buckley J).

398 *Administration of Estates Act 1925* (UK) s 34, sch 1 pt 2.

399 *Administration and Probate Act 1928* (Vic) s 34, sch 2 pt 2.

400 *Administration and Probate Act 1929* (ACT) s 41C(1); *Probate and Administration Act 1898* (NSW) s 46C(2); *Administration and Probate Act* (NT) s 57(1); *Succession Act 1981* (Qld) s 59(3); *Administration and Probate Act 1935* (Tas) s 34(3); *Administration and Probate Act 1958* (Vic) s 39(2).

Australian Capital Territory, New South Wales, Northern Territory, Tasmania

17.13 The statutory order in Tasmania is virtually identical to the English statutory order.⁴⁰¹ Under the Tasmanian legislation, property is applied in the following order:

- Class 1 Property of the deceased, undisposed of by will subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.
- Class 2 Property of the deceased not specifically devised or bequeathed, but included (either by a specific or general description) in a residuary gift,⁴⁰² subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.
- Class 3 Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.
- Class 4 Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for, the payment of debts.
- Class 5 The fund, if any, retained to meet pecuniary legacies.
- Class 6 Property specifically devised or bequeathed, rateably according to value.
- Class 7 Property appointed by will under a general power, rateably according to value.

17.14 The statutory orders prescribed in the ACT, New South Wales and Northern Territory legislation reproduce (with minor variations in expression) Classes 1 to 6 of the Tasmanian order, but omit what appears in the Tasmanian statutory order as Class 7.⁴⁰³

17.15 The omission of Class 7 from the ACT, New South Wales and Northern Territory statutory orders does not mean that in these jurisdictions property appointed by will in exercise of a general power of appointment may not be used for the payment of debts. On the contrary, the legislation in these

⁴⁰¹ *Administration and Probate Act 1935* (Tas) s 34(3), sch 2 pt 2.

⁴⁰² A gift of 'all my real estate' has been held to be a residuary gift for the purpose of Class 2: *Re Wilson* [1967] 1 Ch 53, 69–70 (Pennycuik J).

⁴⁰³ *Administration and Probate Act 1929* (ACT) s 41C(1), sch 4 pt 4.1; *Probate and Administration Act 1898* (NSW) s 46C(2), sch 3 pt 2; *Administration and Probate Act* (NT) s 57(1), sch 4 pt 1.

jurisdictions expressly provides that such property is assets for the payment of debts.⁴⁰⁴

17.16 A commentator on the New South Wales legislation has suggested that, as a result of the omission of Class 7 from the statutory order in that State, the appointed property 'comes within the order of assets according to the manner of disposition'.⁴⁰⁵ On that basis, where a general power is exercised by a residuary disposition in a will, the appointed property falls within Class 2. On the other hand, where property is specifically appointed by will, it falls within Class 6, 'and is not deferred to the very last as an equitable asset'.⁴⁰⁶ A similar argument can be made in relation to the legislation in the Territories.

17.17 The statutory orders that apply in the ACT, New South Wales, the Northern Territory and Tasmania — like the English statutory order on which they are based — made several important changes to the order in which property is applied towards the payment of debts:

- Property that would have been in Class 1 of the old order (residuary personalty and personalty undisposed of by will) is now split between Classes 1 and 2 of the statutory orders, with property undisposed of by will being used before property the subject of a residuary disposition.
- Realty undisposed of by will, which was found in Class 3 of the old order, is absorbed into Class 1 of the statutory orders.
- Realty the subject of a residuary devise, which was found in Class 6 of the old order, is found in Class 2 of the statutory orders.

17.18 In an important respect, however, the statutory orders in these jurisdictions still follow the old order. Property undisposed of by will and property the subject of a residuary disposition are still applied ahead of property that is appropriated for, or charged with, the payment of debts. Although it might be thought that the appropriation of property for the payment of debts, or the charging of property with the payment of debts, evinced an intention on the part of the testator that such property should be used primarily for the payment of debts, property the subject of such dispositions appears as Classes 3 and 4 respectively of the statutory orders in these jurisdictions.

Victoria

17.19 As outlined earlier, the Victorian statutory order was also initially based on the English statutory order. However, in 1933, significant changes were

⁴⁰⁴ See [15.12] above.

⁴⁰⁵ RA Woodman, *Administration of Assets* (2nd ed, 1978) 25, 81.

⁴⁰⁶ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 388.

made to the Victorian order.⁴⁰⁷ The new order that resulted from the 1933 amendments was later reproduced in the *Administration and Probate Act 1958* (Vic).⁴⁰⁸

17.20 The Victorian statutory order makes a significant departure from the Australian statutory orders that are based on the English statutory order.⁴⁰⁹ Whereas property appropriated for, and property charged with, the payment of debts is found in Classes 3 and 4 respectively of the other statutory orders, in Victoria, those types of property have been moved up within the statutory order and are found in Classes 2 and 3. As a result, property appropriated for, and property charged with, the payment of debts is applied towards the payment of debts ahead of property comprising the residuary estate, which is found in Class 4. The Victorian order is as follows:

- | | |
|---------|---|
| Class 1 | Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies. |
| Class 2 | Property of the deceased specifically appropriated or devised or bequeathed or directed to be sold (either by a specific or general description), for the payment of debts. |
| Class 3 | Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for, the payment of debts. |
| Class 4 | Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid. |
| Class 5 | The fund, if any, retained to meet pecuniary legacies. |
| Class 6 | Property specifically devised or bequeathed, rateably according to value. |
| Class 7 | Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value. |

⁴⁰⁷ *Statute Law Revision Act 1933* (Vic) s 2, sch, which amended pt 2 of sch 2 of the *Administration and Probate Act 1928* (Vic).

⁴⁰⁸ *Administration and Probate Act 1958* (Vic) s 39(2), sch 2 pt 2.

⁴⁰⁹ The statutory orders that apply in the ACT, New South Wales, the Northern Territory and Tasmania are considered at [17.13]–[17.18] above.

17.21 A commentator on the Victorian legislation has suggested that, by making property the subject of a residuary gift (Class 4) liable for the satisfaction of debts only after property appropriated for, or charged with, the payment of debts (Classes 2 and 3), the Victorian statutory order gives greater weight to the testator's intentions:⁴¹⁰

The Legislature quite properly intended to give greater weight to the clearly expressed intentions of testators, and as a result eliminated the difficulties flowing from Classes 3 and 4 of the English and New South Wales legislation in their relationship with Class 2.

17.22 Despite this advance, the same commentator has suggested that the reforms in Victoria did not go far enough, as there is still a difficulty where 'assets are either appropriated for, or charged with, the payment of debts, and there is a partial intestacy'.⁴¹¹ The Victorian statutory order is criticised on the basis that:⁴¹²

On the one hand, the Victorian legislation has tended to give greater weight to the expressed intentions of testators, by placing assets comprised in a residuary gift in the fourth class; on the other hand, Classes 2 and 3 can only be reconciled with Class 1, in the same will, if an appropriation of property for the payment of debts, or a charge of debts upon property, does not, per se, constitute a provision in the will which operates to exclude the statutory order of application of assets.

Queensland

17.23 Unlike the statutory orders that apply in the other Australian jurisdictions, the statutory order prescribed by the *Succession Act 1981* (Qld) was not modelled on the English statutory order. In its 1978 Report, the Queensland Law Reform Commission suggested that the reforms made by the *Administration of Estates Act 1925* (UK) in this area of the law had not worked well and had produced much litigation.⁴¹³

17.24 The Queensland statutory order reflected an entirely new approach. Significantly, it reduced the number of classes from seven to four, and, like the Victorian statutory order discussed above, changed the order in which property appropriated for, or charged with, the payment of debts is applied relative to residuary property.

410 RA Woodman, *Administration of Assets* (2nd ed, 1978) 142.

411 Ibid.

412 Ibid 142–3.

413 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 39. See the discussion of the problems arising in relation to Classes 3 and 4 of the English statutory order at [17.57]–[17.68] below. It has been observed that the English statutory order for the payment of debts 'seems to have created as many problems as it has solved': El Sykes, *Payment of Debts by Executors in Queensland* (1955) 15.

17.25 Section 59(1) of the *Succession Act 1981* (Qld) provides for the following classes:⁴¹⁴

- Class 1 Property specifically appropriated devised or bequeathed (either by a specific or general description) for the payment of debts; and property charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for, the payment of debts.
- Class 2 Property comprising the residuary estate⁴¹⁵ of the deceased, including property in respect of which any residuary disposition operates as the execution of a general power of appointment.
- Class 3 Property specifically devised or bequeathed, including property specifically appointed under a general power of appointment and any legacy charged on property so devised bequeathed or appointed.
- Class 4 *Donationes mortis causa*.⁴¹⁶

17.26 Class 1 of the Queensland statutory order abolishes the distinction that is found in all other Australian jurisdictions between, on the one hand, property appropriated, devised or bequeathed for the payment of debts and, on the other hand, property merely charged with the payment of debts. It has the effect of combining in the one class property that is found in Classes 3 and 4 of the statutory orders in the ACT, New South Wales, the Northern Territory and Tasmania,⁴¹⁷ and property that is found in Classes 2 and 3 of the Victorian statutory order.⁴¹⁸

17.27 In suggesting this change, the Queensland Law Reform Commission in its 1978 Report explained:⁴¹⁹

we doubt whether any testator would really wish to make a distinction between a trust to pay debts and a charge to pay debts, or would intend, even if he did, that the former should be applicable for the payment of debts before the latter.

⁴¹⁴ The Queensland Law Reform Commission in its 1978 Report saw no reason to place the rules in a schedule to the Act, and preferred to set them out in the section itself: Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 41.

⁴¹⁵ See the discussion of s 55 of the *Succession Act 1981* (Qld) at [17.29]–[17.30] below.

⁴¹⁶ *Donationes mortis causa* are gifts made in anticipation of the donor's death and are discussed at [17.91]–[17.103] below.

⁴¹⁷ See [17.13] above.

⁴¹⁸ See [17.20] above.

⁴¹⁹ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 41.

17.28 The Commission also referred to difficulties that had ‘been encountered in deciding whether a particular expression gave rise to a trust or a charge’ and suggested that ‘by merging the two classes unnecessary litigation may be avoided’.⁴²⁰

17.29 Class 2 of the Queensland statutory order, by means of an enlarged definition of ‘residuary estate’, merges into the one class property the subject of a residuary disposition and property that is undisposed of by will. Section 55 of the *Succession Act 1981* (Qld) provides:

55 Definition for div 2

In this division—

residuary estate means—

- (a) property of the deceased that is not effectively disposed of by his or her will; and
- (b) property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary disposition.

17.30 As regards personalty, this was the law in Queensland even before the enactment of the *Succession Act 1981* (Qld). At that time, the old order of application of assets applied, Class 1 of which included both personalty the subject of a residuary disposition and personalty undisposed of by will.⁴²¹

17.31 The Queensland statutory order also adopts a simplified approach in relation to the application of property appointed by will in exercise of a general power of appointment. It implements the recommendation made by the Queensland Law Reform Commission in its 1978 Report that:⁴²²

if property the subject of a general power of appointment is appointed by the residuary clause, it should be available for the payment of debts with other property the subject of the same clause; and that if a general power is exercised by specific gift then the fund should be available for the payment of debts with other property the subject of the specific gift. In this way we reduce the number of classes and the possibility of litigation even further.

17.32 Classes 2 and 3 of the classes listed in section 59(1) of the *Succession Act 1981* (Qld) are drafted in accordance with these principles. The effect of section 33J of the Act is that a residuary provision in a will impliedly exercises a general power of appointment held by a testator with respect to property.⁴²³

⁴²⁰ Ibid. A similar view is expressed in RA Woodman, *Administration of Assets* (2nd ed, 1978) 169.

⁴²¹ See [17.4] above.

⁴²² Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 43.

⁴²³ *Succession Act 1981* (Qld) s 33J is considered further at [17.85]–[17.88] below. Until the commencement of the *Succession Amendment Act 2006* (Qld), the relevant provision was s 28(d) of the *Succession Act 1981* (Qld). See also *Wills Report* (1997), Draft Wills Bill 1997 cl 35, which is to the same effect.

Property appointed by the operation of a residuary provision is therefore placed in the same class as other property that is disposed of by the residuary disposition. On the other hand, property that is specifically, rather than impliedly, appointed is placed in the same class as other property specifically given; its use is not deferred until property the subject of other specific dispositions has first been exhausted.

17.33 The Queensland statutory order does not include as a class the fund retained for the payment of pecuniary legacies. As observed by the Queensland Law Reform Commission in its 1978 Report, the fund for the payment of pecuniary legacies is in most legislation inserted as a class before what is Class 3 in the Queensland order — that is, immediately before property specifically devised or bequeathed.⁴²⁴ In Queensland, pecuniary legacies are dealt with in section 60 of the *Succession Act 1981* (Qld). The effect of that provision is that, in Queensland, the fund for the payment of pecuniary legacies is drawn from the residue after the payment of debts out of the residue. It was therefore unnecessary to include a fund for the payment of pecuniary legacies as a separate class.⁴²⁵

ISSUES FOR CONSIDERATION

17.34 In the Discussion Paper, the National Committee considered whether it might be possible to achieve a much simpler and more rational order for the application of assets towards the payment of debts.⁴²⁶ The rationalisation of the classes of assets prescribed in the various statutory orders may lead to greater certainty in relation to the application of assets, and may reduce opportunities for litigation of the kind to which the English statutory order, in particular, has given rise.⁴²⁷ The shorter the list of classes of assets for the payment of debts, the easier it should be to understand the effect of a direction contained in a will to pay debts. The rationalisation of the classes also provides an opportunity to address some of the objections that may be made in relation to the existing statutory orders.

17.35 An examination of the various classes of property for the payment of debts in a solvent estate gives rise to the following issues:

- whether the model statutory order should provide that assets comprising the residuary estate should be applied towards the payment of debts before assets that are the subject of specific gifts;

⁴²⁴ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 42.

⁴²⁵ See the discussion of s 60 of the *Succession Act 1981* (Qld) at [18.21]–[18.24] below.

⁴²⁶ *Administration of Estates Discussion Paper* (1999) QLRC 208–9; NSWLRC [15.56]–[15.60].

⁴²⁷ See [17.57]–[17.62] below.

- whether assets undisposed of by will should be included in the residuary estate;
- whether the model statutory order should refer to property appropriated for the payment of debts and property charged with the payment of debts and, if so, whether such property should be combined in the one class;
- the order in which property appointed by will in the exercise of a general power of appointment should be applied towards the payment of debts; and
- whether the model statutory order should include as a class property the subject of a *donatio mortis causa*.⁴²⁸

17.36 These issues are discussed in turn below.

APPLICATION OF THE RESIDUARY ESTATE BEFORE ASSETS THE SUBJECT OF SPECIFIC GIFTS

Discussion Paper

17.37 In the Discussion Paper, the National Committee observed that there can really be only two kinds of assets from which the debts of the deceased can be paid — assets referred to in the will and assets not referred to specifically in the will (the latter usually being described as the residuary estate of the deceased).⁴²⁹ It acknowledged⁴³⁰ that, as between residuary assets and assets specifically bequeathed or devised, the law has always preferred a rule that debts should be paid out of residuary assets ahead of specific assets.⁴³¹

The policy of the law is to allow comparative immunity from creditors to the beneficiaries of specific devises and legacies, as against beneficiaries of residue and general legatees.

17.38 Consequently, the National Committee proposed that, in a solvent estate, assets should be applied towards the payment of debts in the following order:⁴³²

- Class 1 Assets forming part of the residuary estate (including assets that have been specifically referred to in a will of the deceased and are the subject of a disposition that fails to have effect).

⁴²⁸ For an explanation of *donationes mortis causa* see [17.91]–[17.92] below.

⁴²⁹ *Administration of Estates Discussion Paper* (1999) QLRC 209; NSWLRC [15.58].

⁴³⁰ *Ibid*, QLRC 209; NSWLRC [15.59].

⁴³¹ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [11.90].

⁴³² *Administration of Estates Discussion Paper* (1999) QLRC 210; NSWLRC 301 (Proposal 74).

- Class 2 Specific assets (that is, assets specifically referred to in a will and the subject of a disposition that has effect).

Submissions

17.39 All the submissions that addressed this issue agreed with the National Committee's proposal.⁴³³ Both the Queensland Law Society and the New South Wales Law Society commented that their support for the proposal was on the basis that this order of application of assets would be subject to an expression of a contrary intention by the testator in his or her will.⁴³⁴

The National Committee's view

17.40 In the National Committee's view, assets comprising the residuary estate should be applied towards the payment of debts before assets that are the subject of specific dispositions.

17.41 The feasibility of having only two statutory classes for the payment of debts ultimately depends on whether some of the classes within the existing statutory orders can satisfactorily be merged or removed altogether. These issues are considered below.

RESIDUARY PROPERTY AND PROPERTY NOT DISPOSED OF BY WILL

Background

17.42 With the exception of the Queensland statutory order, the statutory orders that apply in the other Australian jurisdictions all provide that intestacy beneficiaries are to bear the burden of debts ahead of residuary beneficiaries. In relation to personalty, this distinction was not made under the old order of application of assets, where personalty of both kinds was found in Class 1.⁴³⁵

17.43 In Queensland, as a result of the definition of 'residuary estate' in section 55 of the *Succession Act 1981* (Qld),⁴³⁶ property that is undisposed of by will is included in Class 2 as part of the residuary estate.

17.44 In its 1978 Report, the Queensland Law Reform Commission suggested that, in view of the provision it was proposing in order to avoid the incidence of partial intestacies of residue, the two classes of beneficiaries would

⁴³³ Submissions 1, 8, 11, 12, 14, 15.

⁴³⁴ Submissions 8, 15. The issue of the expression of a contrary intention is considered at [17.114]–[17.130] below.

⁴³⁵ See [17.4]–[17.5] above in relation to the old order of application of assets. The distinction between residuary property and property not disposed of by will was first made by the *Administration of Estates Act 1925* (UK).

⁴³⁶ See [17.29] above.

rarely exist side by side. It therefore saw ‘no particular need to choose between intestacy beneficiaries and beneficiaries under residuary provisions’.⁴³⁷ That recommendation was implemented by the enactment of section 29(b) of the *Succession Act 1981* (Qld), which originally provided:⁴³⁸

29 Construction of residuary dispositions

Unless a contrary intention appears by the will—

(a) ...

(b) subject to this Act, where a residuary disposition in fractional parts fails as to any of such parts for any reason that part shall pass to that part of the residuary disposition which does not fail and if there is more than one part which does not fail to all of those parts proportionately.

17.45 Before this provision was enacted, if the residuary estate was left in equal shares to two beneficiaries and one of the beneficiaries died before the testator in circumstances where the anti-lapse provisions did not apply, the testator died intestate as to the half share of the residuary estate.⁴³⁹

17.46 In its 1978 Report, the Queensland Law Reform Commission also expressed the view that an intestacy beneficiary should not necessarily have to pay debts ahead of a residuary beneficiary who would be more remote from the testator, in terms of relationship, than the intestacy beneficiary.⁴⁴⁰

17.47 In its Wills Report, the National Committee recommended a provision to the same effect as section 29(1)(b) of the *Succession Act 1981* (Qld), as it appeared before its repeal in 2006,⁴⁴¹ and provisions to that effect have since been enacted in New South Wales, the Northern Territory, Tasmania and Victoria.⁴⁴² In view of the National Committee’s recommendation in the Wills Report, there may be little point in maintaining the difficult distinction between assets undisposed of by the will and assets forming part of a residuary gift.

Discussion Paper

17.48 In the Discussion Paper, the National Committee expressed the view that there is no need to distinguish between assets undisposed of by will and

⁴³⁷ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 40.

⁴³⁸ *Succession Act 1981* (Qld) s 29(b) was amended in 1997, becoming s 29(1)(b), so that it applied to a disposition of all, or the residue, of the testator’s estate (rather than just to a disposition of the residue). It was repealed in 2006, when it was replaced by s 33P of the *Succession Act 1981* (Qld).

⁴³⁹ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 16.

⁴⁴⁰ Ibid 40.

⁴⁴¹ See *Wills Report* (1997) QLRC 91–3; NSWLRC [6.97]–[6.105] and Draft Wills Bill 1997 cl 41(2), (3).

⁴⁴² *Succession Act 2006* (NSW) s 42(2), (3); *Wills Act* (NT) s 41(2); *Succession Act 1981* (Qld) s 33P; *Wills Act 2008* (Tas) s 56(2); *Wills Act 1997* (Vic) s 46(3).

assets forming part of the residuary estate.⁴⁴³ The National Committee therefore proposed that the term ‘residuary estate’ should have the same meaning as is given to that term by section 55 of the *Succession Act 1981* (Qld), so that it includes property not effectively disposed of by will.⁴⁴⁴

Submissions

17.49 The proposal to adopt the definition of ‘residuary estate’ found in section 55 of the *Succession Act 1981* (Qld) was supported by all the respondents who addressed this issue — namely, the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁴⁴⁵

17.50 The submissions made on behalf of the Public Trustee of New South Wales and the New South Wales Law Society based their support for the adoption of that definition on the need for uniformity on the issue. They did not express support for the underlying principle that a residuary beneficiary should not, as far as the payment of debts is concerned, be privileged over an intestacy beneficiary.⁴⁴⁶

The National Committee’s view

17.51 As explained above, the Draft Wills Bill 1997 included in the National Committee’s Wills Report included a provision that has the effect that, if a gift of part of the residuary estate fails, that part is shared proportionately among the other beneficiaries of the residue.⁴⁴⁷ Having regard to that recommendation, it is unlikely that the situation would arise where there were both residuary and intestacy beneficiaries. Consequently, the National Committee considers there to be little point in retaining, as separate classes within the model order, both property undisposed of by will and the residuary estate.

17.52 The National Committee is therefore of the view that the model order should follow the Queensland legislation where the two types of property are merged into the one class. It should therefore include a provision to the effect of section 55 of the *Succession Act 1981* (Qld), and provide expressly that a reference in the model statutory order to the residuary estate of a deceased person includes any property that is not effectively disposed of by the deceased person’s will.

443 *Administration of Estates Discussion Paper* (1999) QLRC 207; NSWLRC [15.54].

444 *Ibid*, QLRC 207; NSWLRC 297 (Proposal 73).

445 Submissions 1, 8, 11, 12, 14, 15.

446 Submissions 11, 15.

447 See [17.44]–[17.47] above.

17.53 The National Committee notes that section 55(b) of the *Succession Act 1981* (Qld) provides that the residuary estate of a deceased person also includes:

property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary disposition. (emphasis added).

17.54 As a general proposition, the National Committee is of the view that, where possible, the model legislation should avoid references to property ‘devised or bequeathed’. Those terms refer specifically to gifts of realty and personalty, whereas that distinction is no longer relevant to the modern order of application of assets.

17.55 Accordingly, that part of the model provision that is based on section 55(b) of the *Succession Act 1981* (Qld) should instead refer to property not specifically given by will, but included, either by a specific or general description, in a residuary disposition.

17.56 The definition proposed above is premised on the deceased leaving a will, even if part or all of the deceased’s estate is not effectively disposed of by the will. In the case of a person who dies intestate — that is, without leaving a will — the residuary estate should be defined to mean the whole of the deceased’s estate.⁴⁴⁸

PROPERTY APPROPRIATED, DEVISED OR BEQUEATHED FOR THE PAYMENT OF DEBTS AND PROPERTY CHARGED WITH THE PAYMENT OF DEBTS

Background

17.57 Although the various statutory orders are all expressed to be subject to the expression of a contrary intention in the will, they all include classes that themselves reflect an expression of the testator’s intention — namely, property appropriated, devised or bequeathed⁴⁴⁹ for the payment of debts and property charged with the payment of debts. In the ACT, New South Wales, the Northern Territory and Tasmania, these types of property are found in Classes 3 and 4. In Victoria, they are found in Classes 2 and 3. In Queensland, they are merged in Class 1.

17.58 Arguably a direction that property is appropriated for the payment of debts, or is charged with the payment of debts, can be said to reflect an expression of the testator’s intention. In jurisdictions other than Queensland,

⁴⁴⁸ This means that there would be one class of property, namely Class 2 property, that would be applied towards the payment of debts.

⁴⁴⁹ In this chapter, a reference to property ‘appropriated for the payment of debts’ is intended to refer to property ‘appropriated, devised or bequeathed for the payment of debts’.

the location within the statutory order of property the subject of these kinds of directions has the potential to create conflicting pressures on the interpretation of testamentary clauses.⁴⁵⁰

17.59 For example, in *Re Gordon*,⁴⁵¹ the testator gave her executors £50 in trust to pay her debts and funeral and testamentary expenses, and to pay any balance remaining to a particular society. As the will contained no residuary disposition, the testator died intestate as to her residuary estate. The question arose as to which part of her estate should be liable for the debts. Notwithstanding the creation of a fund for the payment of debts, the Court held that the undisposed of estate was the primary fund for the payment of debts:⁴⁵²

In the present case it is clear that the testatrix has either bequeathed property for the payment of her debts or has bequeathed property charged with the payment of debts. She has made no other disposition of her property. ... Where a solvent testator has made by his will a disposition of property which falls either within para 3 of the Schedule or within para 4, and has made no other disposition of his property and has not otherwise indicated his intentions, there seem to me to be no grounds for a conclusion that such a testator has intended to vary or interfere with or alter the order in which the statute has said that assets are to be applied for the payment of debts and funeral and testamentary expenses.

17.60 A similar approach was taken in *Fuller v Fuller*,⁴⁵³ where a testator had directed that certain property be sold and, after payment of her outstanding debts, be used to pay various legacies. Maughan AJ held that the general personal estate was primarily liable for the payment of the debts,⁴⁵⁴ commenting that, if the provision in the will had the effect of making the proceeds of the sale of the property primarily liable for the payment of the debts, Classes 3 and 4 of the statutory order 'would be nugatory'.⁴⁵⁵

17.61 However, there is a substantial body of cases in which the courts have taken a different approach, and have held that, where a testator has appropriated property for, or charged it with, the payment of debts, that property is the primary fund for the payment of debts.⁴⁵⁶ In *Re Williams*,⁴⁵⁷ which

⁴⁵⁰ In *Nield v Fowler* [1961] NSW 85, 90 the Full Court of the Supreme Court of New South Wales (Owen, Clancy and Walsh JJ) referred to the difficulties in determining the operation of Classes 3 and 4 of the New South Wales statutory order.

⁴⁵¹ [1940] Ch 769.

⁴⁵² Ibid 775–6 (Bennett J).

⁴⁵³ (1936) 36 SR (NSW) 600.

⁴⁵⁴ Ibid 606.

⁴⁵⁵ Ibid 605.

⁴⁵⁶ See, for example, *Re Littlewood* [1931] 1 Ch 443; *Re James* [1947] Ch 256; *Re Williams* [1950] ALR 751, 757 (Dean J); *Re Meldrum* [1952] Ch 208; *Permanent Trustee Co of NSW Ltd v Temple* (1956) 57 SR (NSW) 301, 305 (Hardie J); *Re Jaeger* [1961] VR 14, 18–19 (Herring CJ).

⁴⁵⁷ [1950] ALR 751.

concerned the Victorian statutory order, the Court explained how effect was to be given to such a direction.⁴⁵⁸

It seems to me more useful to refer to sec 34(2) which makes the Schedule apply 'subject to the provisions of the will.' This requires that the will be first construed in order to discover its meaning and effect, and if [the] testator has dealt with the incidence of debts etc then there is no need to refer to the Schedule at all. If the present will be first construed, and if it be construed in the manner I have indicated, then there is no room for the application of the Schedule. ... It is not necessary to attempt to solve the conundrum which has hitherto remained unsolved of what words can answer the description of our present para (2) and (3) and not override or vary the Schedule order.

17.62 A commentator on the administration of assets has described the conflict that arises in these jurisdictions in this way:⁴⁵⁹

the principal difficulty in regard to both Classes 3 and 4 is found in the fact that the very words which are necessary to bring assets within either class seem quite sufficient to vary the statutory orders, so that there is very little justification for the inclusion of these classes in the order.

17.63 This difficulty does not arise in relation to the Queensland statutory order, since property appropriated for, or charged with, the payment of debts is found in Class 1. Nevertheless, the question remains as to whether, if the model statutory order for the payment of debts is to be subject to a contrary intention expressed by the testator (as is the case in all Australian jurisdictions⁴⁶⁰), there is a continuing need to make express reference within that order to property appropriated for, or charged with, the payment of debts.

17.64 This issue was considered by the Queensland Law Reform Commission in its 1978 Report, where it explained its reasons for the recommendation that property appropriated for, or charged with, the payment of debts should constitute Class 1 of the statutory order:⁴⁶¹

Whilst it is arguable that there is no need to include property of this description in the classes at all, since it is provided ... that the will may vary the order ... we, nevertheless, recommend that it be retained as a class both as a statutory expression of the view we take and to provide personal representatives with clear guidance as to the order in which such property should be used. Otherwise the executor would have himself to consider whether a direction or trust to pay debts out of property placed that property in a class of its own and where that class was in relation to the other classes.

17.65 Further, suppose a testator in one clause of a will gave property charged with the payment of debts generally, and then in a subsequent clause of that will, or in a later codicil, gave property on trust to pay debts generally. A

458 Ibid 757 (Dean J).

459 RA Woodman, *Administration of Assets* (2nd ed, 1978) 60.

460 See [17.8], [17.12] above.

461 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 42.

court might find it difficult to come to a conclusion that the property charged with the payment of debts should be used for that purpose ahead of the property, given later, on trust to pay debts. It might be argued that directions of this sort contained in a will should be complied with in the order in which they appear in the will. On the other hand, it might be argued that the old order should be applied, and that realty devised on trust for (and not merely charged with) the payment of debts should be applied first.⁴⁶²

17.66 Without an express provision, uncertainty is likely to result where a testator inserts both a provision appropriating property for the payment of debts and a provision charging property with the payment of debts.

17.67 The question then is whether the model legislation should provide that, in the absence of a contrary intention, property appropriated for the payment of debts should be used for that purpose ahead of property charged with the payment of debts. Alternatively, the model legislation could follow Class 1 of the Queensland statutory order, under which property appropriated for, and property charged with, the payment of debts are applied rateably.

17.68 The advantages of adopting Class 1 of the Queensland statutory order are twofold. Class 1 does not make an assumption about the testator's intention as to order, as the old order and the other statutory orders do. There is no cogent reason to suppose that, if a testator were to include both kinds of direction in a will, the intention is that property appropriated for the payment of debts should be used ahead of property charged with the payment of debts. Further, by combining property appropriated for the payment of debts and property charged with the payment of debts in the one class, the Queensland statutory order avoids disputes as to whether one direction created a trust and the other a charge, or vice versa.

Discussion Paper

17.69 In the Discussion Paper, the National Committee did not express a preliminary view on this issue. Instead, it sought submissions on whether, if the model legislation refers to only two classes of property to be applied for the payment of debts and that order is subject to the expression of a contrary intention, there is any need for the model legislation to provide for the situation where a will refers both to property appropriated for the payment of debts and to property charged with the payment of debts.⁴⁶³

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The old order of application of assets is set out at [17.4] above. Realty devised on trust for the payment of debts was found in Class 2 of that order.

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Administration of Estates Discussion Paper (1999) QLRC 218; NSWLRC 311.

Submissions

17.70 The ACT Law Society supported an express provision in the model legislation to deal with the situation where a will contains both types of dispositions, suggesting that it would provide greater certainty. In particular, it supported the position adopted in the Queensland legislation, where both types of property are applied rateably:⁴⁶⁴

It would be advisable to provide in legislation for a situation where the will refers both to dispositions of property on trust to pay debts and property charged with the payment of debts. This would avoid the question or possibility of litigation by different classes of beneficiaries and also avoid the necessity and cost of personal [representatives] applying to the Court for directions. The position adopted under the Queensland list in which property given on trust to pay debts and property given charged with the payment of debts are applied equally is preferable.

17.71 An academic expert in succession law supported the inclusion of an express provision. He commented:⁴⁶⁵

the rule, without a statute, is that property left on trust to pay debts is to be used before property subject to a charge for the payment of debts. Unless you change this rule it could easily resurrect itself in arguments about contrary intention.

17.72 Only the Public Trustee of New South Wales expressed the view that there was no need for the model legislation to provide for the situation where both types of disposition are made in a will.⁴⁶⁶

The National Committee's view

17.73 In the National Committee's view, Class 1 of the model statutory order should consist of the property presently constituting Class 1 of the Queensland statutory order. However, for the reason explained earlier in this chapter,⁴⁶⁷ the model order of application of assets should avoid the references to property 'devised or bequeathed', which currently appear in section 59(1) of the *Succession Act 1981* (Qld). Accordingly, Class 1 of the model order should be expressed to consist of:

- 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.

⁴⁶⁴ Submission 14.

⁴⁶⁵ Submission 12.

⁴⁶⁶ Submission 11.

⁴⁶⁷ See [17.54]–[17.55] above.

17.74 The model legislation should also make it clear that Class 1 property is created by the testator's will.⁴⁶⁸

17.75 The National Committee acknowledges that, if the model order did not include these types of property as a distinct class, a direction that property be appropriated for, or charged with, the payment of debts would almost certainly signify a contrary intention about the order of application of assets, with the result that such property would be applied before the residuary estate. However, the National Committee considers that the inclusion of a class consisting of property appropriated for the payment of debts and property charged with the payment of debts clarifies the position where a will contains both types of dispositions. The inclusion of such a class also provides guidance to personal representatives.

17.76 It follows that the residuary estate should constitute Class 2 of the model statutory order, while property the subject of a specific disposition, including any legacy charged on such property, should constitute Class 3. This is the position under section 59(1) of the *Succession Act 1981* (Qld).

17.77 Class 3 of the model order should also be expressed to refer to property specifically given by will, rather than to property specifically devised or bequeathed.

PROPERTY THE SUBJECT OF A GENERAL POWER OF APPOINTMENT THAT IS EXERCISED BY WILL

Background

17.78 In all jurisdictions, it appears to be the case that, where a general power of appointment is exercised by the operation of a residuary gift, the property is applied in the same order as other property that is disposed of as part of that gift.⁴⁶⁹

17.79 However, where the property is specifically appointed by will, the jurisdictions are divided as to how the property is applied towards the payment of debts.

17.80 In South Australia and Western Australia, where the old order applies, the property is found in Class 7 and is applied last, after property the subject of specific dispositions has been exhausted.⁴⁷⁰ That is also the position in

⁴⁶⁸ Property that is subject to a pre-existing charge when the testator dies does not thereby become Class 1 property. The liability of mortgaged or charged property to contribute to the payment of debts is considered separately at [17.145]–[17.237] below.

⁴⁶⁹ See [17.6]–[17.7], [17.15]–[17.16], [17.20], [17.31]–[17.32] above. Note, however, that, under the old order of application of assets, a residuary devise of realty fell within Class 6: see [17.4], [17.7] above.

⁴⁷⁰ See [17.4] above.

Tasmania and Victoria, where the property falls within Class 7 of the statutory orders that apply in those jurisdictions.⁴⁷¹

17.81 On the other hand, in the ACT, New South Wales and the Northern Territory, where the statutory orders do not include a reference to property the subject of a general power of appointment, it appears that property that is specifically appointed is applied rateably with other property that is specifically devised or bequeathed by the will.⁴⁷² In Queensland, this is also the position, since property specifically appointed under a general power of appointment is expressly included in Class 3, together with other specific dispositions.⁴⁷³

Discussion Paper

17.82 In the Discussion Paper, the National Committee expressed the view that there was no reason to depart from the Queensland statutory order in this respect, and sought submissions on whether property the subject of a general power of appointment should be included in the class within which it is impliedly or expressly exercised.⁴⁷⁴

Submissions

17.83 All the submissions that addressed this issue — the Bar Association of Queensland, the Queensland Law Society, an academic expert in succession law and the ACT Law Society — agreed with the approach taken in the Queensland statutory order.⁴⁷⁵

The National Committee's view

17.84 In the National Committee's view, the manner in which property appointed under a general power of appointment is treated under the Queensland statutory order⁴⁷⁶ is a significant improvement on the position in the other Australian jurisdictions. The model legislation should generally follow the Queensland statutory order in this respect.

17.85 However, the model legislation should clarify an ambiguity that presently exists in how Class 2 of the Queensland statutory order deals with dispositions in a will that operate as the exercise of a general power of appointment. Section 33J of the *Succession Act 1981* (Qld) provides that

⁴⁷¹ See [17.13], [17.20] above.

⁴⁷² See [17.13], [17.16] above.

⁴⁷³ See [17.25] above.

⁴⁷⁴ *Administration of Estates Discussion Paper* (1999) QLRC 214; NSWLRC [15.81].

⁴⁷⁵ Submissions 1, 8, 12, 14.

⁴⁷⁶ See [17.31]–[17.32] above.

certain types of dispositions in a will operate as an exercise of a general power of appointment:⁴⁷⁷

33J What a general disposition of property includes

- (1) A general disposition of all of the testator's property—
 - (a) includes any property over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (2) A general disposition of all of the testator's property of a particular description—
 - (a) includes any property of that description over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (3) A general disposition of the residue of the testator's property—
 - (a) includes any property over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (4) A general disposition of the residue of the testator's property of a particular description—
 - (a) includes any property of that description over which the testator has a general power of appointment exercisable by will; and
 - (b) operates as an exercise of the power of appointment.
- (5) Subsection (1), (2), (3) or (4) does not apply if a contrary intention appears in the will.

17.86 In the Queensland statutory order, Class 2 includes 'property in respect of which any residuary disposition operates as the execution of a general power of appointment'. That expression obviously includes a residuary disposition to which section 33J(3) or (4) of the *Succession Act 1981* (Qld) applies — for example, a disposition of 'my residuary estate' or 'my residuary real estate'.

17.87 However, it is not entirely clear whether that expression is broad enough to include a disposition to which section 33J(1) or (2) applies. In *Re Wilson*,⁴⁷⁸ it was held that a gift of 'all my real estate' was a residuary gift for the

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Similar provisions are found in all other Australian jurisdictions: see *Wills Act 1968* (ACT) s 26(2); *Succession Act 2006* (NSW) s 37; *Wills Act* (NT) s 35; *Wills Act 1936* (SA) s 30; *Wills Act 2008* (Tas) s 50; *Wills Act 1997* (Vic) s 41; *Wills Act 1970* (WA) s 26(1)(d).

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[1967] 1 Ch 53, 69–70 (Pennycuik J).

purpose of Class 2 of the English statutory order.⁴⁷⁹ On that view, a disposition to which section 33J(1) applied would constitute a residuary disposition and the property appointed by the disposition would fall within Class 2 of the Queensland statutory order. However, in *Re the Will of Harvey*,⁴⁸⁰ the Supreme Court of Queensland held that a disposition of 'the whole of my estate' was not a residuary disposition:⁴⁸¹

a residuary disposition is a general disposition of the balance of an estate following a prior disposition. My conclusion is based upon common usage rather than any special legal usage of the words. In the present case, there is no prior disposition, and therefore I conclude that there is no residuary disposition.

17.88 Although a general disposition of all of a testator's property (such as a disposition of 'the whole of my estate') or a general disposition of all of a testator's property of a particular description (such as a disposition of 'all my real property') operates, under section 33J(1) or (2) as an exercise of a relevant general power of appointment, if the particular disposition is held to constitute a general disposition, rather than a residuary disposition, the property appointed by the disposition will not fall within Class 2 of the Queensland statutory order.

17.89 The National Committee considers it desirable for the model statutory order to clarify this issue. Accordingly, Class 2 of the model order should not refer to 'property in respect of which any residuary disposition operates as the execution of a general power of appointment', but to 'any 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'. Individual jurisdictions, in enacting that provision, can then refer to their specific legislative provision that corresponds to section 33J.⁴⁸²

17.90 In accordance with the Queensland statutory order, property that is specifically appointed by will in the exercise of a general power of appointment should be placed in Class 3 with other specific dispositions.

DONATIONES MORTIS CAUSA

Background

17.91 A *donatio mortis causa* is a gift made in anticipation of the donor's death. It has 'some of the characteristics of a gift and some of the

479 See note 402 above.

480 [1990] 2 Qd R 508.

481 Ibid 511 (Dowsett J). This decision concerned s 29(b) of the *Succession Act 1981* (Qld), which was later replaced by s 33P.

482 See note 477 above.

characteristics of a legacy', but 'does not have to be executed in the manner prescribed for wills'.⁴⁸³

17.92 There are three essential requirements for a valid *donatio mortis causa*.⁴⁸⁴

(1) the gift must be made in contemplation of the donor's death, although not necessarily in expectation of death; (2) there must be delivery of the subject matter of the gift to the donee or a transfer of the means or part of the means of getting at the property, or, as has been said, the essential indicia of title; and (3) the gift must be conditional upon it taking effect on the death of the donor, being revocable until that event occurs.

17.93 *Donationes mortis causa* are included as the final class of assets (Class 4) of the Queensland statutory order.⁴⁸⁵ However, they are not conventionally listed in references to the old order of application of assets, and they do not form part of the statutory orders that apply in the other Australian jurisdictions or in England.

17.94 In recommending that *donationes mortis causa* be included as the fourth class of the Queensland statutory order, the Queensland Law Reform Commission expressed the view that property the subject of a *donatio mortis causa* has always been available for the payment of debts after all other assets have been exhausted.⁴⁸⁶

17.95 However, in an important respect, *donationes mortis causa* differ from the other types of property referred to in the various statutory orders. Where a *donatio mortis causa* is used to pay debts of the donor, it involves recovering the gift from the donee. This is necessary because the legal title to a chattel the subject of a *donatio mortis causa* does not vest in the personal representative of the deceased, but passes directly to the donee.⁴⁸⁷

483 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [2.160].

484 *Public Trustee v Bussell* (1993) 30 NSWLR 111, 115 (Cohen J).

485 The Queensland statutory order is set out at [17.25] above.

486 Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 42, referring to *Re Korvine's Trust* [1921] 1 Ch 343, 348 where Eve J observed that 'the subject matter of the donatio is liable to the donor's debts upon a deficiency of assets'. In its Family Provision Report, the National Committee recommended the adoption of provisions based on ss 21–29 of the *Family Provision Act 1982* (NSW), under which the court could designate certain property as part of the deceased's notional estate, and order that provision be made out of the notional estate so designated: *Family Provision Report* (1997) Ch 6. Provisions to that effect may assist in overcoming some of the inequities that may arise where, because a *donatio mortis causa* has taken property out of the estate, it is not possible, after the payment of debts, to make proper provision for an eligible person. Note that, when the *Succession Amendment (Family Provision) Act 2008* (NSW) commenced on 1 March 2009, the *Family Provision Act 1982* (NSW) was repealed. Sections 21–29 of the *Family Provision Act 1982* (NSW) were replaced by ss 74–90 of the *Succession Act 2006* (NSW).

487 *Re Korvine's Trust* [1921] 1 Ch 343, 348 where Eve J commented that, if the donor of a *donatio mortis causa* dies without revoking the gift, 'the donee's title is derived from the act of the donor in his lifetime and relates back to the date of that act'.

17.96 When the Law Reform Commission of Western Australia was reviewing the law in relation to the payment of debts in solvent estates, it considered whether it should follow the Queensland statutory order in respect of the inclusion of *donationes mortis causa*. Although the Western Australian Commission was of the view that the Queensland statutory order was 'fundamentally a good one, and preferable to all other existing models in jurisdictions comparable to Western Australia',⁴⁸⁸ it nevertheless recommended that *donationes mortis causa* should not be capable of being applied in payment of the debts of the donor.⁴⁸⁹ The liability of gifts of this kind for the debts of the donor was opposed on the grounds of impracticality, injustice and uncertainty:⁴⁹⁰

the practical reality is that the donee of such a gift might well have spent it, converted it, or otherwise disposed of it, well before the donor's estate has reached the stage of administration at which assets must be applied in payment of debts. It could work considerable injustice for the donee of such a gift, accepting it in good faith, and unaware of its potential attachment in payment of the donor's debts, to find himself, perhaps long afterwards, in the position of having to disgorge it, or a sum of money equal to its value at the date of the donor's death. In addition, the very question whether a gift has as a matter of law been made inter vivos, or is a donatio mortis causa, is in the nature of things rarely susceptible of a clear-cut answer on the facts. To this extent Class 4 of the Queensland order also appears to have potential for encouraging litigation.

Discussion Paper

17.97 In the Discussion Paper, the National Committee proposed that *donationes mortis causa* should not be called in to pay the debts of a solvent estate.⁴⁹¹ It considered that, if the debts of an estate could not be paid without resort to gifts of this kind, the estate was really insolvent, and the rules in relation to the payment of debts of an insolvent estate should apply.⁴⁹²

Submissions

17.98 The National Committee's proposal was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, and the ACT and New South Wales Law Societies.⁴⁹³

⁴⁸⁸ Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 Pt VII (1988) [5.12].

⁴⁸⁹ Ibid [5.17], [6.2] Recommendation (3).

⁴⁹⁰ Ibid [4.37].

⁴⁹¹ *Administration of Estates Discussion Paper* (1999) QLRC 212; NSWLRC 302 (Proposal 75).

⁴⁹² Ibid, QLRC 211; NSWLRC [15.69].

⁴⁹³ Submissions 1, 8, 11, 14, 15.

17.99 Only one respondent disagreed with the National Committee's proposal. That submission, by an academic expert in succession law, disputed that, where an estate required the recovery of such gifts in order to pay all the debts, the estate should be administered in insolvency.⁴⁹⁴

The assets of an estate may be insufficient to pay the debts of the deceased without recovering *donationes mortis causa*, but sufficient to pay the debts if those gifts are recovered. Such an estate would not be administered in insolvency.

17.100 This respondent acknowledged that the recovery of such gifts may be 'very untidy' and that donors who make such gifts presumably do so in the hope that the donees will not be required to give them back. He suggested, however, that it is because of these considerations that such gifts appear in the last class of the Queensland statutory order.⁴⁹⁵

The National Committee's view

17.101 Queensland is the only jurisdiction where *donationes mortis causa* are included in the statutory order for the payment of debts in a solvent estate.

17.102 In the National Committee's view, it is unnecessary for the model provision dealing with the payment of debts in a solvent estate to address the issue of the extent to which *donationes mortis causa* should be applied towards the payment of the debts of such an estate. If the debts cannot be paid without recourse to gifts of this kind — which vest in the donee, rather than in the personal representative of the donor⁴⁹⁶ — the estate is properly to be regarded as insolvent.⁴⁹⁷

17.103 However, the National Committee does not agree with the more far-reaching recommendation of the Law Reform Commission of Western Australia that *donationes mortis causa* should not be capable of being applied in the payment of debts of the donor at all.⁴⁹⁸ The legislation should not prevent proceedings from being brought to recover a *donatio mortis causa* where the debts of the estate cannot be paid without recourse to that property.

494 Submission 12.

495 Ibid.

496 See [17.95] above.

497 The payment of debts in an insolvent estate is considered in Chapter 16 of this Report.

498 See [17.96] above.

MODEL STATUTORY ORDER FOR THE APPLICATION OF ASSETS: SUMMARY

The National Committee's view

17.104 Earlier in this chapter, the National Committee has made proposals about:

- the inclusion, as the first class in the model statutory order, of property appropriated by will for the payment of debts and property charged by will with the payment of debts;
- the application of the residuary estate before property the subject of a specific disposition; and
- the manner in which property appointed by will in the exercise of a general power of appointment is to be applied towards the payment of debts.

17.105 In view of those proposals, the National Committee is of the view that the model statutory order for the application of assets should be based on the Queensland statutory order in section 59(1) of the *Succession Act 1981* (Qld), subject to the proposals made earlier in this chapter about updating the language of that provision and not including *donationes mortis causa* as the final category of the model order.

17.106 Accordingly, the model statutory order for the application of property towards the payment of debts in a solvent estate will be:

- | | |
|---------|--|
| 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 section 33J of the <i>Succession Act 1981</i> (Qld), or its equivalent, as the exercise of a general power of appointment; and |
| 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. |

RATEABILITY

The existing law

17.107 The effect of the principle of rateability is that, if some of the assets in a particular class must be applied to pay debts, all the beneficiaries with an interest in assets of that class bear that loss in proportion to their respective interests.

17.108 This principle has been said to apply generally to the various classes of the old order of application of assets.⁴⁹⁹ It was applied by the High Court in *Ramsay v Lowther*,⁵⁰⁰ where assets falling within the fourth class of the old order were required to contribute to the payment of debts.⁵⁰¹

But being there, then comes into play the doctrine of equality. If the earlier classes were able to sustain the burden, let them; if not, this class must share it, and share it proportionately.

17.109 The statutory orders that apply in the ACT, New South Wales, the Northern Territory, Tasmania and Victoria provide that property falling within Class 6 (property specifically devised or bequeathed) is to be applied 'rateably according to value'.⁵⁰² The statutory orders in Tasmania and Victoria also provide that property falling within Class 7 (property appointed by will under a general power of appointment) is to be applied 'rateably according to value'.⁵⁰³ It is considered, however, that the principle of rateability would apply to all classes within these statutory orders, and that the references in Classes 6 and 7 merely restate the law in this respect.

17.110 In Queensland, the legislation provides expressly that the principle of rateability applies to all classes within the statutory order. Section 59(2) of the *Succession Act 1981* (Qld) provides:⁵⁰⁴

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...

- (2) Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, the payment of pecuniary legacies rateably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied rateably.

499 Sykes EI, *Payment of Debts by Executors in Queensland* (1955) 15.

500 (1912) 16 CLR 1.

501 Ibid 24 (Isaacs J, with whom Barton J agreed).

502 See [17.13], [17.20] above.

503 Ibid. As explained at [17.14] above, there is no corresponding class in the statutory orders of the ACT, New South Wales or the Northern Territory.

504 The payment of pecuniary legacies is considered in Chapter 18 of this Report.

Discussion Paper

17.111 In the Discussion Paper, the National Committee proposed that the principle of rateability should apply to all property within a given class.⁵⁰⁵

Submissions

17.112 This proposal was supported by all the respondents who addressed the principle of rateability — namely, the Bar Association of Queensland, the Queensland Law Society, the New South Wales Public Trustee, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁵⁰⁶

The National Committee's view

17.113 In the National Committee's view, 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 of the model statutory order is to be applied rateably in the discharge of debts.⁵⁰⁷

VARIATION OF THE ORDER OF APPLICATION OF ASSETS BY THE EXPRESSION OF A CONTRARY INTENTION

Existing legislative provisions

17.114 In all Australian jurisdictions, the order in which assets are applied towards the payment of debts in a solvent estate may be displaced by a contrary intention in the deceased person's will.⁵⁰⁸

17.115 Section 59(3) of the *Succession Act 1981* (Qld) is by far the most comprehensive of these provisions. It provides for the variation by a testator of both the order of the discharge of debts and the operation of the principle of rateability. It also has the effect that a general direction for the payment of debts 'is considered as having no intention of varying beneficial entitlements'.⁵⁰⁹ Section 59(3) provides:

⁵⁰⁵ *Administration of Estates Discussion Paper* (1999) QLRC 213; NSWLRC 304 (Proposal 76).

⁵⁰⁶ Submissions 1, 8, 11, 12, 14, 15.

⁵⁰⁷ The inclusion of a provision to the effect of the second limb of s 59(2) of the *Succession Act 1981* (Qld) is recommended below: see Recommendation 18-3.

⁵⁰⁸ *Administration and Probate Act 1929* (ACT) s 41C(1); *Probate and Administration Act 1898* (NSW) s 46C(2); *Administration and Probate Act* (NT) s 57(1); *Succession Act 1981* (Qld) s 59(3); *Administration and Probate Act 1935* (Tas) s 34(3), sch 2 pt 2 para 8; *Administration and Probate Act 1958* (Vic) s 39(2). This is also the position in South Australia and Western Australia, where the older order of application of assets applies: see [17.4], [17.9] above.

⁵⁰⁹ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [11.140].

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...

- (3) The order in which the estate is applicable towards the discharge of debts and the incidence of rateability as between different properties within each class may be varied by a contrary or other intention signified by the will, but a contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts.

Issues for consideration

17.116 The following issues arise for consideration:

- whether the model legislation should provide that the statutory order for the application of assets towards the payment of debts in a solvent estate should be able to be varied by the expression by the testator of a contrary intention;
- whether the model legislation should provide that particular expressions do not signify an intention to displace the model statutory order;
- whether any contrary intention must be expressed in the deceased person's will.

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

Discussion Paper

17.117 In the Discussion Paper, the National Committee proposed that the model provisions about the payment of debts in a solvent estate should be subject to an admissible expression of a contrary intention by the testator.⁵¹⁰

Submissions

17.118 All the submissions that addressed this issue — namely, the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies — agreed that the model provisions dealing with the payment of debts in a solvent estate should be subject to the expression of a contrary intention.⁵¹¹

⁵¹⁰ *Administration of Estates Discussion Paper* (1999) QLRC 216; NSWLRC 308 (Proposal 77).

⁵¹¹ Submissions 1, 8, 11, 12, 14, 15.

The National Committee's view

17.119 In the National Committee's view, the model statutory order for the application of assets towards the payment of debts in a solvent estate should be able to be varied by the expression of a contrary intention by the testator.

Location of contrary intention***Discussion Paper***

17.120 In the Discussion Paper, the National Committee proposed that the expression of a contrary intention about the operation of the model order should not have to be contained in the deceased person's will.⁵¹²

Submissions

17.121 The submissions received in response to the Discussion Paper were divided as to whether it should be permissible to establish a contrary intention other than by the will.

17.122 The Queensland and New South Wales Law Societies were both of the view that a contrary intention should be able to be established only by the will.⁵¹³ The Queensland Law Society commented:⁵¹⁴

The Committee agrees that the testator can express a contrary intention. However, it does not agree that the contrary intention might be contained outside the will. The capacity to express a contrary intention is, relatively speaking, a pandering (though legitimate) to only a small portion of will makers.

The Committee sees no justification for complicating what might in practice be an uncommon situation by allowing ex testamentary provisions to take effect.

17.123 On the other hand, the Bar Association of Queensland, the Public Trustee of New South Wales and the ACT Law Society were of the view that it should not be necessary for the expression of a contrary intention to be contained in the will.⁵¹⁵ However, the view of the ACT Law Society was based on the assumption that the form in which the contrary intention was expressed would satisfy the legislative requirements for the exercise of the court's power to dispense with the requirements for the execution of a will.⁵¹⁶

512 *Administration of Estates Discussion Paper* (1999) QLRC 216; NSWLRC 308 (Proposal 77).

513 Submissions 8, 15.

514 Submission 8.

515 Submissions 1, 11, 14.

516 Submission 14. In its Wills Report, the National Committee recommended a provision under which a document purporting to embody the testamentary intentions of a deceased person constitutes a will of the deceased person, notwithstanding lack of compliance with the formal execution requirements, if the court is satisfied that the deceased person intended the document to constitute his or her will. See *Wills Report* (1997), Draft Wills Bill 1997 cl 10.

If the contrary intention is not contained in the will then it does mean that the court will have to be satisfied, presumably on the same grounds as it would be for an invalidly executed testamentary document, that the testator, in fact, intended the contrary intention, which is not expressed in the will, to be part of his will. However, given that the legislative bodies are prepared to accept that an invalidly executed testamentary document can be admitted to Probate and to constitute a binding will, it seems that a similar provision in relation to the contrary intention would also be acceptable.

17.124 However, the National Committee's recommendation in its Wills Report that certain provisions should be subject to a contrary intention, whether or not contained in the will, did not prescribe the means by which such an intention should be established.

17.125 An academic expert in succession law commented that he was not opposed to the contrary intention being established outside the will, but suggested that:⁵¹⁷

It must be decided as a matter of general law what sort of extrinsic evidence is admissible in the construction of wills. There should not be a special dispensation applicable only in the administration of these rules.

The National Committee's view

17.126 A similar issue was considered by the National Committee in its Wills Report — namely, the extent to which various statutory provisions dealing with the construction of wills should be able to be displaced by a contrary intention found outside the will, rather than only by an intention expressed in the will.⁵¹⁸

17.127 In that Report, the National Committee expressed the view that, in matters of construction, the intention of the testator should, as a general principle, be the primary consideration, and the establishment of a contrary intention should not generally be confined to one that could be shown in a will.⁵¹⁹ However, the National Committee was concerned that, if the effect of certain provisions could be displaced by the expression of a contrary intention found outside the will, it would be likely to invite direct evidence of the testator's dispositive intention.⁵²⁰ Ultimately, the National Committee recommended that certain model provisions, the purpose of which was to avoid partial intestacies, should be able to be displaced by a contrary intention whether or not expressed in the will,⁵²¹ but that certain other provisions should be able to be displaced

⁵¹⁷ Submission 12.

⁵¹⁸ See *Wills Report* (1997) QLRC 62–3; NSWLRC [6.1]–[6.7].

⁵¹⁹ *Ibid*, QLRC 62; NSWLRC [6.3].

⁵²⁰ *Ibid*, QLRC 63; NSWLRC [6.6].

⁵²¹ See *Wills Report* (1997), Draft Wills Bill 1997 cl 29 (When a will takes effect), 30 (Effect of failure of a disposition), 35 (What does a general disposition of property include?), 36 (What does a general disposition of land include?), 37 (Effect of devise of real property without words of limitation).

only by a contrary intention found in the will.⁵²² The distinction drawn by the National Committee in this respect was followed in the Northern Territory⁵²³ and in Victoria⁵²⁴ when the model wills legislation was implemented in those jurisdictions.⁵²⁵

17.128 In the National Committee's view, although the model statutory order for the application of assets should be able to be varied by the expression of a contrary intention, it should be necessary for the expression of a contrary intention to be made by the testator's will.

17.129 In this context, the National Committee uses the term 'will' in its broadest sense. In its Wills Report, the National Committee recommended that the court should have a fairly broad dispensing power in relation to the execution of wills. Under the model provision recommended, if a document purports to embody the intentions of a deceased person, but was not executed in the manner required by the legislation for a will to be valid, the document will nevertheless constitute the deceased person's will if the court is satisfied that the deceased person intended the document to constitute his or her will.⁵²⁶ The recommended provision gives a much broader meaning to what may be regarded as the will of a deceased person. In the National Committee's view, that provision provides sufficient flexibility by allowing the court to recognise the intention of a testator that is expressed in a document that, for want of compliance with the formal execution requirements for wills, would not otherwise be found to constitute a will.

17.130 If a contrary intention could be established other than by will (using that term in its broadest sense), it could result in uncertainty as to whether the model statutory order had been varied. That uncertainty, especially in relation to what is sufficient proof of a contrary intention, could result in costly disputes, and erode the assets of the estate. Accordingly, the National Committee is of the view that 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 confine a contrary intention to one that appears in the deceased's will.

⁵²² See *Wills Report* (1997), Draft Wills Bill 1997 cl 34 (Beneficiaries must survive testator by 30 days), 38 (How dispositions to issue operate), 39 (How requirements to survive with issue are construed), 40 (Dispositions not to fail because issue have died before testator), 41 (Constructions of dispositions), 42 (Legacies to unincorporated associations of persons), 44 (Effect of referring to valuation in a will).

⁵²³ See *Wills Act* (NT) ss 29, 30 and 35–37, which are subject to a contrary intention that appears in the will or elsewhere, and ss 34, 38–42 and 44, which are subject to a contrary intention that appears in the will.

⁵²⁴ See *Wills Act 1997* (Vic) ss 34, 35 and 40–42, which are subject to a contrary intention that appears in the will or elsewhere, and ss 39, 43–47 and 49, which are subject to a contrary intention that appears in the will.

⁵²⁵ However, this distinction has not been followed in New South Wales or Queensland, where the provisions based on cl 29, 30 and 35–37 of the Draft Wills Bill 1997, unlike the model provisions on which they were based, are subject to a contrary intention that appears in the will: see *Succession Act 2006* (NSW) ss 30(2), 31(2), 36(2), 37(2), 38(2); *Succession Act 1981* (Qld) ss 33E(2), 33G(2), 33I(2), 33J(5), 33K(2). In Tasmania, ss 44 and 45 of the *Wills Act 2008* (Tas), which are based on cl 29 and 30 of the Draft Wills Bill 1997, are subject to a contrary intention that appears in the will: see ss 44(2), 45(2). However, ss 50–52 of the *Wills Act 2008* (Tas), which are based on cl 35–37 of the Draft Wills Bill 1997, do not include a provision to the effect that they are subject to a contrary intention that appears in the will (or elsewhere).

⁵²⁶ *Wills Report* (1997) QLRC 15–16; NSWLRC 40–3.

Expressions signifying a contrary intention

17.131 Under the old order of application of assets, a mere general direction for the payment of debts out of the estate had the effect of moving property the subject of a specific disposition from Class 6, where it would ordinarily be found, and placing it in Class 4 (property charged with the payment of debts).⁵²⁷ That rule of construction was applied in *Calcino v Fletcher*,⁵²⁸ where the relevant clause of the will simply provided:⁵²⁹

MY TRUSTEES shall pay my debts funeral and testamentary expenses and all expenses incidental to the execution of the preceding Trusts and power and all Probate Estates and other Duties payable in respect of my estate or in consequence of my death.

17.132 As a result, assets that were the subject of various specific bequests made by other clauses of the will were held to fall within Class 4, and were to be used to discharge the various debts before resorting to the fund set aside to meet the pecuniary legacies, which constituted Class 5.⁵³⁰

17.133 This rule has been the subject of criticism on the basis that:⁵³¹

debts, funeral and testamentary expenses must be paid whether the will so directs or not, and it is unreasonable that a direction to do something which, by law, must be done in any event should remove assets from one class to another.

17.134 It was to avoid the possible effect of this rule that the Queensland Law Reform Commission, in its 1978 Report, recommended a provision to the effect of section 59(3) of the *Succession Act 1981* (Qld). As the Commission explained:⁵³²

Such directions occur in many precedent books and they should be regarded as being merely administrative. In the past disproportionate significance has been attached to general directions to pay debts, for historical reasons now irrelevant, so much so that in the present order of application of assets the presence of a mere general direction to pay debts suffices to remove assets from class 6 to class 4.

⁵²⁷ *Calcino v Fletcher* [1969] Qd R 8, 24 (Hoare J).

⁵²⁸ [1969] Qd R 8.

⁵²⁹ *Ibid* 16 (Hoare J).

⁵³⁰ *Ibid* 26.

⁵³¹ RA Woodman, *Administration of Assets* (2nd ed, 1978) 64. See also WA Lee, *The Administration of Solvent Deceased Estates in Queensland* (1973) 21, where a similar view is expressed.

⁵³² Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 43.

17.135 The Law Reform Commission of Western Australia, in reviewing the payment of debts in solvent estates, commented that section 59(3) of the Queensland legislation ‘embodies a much needed reform of the law’.⁵³³

Its effect is to define negatively expressions sufficient to oust the statutory order. Reflection upon this matter shows that, whereas it is in general very difficult to legislate with regard to questions of the construction of wills, it is possible to identify various commonly-employed drafting devices intended to be covered by the policy of the legislation. That is what has been done here, with the result that the difficult problems of construction ... appear to have been overcome, or at least very much reduced, in Queensland.

17.136 In *Nield v Fowler*,⁵³⁴ the Full Court of the Supreme Court of New South Wales held that the old rule of construction about the effect of a general direction for the payment of debts out of the estate does not apply to the statutory order in that jurisdiction, as the New South Wales legislation ‘has drastically altered the rules as to the order of administration which were applicable under the earlier law’.⁵³⁵

17.137 Notwithstanding the decision in *Nield v Fowler*,⁵³⁶ it may still be desirable to include a provision in the model legislation to the effect of section 59(3) of the *Succession Act 1981* (Qld) to put beyond doubt that a general direction for the payment of debts out of the estate cannot affect the operation of the model statutory order.

Discussion Paper

17.138 In the Discussion Paper, the National Committee sought submissions on whether the model legislation should stipulate what should or should not constitute an expression of a contrary intention.⁵³⁷

Submissions

17.139 The ACT Law Society was of the view that the model legislation should not stipulate what constitutes a contrary intention.⁵³⁸ An academic expert in succession law was also of the same view.⁵³⁹

I think it would be a mistake to try to stipulate what can constitute a contrary intention. That could lead to a voluminous draft or a dead end. (emphasis in original)

⁵³³ Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 Pt VII (1988) [4.39].

⁵³⁴ [1961] NSW 85.

⁵³⁵ Ibid 91 (Owen, Clancy and Walsh JJ).

⁵³⁶ [1961] NSW 85.

⁵³⁷ *Administration of Estates Discussion Paper* (1999) QLRC 216; NSWLRC 308.

⁵³⁸ Submission 14.

⁵³⁹ Submission 12.

17.140 The ACT Law Society was, however, of the view that the model legislation should stipulate that a general statement as to the payment of debts does not constitute a contrary intention.⁵⁴⁰ That is the position under section 59(3) of the *Succession Act 1981* (Qld).

17.141 The Bar Association of Queensland expressly supported the adoption of a model provision to the effect of section 59(3) of the *Succession Act 1981* (Qld).⁵⁴¹ That provision was also generally supported by the Queensland Law Society, which commented:⁵⁴²

It was obvious when section 59(3) of the *Succession Act 1981* (Qld) was drafted, the legislators had a concern that the general expression which was simply dragged into wills as a result of slavishly following will precedents, might be the subject of attempts to promote them into statements of contrary intention.

17.142 The Queensland Law Society suggested that an expression of contrary intention should specify the part of the estate to be burdened and the debts in respect of which that part of the estate is to be burdened.⁵⁴³

The National Committee's view

17.143 In the National Committee's view, the model legislation should include a provision to the effect of the second limb of section 59(3) of the *Succession Act 1981* (Qld), so that it is clear that a general direction, charge or trust for the payment of debts out of the testator's estate or out of the testator's residuary estate does not constitute an intention to vary the model statutory order. Although it has been held, in relation to the New South Wales statutory order, that a general direction for the payment of debts out of the estate does not have the effect of moving property specifically disposed of by will from Class 6 to Class 4,⁵⁴⁴ the National Committee considers it desirable for the model legislation to provide expressly that the old rule of construction does not apply. The model legislation should also provide that a general direction for the payment of debts of the kind referred to in section 59(3) does not constitute the property the subject of the direction as Class 1 property.

17.144 However, the National Committee is of the view that it would be impractical to attempt to stipulate what expressions should be sufficient to signify a contrary or other intention.

540 Submission 14.

541 Submission 1.

542 Submission 8.

543 Ibid.

544 See [17.136] above. The New South Wales statutory order is explained at [17.13]–[17.18] above.

PAYMENT OF DEBTS WHERE PROPERTY MORTGAGED OR CHARGED

The existing law and its origins

17.145 In all Australian jurisdictions except the Northern Territory, there is a significant statutory exception to the requirement that assets are to be applied towards the payment of debts according to the order discussed above. This exception arises when, at the time of a person's death, he or she is possessed of, or is entitled to, property that is charged with the payment of a debt.⁵⁴⁵ The effect of this exception is that:⁵⁴⁶

in the absence of an intention to the contrary, the debt must be borne by that property, and the person who takes that property cannot ask for that debt to be paid out of the general assets of the estate. (note omitted)

17.146 This principle was first introduced in England by the *Real Estate Charges Act 1854* (UK), which applied where 'land or other hereditaments'⁵⁴⁷ was charged, by way of mortgage, with the payment of any sum of money. That Act, together with its two amending Acts,⁵⁴⁸ is commonly referred to as *Locke King's Act*.⁵⁴⁹ Prior to the introduction of that legislation, the primary fund for the payment of a mortgage debt was personalty not specifically bequeathed, which constituted Class 1 of the old order of assets.⁵⁵⁰ Consequently, where devised land was subject to a mortgage, the devisee in effect took the property free of the mortgage, since the mortgage debt was borne by the beneficiaries of the residuary personalty.

17.147 *Locke King's Act* was repealed by the *Administration of Estates Act 1925* (UK),⁵⁵¹ and replaced by a new provision of that Act.⁵⁵² That provision,

⁵⁴⁵ *Civil Law (Property) Act 2006* (ACT) s 500; *Conveyancing Act 1919* (NSW) s 145; *Succession Act 1981* (Qld) s 61; *Administration and Probate Act 1919* (SA) s 52; *Administration and Probate Act 1935* (Tas) s 35; *Administration and Probate Act 1958* (Vic) s 40; *Wills Act 1970* (WA) s 28.

An equivalent provision used to apply in the Northern Territory by virtue of s 75 of the *Administration and Probate Act 1891* (SA). However, except in relation to the administration of the estate of a person who died before 8 February 1971, the *Administration and Probate Act 1891* (SA) no longer applies to the Northern Territory as a law of the Territory: *Administration and Probate Ordinance 1969* (NT) s 3(2), (3), sch 2.

⁵⁴⁶ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [50–11].

⁵⁴⁷ The reference in s 1 of the *Real Estate Charges Act 1854* (UK) to an estate or interest charged in 'land or other hereditaments' was held not to extend to leaseholds: *Solomon v Solomon* (1864) 33 LJ (Ch) 473; *Re Wormsley's Estate* (1876) 4 Ch D 665. The *Real Estate Charges Act 1854* (UK) was amended in 1867 and 1877. The 1877 Act used the words 'land or other hereditaments of whatever tenure' and made other amendments by virtue of which the Act was extended to apply to leaseholds: *Re Kershaw* (1888) 37 Ch D 674.

⁵⁴⁸ *Real Estate Charges Act 1867* (UK); *Real Estate Charges Act 1877* (UK).

⁵⁴⁹ The Acts were so called after Peter John Locke King, who was the proposer of the first of these Acts, the *Real Estate Charges Act 1854* (UK): Sir W Holdsworth, *A History of English Law* (1938) vol XI, 371.

⁵⁵⁰ The old order for the application of assets is set out at [17.4] above.

⁵⁵¹ *Administration of Estates Act 1925* (UK) s 56, sch 2 pt 1.

⁵⁵² *Administration of Estates Act 1925* (UK) s 35.

which is still in force, extended the operation of the original principle, and applies whether the mortgaged property consists of realty or personalty.

17.148 The Australian provisions that embody the principle of *Locke King's Act* have their origins in the English legislation. In this chapter, these provisions are referred to as 'Locke King's legislation'. This legislation is expressed in fairly consistent terms, although there are some differences in relation to the scope of the legislation of the various States and the ACT.⁵⁵³

17.149 Section 61 of the *Succession Act 1981* (Qld), which is one of the more modern formulations of Locke King's legislation in Australia, provides:

61 Payments of debts on property mortgaged or charged

- (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in property, which at the time of his or her death is charged with the payment of any debt, whether by way of mortgage, charge or otherwise, legal or equitable (including a lien for unpaid purchase money), and the deceased has not by will signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the debt; and every part of the said interest, according to its value, shall bear a proportionate part of the charge of the whole thereof.
- (2) A contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts.

17.150 In the ACT, an updated form of the Locke King's legislation has been included in the *Civil Law (Property) Act 2006* (ACT).⁵⁵⁴ Section 500 of that Act provides:

500 Charges on property of deceased person to be paid primarily out of property charged

- (1) This section applies if a person dies possessing or being entitled to, or, under a general power of appointment, disposes of by will—
 - (a) property that at the time of the person's death is charged with the payment of an amount, whether by legal mortgage, equitable charge or in some other way (including a lien for unpaid purchase money); or
 - (b) land for which an amount is owing at the time of the person's death under a contract of purchase.

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As explained at note 545 above, Locke King's legislation does not apply in the Northern Territory in respect of the administration of the estates of persons who died on or after 8 February 1971.

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The previous ACT provision was found in s 109 of the *Conveyancing and Law of Property Act 1898* (ACT).

- (2) Unless the deceased person has by will indicated a contrary intention, the property charged or land for which purchase money is owing is, as between the different people claiming through the deceased person, primarily liable for the payment of the charge or purchase money and—
 - (a) each part of property that is subject to a charge must bear a proportionate part of the charge on the whole of the property; and
 - (b) each part of a parcel of land for which purchase money is owing must bear a proportionate part of the amount owing for the whole parcel.
- (3) A contrary intention is not taken to be indicated—
 - (a) by a general direction in the deceased person's will for the payment of debts, or all debts, of the person out of—
 - (i) the person's personal estate; or
 - (ii) the person's residuary real and personal estate; or
 - (iii) the person's residuary real estate; or
 - (b) by a charge in the deceased person's will of debts, or all debts, of the person on any estate mentioned in paragraph (a).
- (4) However, a contrary intention is taken to be indicated by words in the deceased person's will expressly or by necessary implication indicating an intention that a general direction in the will of the kind mentioned in subsection (3)(a), or a charge in the will of the kind mentioned in subsection (3)(b), is to apply to a charge on property mentioned in subsection (1)(a) or an amount of unpaid purchase money mentioned in subsection (1)(b).
- (5) This section does not affect the right of a person entitled to a charge on property mentioned in subsection (1)(a), or to unpaid purchase money mentioned in subsection (1)(b), to obtain payment of the charge or purchase money out of other assets of the deceased person or in some other way.

17.151 The legislation in the ACT, New South Wales, Queensland, Tasmania, Victoria and Western Australia applies whether the interest charged with the payment of any debt consists of realty or personalty.⁵⁵⁵ In South Australia, however, the legislation applies only where the interest charged is 'land or other hereditaments'.⁵⁵⁶

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Civil Law (Property) Act 2006 (ACT) s 500; *Conveyancing Act 1919* (NSW) ss 7 (definition of 'property'), 145; *Succession Act 1981* (Qld) s 61, *Acts Interpretation Act 1954* (Qld) s 36 (definition of 'property'); *Administration and Probate Act 1935* (Tas) ss 3(1) (definition of 'property'), 35; *Administration and Probate Act 1958* (Vic) ss 5 (definition of 'property'), 40; *Wills Act 1970* (WA) ss 4 (definition of 'property'), 28.

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Administration and Probate Act 1919 (SA) s 52(1). See note 547 above for an explanation of the expression 'land or other hereditaments'.

17.152 The legislation in all these jurisdictions applies not only where the property is charged by way of mortgage, but also where the property is subject to a lien for unpaid purchase money.⁵⁵⁷

17.153 In all Australian jurisdictions that have Locke King's legislation, the principle that property charged with the payment of a debt is primarily liable for the payment of that debt applies unless the deceased has signified a contrary or other intention.⁵⁵⁸ The legislation in most of these jurisdictions provides that certain expressions do not signify a contrary or other intention.⁵⁵⁹

Effect where Locke King's legislation applies

17.154 At its simplest, the effect of Locke King's legislation is that, if a testator devises property (which is subject to a mortgage) to A, and the residue of the estate to B, A is not entitled to have the mortgage discharged out of the residuary estate. Instead, the debt secured by the mortgage must be discharged out of the property that has been specifically devised.

17.155 Similarly, because the legislation applies where property is subject to a lien for unpaid purchase money, the legislation has the effect that, if a testator enters into a contract to purchase a property, but dies before completing the purchase and paying the purchase price, any unpaid money must be borne primarily by the property, rather than by the residuary estate.

17.156 The theory underlying the legislation is that:⁵⁶⁰

where a testator has charged property with the payment of a debt all he really owns is the property minus the value of the charge, and that when he disposes of that property by will he disposes of it together with the burden of the charge which he has placed on it. The testator may oust the operation of the subsection by will if he pleases and cast the burden of paying a debt charged on a property on another property or on the residuary estate, if he is so minded.

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Civil Law (Property) Act 2006 (ACT) s 500(1)(b) (which refers to 'land for which an amount is owing at the time of the person's death under a contract of purchase'); *Conveyancing Act 1919* (NSW) s 145(1)(a); *Succession Act 1981* (Qld) s 61(1); *Administration and Probate Act 1919* (SA) s 52(1); *Administration and Probate Act 1935* (Tas) s 35(1); *Administration and Probate Act 1958* (Vic) s 40(1); *Wills Act 1970* (WA) s 28(1). Until recently, the ACT Locke King's legislation did not apply in these circumstances, but only where property was charged by way of mortgage: see *Conveyancing and Law of Property Act 1898* (ACT) s 109(1) (repealed).

The *Real Estate Charges Act 1854* (UK) did not originally apply where the property was subject to a lien for unpaid purchase money. However, that Act was amended in 1867 to provide that reference in the Act to a 'mortgage' extended to a lien for unpaid purchase money: *Real Estate Charges Act 1867* (UK) s 2.

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Civil Law (Property) Act 2006 (ACT) s 500(2); *Conveyancing Act 1919* (NSW) s 145(1); *Succession Act 1981* (Qld) s 61(1); *Administration and Probate Act 1919* (SA) s 52(1); *Administration and Probate Act 1935* (Tas) s 35(1); *Administration and Probate Act 1958* (Vic) s 40(1); *Wills Act 1970* (WA) s 28(1).

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These provisions are considered at [17.202]–[17.218] below.

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Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 44.

Issues for consideration

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

- whether the model legislation should include a provision that generally reflects the principle embodied by Locke King's legislation;
- whether the model provision should reflect the traditional formulation of the principle or whether it should be modified to reflect more closely the testator's probable intentions;
- whether the model provision should apply to realty and personality;
- whether the model provision should apply where property is subject to a lien for unpaid purchase money;
- where the expression of a contrary or other intention may be found;
- whether the model provision should provide that particular expressions do not signify an intention to negative the operation of the model provision;
- whether the creation by a testator of Class 1 assets (that is — property appropriated for, or charged with, the payment of debts) should amount to an intention sufficient to negative the operation of the model provision; and
- how the rights of mortgagees should be preserved in the model provision.

Inclusion of Locke King's legislation

Discussion Paper

17.158 In the Discussion Paper, the National Committee proposed, subject to its separate proposal about how a testator should be able to signify a contrary or other intention, that a provision to the effect of section 61 of the *Succession Act 1981* (Qld) — which is the Queensland expression of Locke King's Act — should be included in the model legislation.⁵⁶¹

Submissions

17.159 All the respondents who addressed this issue agreed with the National Committee's proposal that the model legislation should include a provision to the effect of section 61 of the *Succession Act 1981* (Qld). This was the view of the Bar Association of Queensland, the Queensland Law Society, the Public

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Administration of Estates Discussion Paper (1999) QLRC 231; NSWLRC 330 (Proposal 79).

Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁵⁶²

The National Committee's view

17.160 As noted previously, Locke King's legislation applies in all Australian jurisdictions except the Northern Territory. The legislation used to apply in the Northern Territory, but has since been abolished with respect to the administration of the estates of persons dying on or after 8 February 1971.⁵⁶³

17.161 The principal argument for the inclusion in the model legislation of a provision embodying Locke King's legislation is that it provides a simple, settled rule for the administration of assets where a person dies leaving property charged with the payment of a debt. If the model legislation were to provide that Locke King's legislation does not apply to the estates of persons dying after the commencement of the model legislation, it is likely that, for a considerable period of time, the wills of many of those persons would have been drafted on the basis that Locke King's legislation would apply. As a result, the distribution of those estates might not reflect the intentions of the various testators at the time those wills were made.⁵⁶⁴

17.162 The National Committee acknowledges, however, that the argument based on the simplicity of Locke King's legislation and the certainty provided by its inclusion in the model legislation carries considerably more weight in those jurisdictions where the legislation still applies. In relation to the Northern Territory, where Locke King's legislation has been abolished for almost 40 years, it is arguable that the simplest position is not to re-introduce Locke King's legislation.

17.163 On balance, the National Committee is of the view that, as Locke King's legislation applies in all Australian jurisdictions except the Northern Territory, the inclusion in the model legislation of a provision giving effect to that legislation will cause the least disruption to the administration of estates. Accordingly, the model legislation should include a provision to the general effect of section 61 of the *Succession Act 1981* (Qld).

17.164 Particular aspects of the model provision are discussed in more detail below.

⁵⁶² Submissions 1, 8, 11, 12, 14, 15.

⁵⁶³ See note 545 above.

⁵⁶⁴ If the model legislation provided instead that the provision abolishing Locke King's legislation applied only to the administration of the estates of persons whose wills were made after the commencement of the model legislation, it would have the effect that Locke King's legislation would continue to apply for a considerable period of time.

Whether the traditional formulation should be modified

Background

17.165 The purposes for which a testator has charged property with the payment of a debt may not necessarily be connected with the property itself. On the one hand, the property may have been charged to raise money to acquire, improve or maintain the property. On the other hand, the property may have been charged to raise money for a purpose altogether unconnected with the property itself, for example, where the property is used as security for a loan to buy another property. In the first instance, it is not difficult to accept that the probable intention of the testator was that the property should be the primary fund for the payment of the debt. However, where a debt is raised on property for a purpose that is unconnected with the property, it is not as obvious that the testator would have wanted the debt to be paid primarily out of the property charged.

17.166 The fundamental principle embodied by Locke King's legislation was considered by both the Law Reform Commission of British Columbia and the Ontario Law Reform Commission when they were reviewing the comparable legislation in their respective provinces.

17.167 The Law Reform Commission of British Columbia considered that the operation of the legislation produced 'dubious results' where, for example, property was mortgaged to finance the acquisition of other property. It therefore recommended that the legislation should be amended to provide that 'the section applies only to mortgages or charges reasonably related to the acquisition, improvement or preservation of the property'.⁵⁶⁵ It rejected criticism made of its preliminary recommendation (which was to the same effect) that, by drawing a distinction between charges relating to the acquisition or use of property and charges for other purposes, there would be increased litigation concerning the particular purpose to which the proceeds from a secured loan were applied.⁵⁶⁶

It seems to us ... that in most cases the purpose of a sizable secured loan will either be self-evident or relatively easy to ascertain. Most lending institutions, for example, customarily record the reasons for which a loan is requested. It is true that in some cases this task will involve a more searching inquiry. For example, funds advanced on a revolving line of credit that is secured against property owned by the borrower may be applied for multiple purposes. However, financing of this nature is usually arranged in connection with business debts and very seldom relates to the use or acquisition of the particular property against which it is secured.

⁵⁶⁵ Law Reform Commission of British Columbia, *Wills and Changed Circumstances*, Report No 102 (1989) 61, 63.

⁵⁶⁶ Ibid 62–3.

17.168 The Law Reform Commission of British Columbia considered that the additional inquiry that would be required in some cases would be ‘a modest price to pay if it means that the testator’s intent is less often defeated’.⁵⁶⁷ The Commission’s recommendation has not been implemented.⁵⁶⁸

17.169 The Ontario Law Reform Commission was also concerned about the potential inequity of its Locke King’s legislation where property was mortgaged for a purpose unrelated to the property, such as the provision of security for a business venture.⁵⁶⁹ It considered, but rejected, ‘restricting the application of the section to ... charges intended or suffered by the testator with respect to the particular property’.⁵⁷⁰

17.170 Ultimately, the Ontario Law Reform Commission concluded that the general presumption found in the legislation should be retained — that is, that property charged with the payment of a debt should be primarily responsible for paying that debt. However, it recommended that, to temper the ‘harshness of a strict application of the statutory rule’, the court ‘should have the discretion to order the payment of a debt secured on property in a manner other than as provided for’ in the relevant provision.⁵⁷¹ The Commission did not suggest how that discretion should be exercised. This recommendation has not been implemented.⁵⁷²

Discussion Paper

17.171 In the Discussion Paper, the National Committee considered whether the model legislation should include a modified form of Locke King’s Act, so that only that part of the property charged that was referable to the purchase, preservation, maintenance or improvement of the property would be primarily liable for the payment of the debt so charged.⁵⁷³

17.172 Although the National Committee considered that, in some circumstances, this modification might result in a closer approximation to the testator’s intention, it was of the view that, in other circumstances, the modification could have as arbitrary a result as the existing rule.⁵⁷⁴ It outlined a scenario in which a testator mortgaged the family home in order to inject the sum borrowed into a business, and then left the family home to the surviving spouse, the business to one child, and the residue of the estate to two other

⁵⁶⁷ Ibid 63.

⁵⁶⁸ See *Wills Act*, RSBC 1996, c 489, s 30.

⁵⁶⁹ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 195.

⁵⁷⁰ Ibid.

⁵⁷¹ Ibid.

⁵⁷² See *Succession Law Reform Act*, RSO 1990, c S26, s 32.

⁵⁷³ *Administration of Estates Discussion Paper* (1999) QLRC 229–30; NSWLRC [15.137]–[15.138].

⁵⁷⁴ Ibid, QLRC 230; NSWLRC [15.140].

children. The National Committee suggested that, in this situation, there was no good reason to suggest that the testator intended the residuary beneficiaries to pay the moneys borrowed for the purpose of the business.⁵⁷⁵

17.173 The National Committee expressed the view that the principle is now widely accepted and that any change to the principle would be very disruptive.⁵⁷⁶ In addition, it considered that a further reason for retaining the current formulation of the legislation was its simplicity. If it were modified as suggested, it would be necessary in every case where mortgaged property formed part of a deceased estate to inquire into how the money secured by the mortgage had been disbursed. The National Committee was of the view, contrary to that expressed by the Law Reform Commission of British Columbia,⁵⁷⁷ that a change of this kind would be an undesirable complication to the administration of assets.⁵⁷⁸

Submissions

17.174 All the submissions that addressed this issue agreed with the National Committee's proposal to include a provision to the effect of section 61 of the *Succession Act 1981* (Qld), which reflects the traditional formulation of Locke King's Act. This was the view of the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.⁵⁷⁹

The National Committee's view

17.175 The National Committee is concerned that, if the general principle were modified as recommended by the Law Reform Commission of British Columbia, the administration of assets in a deceased estate that included property charged with the payment of a debt would become a more complex matter. In those circumstances, it would be necessary for the personal representative to inquire into how the moneys raised against the property were applied. Although the Law Reform Commission of British Columbia was of the view that it would not be difficult to ascertain that information, the National Committee is not persuaded that an inquiry of this kind would be free from difficulties. Where repayments had been made, but the mortgage had the facility for the borrower to draw on moneys repaid, including for purposes unrelated to the mortgaged property, it could be particularly difficult to ascertain what portion of the amount owing under the mortgage was referable to the purchase, maintenance or improvement of the mortgaged property. The need to ascertain how moneys raised against a mortgaged property have been applied has the potential to

⁵⁷⁵ Ibid, QLRC 230; NSWLRC [15.141].

⁵⁷⁶ Ibid, QLRC 231; NSWLRC [15.147].

⁵⁷⁷ See [17.167]–[17.168] above.

⁵⁷⁸ *Administration of Estates Discussion Paper* (1999) QLRC 231; NSWLRC [15.148].

⁵⁷⁹ Submissions 1, 8, 11, 12, 14, 15.

delay the administration of an estate while the financial institution concerned searches its records, especially in circumstances where the mortgage has been in place for some time. In addition, such searches could result in an additional expense for the estate.

17.176 Further, the National Committee does not accept that, if the principle were modified as discussed, it would necessarily reflect more closely a testator's probable intention about the payment of a mortgage debt. Depending on the circumstances of the case, it may be that, in throwing the burden of the debt (or at least part of it) onto the residuary estate, the application of the principle would not represent the testator's probable intention any more closely than requiring the debt to be borne by the property on which it is charged.

17.177 The National Committee does not favour the recommendation made by the Ontario Law Reform Commission that the court should have a discretion to order the payment of the mortgage debt other than in accordance with the relevant provision.⁵⁸⁰ To the extent to which an estate includes property that is charged with the payment of a debt, that recommendation would give the court a very broad power to rewrite the terms of a testator's will. The Commission considers that a discretion of this kind is too open-ended and, in any event, is unnecessary, given that the distribution of the estate of a deceased person is always subject to the operation of family provision legislation.

17.178 The National Committee acknowledges that not every beneficiary under a will who may be affected by the application of Locke King's legislation will be eligible to apply for family provision. However, in its Family Provision Report, the National Committee recommended changes to the basis on which eligibility to apply for family provision is to be determined. It recommended that a person should be eligible to apply for family provision if, having regard to various specified criteria, the deceased person owed a responsibility to the person to provide for his or her maintenance, education or advancement in life. Under the model provisions, it may be possible for a person who would presently be ineligible to apply for provision out of the estate of a deceased person.⁵⁸¹ As the grounds on which a court may order that provision be made out of the estate of a deceased person are well established, the National Committee considers that family provision legislation is a more suitable mechanism for adjusting the rights of beneficiaries in circumstances where, as a result of the application of Locke King's legislation, adequate provision is not made for the proper maintenance, education or advancement in life of a person.

580 See [17.169]–[17.170] above.

581 *Family Provision Report* (1997) 26–8; *Family Provision Supplementary Report* (2004) App 2, Draft Family Provision Bill 2004 cll 7, 11. See also *Administration and Probate Act 1958* (Vic) s 91, on which this recommendation was based.

17.179 For these reasons, the National Committee is of the view that the model legislation should include a provision that reflects the traditional formulation of Locke King's legislation, such as section 61(1) of the *Succession Act 1981* (Qld).

Application of the model provision to both realty and personality

Background

17.180 As noted above, the legislation in South Australia applies only where the interest charged is land or other hereditaments.⁵⁸² South Australia is the only Australian jurisdiction whose Locke King's legislation pre-dates the *Administration of Estates Act 1925* (UK).⁵⁸³ As previously explained, section 35 of that Act, which replaced the original *Locke King's Act*, applies whether the charged property consists of realty or personality.

17.181 The application of Locke King's legislation to personality was considered by the Law Reform Commission of British Columbia when it was reviewing its own legislation, which was expressed to apply only where the mortgaged interest was freehold or leasehold property. In the view of that Commission, it was 'difficult to see why different results ensue depending on the nature of the property'.⁵⁸⁴ The Commission concluded that the granting of a mortgage over personality to finance its purchase was, in principle, 'no different from financing the purchase of land through a mortgage',⁵⁸⁵ and recommended that the legislation should be amended in order to apply equally to real and personal property.⁵⁸⁶

Discussion Paper

17.182 In the Discussion Paper, the National Committee did not make a specific proposal about the application of the model provision to personality. However, its general recommendation was that a provision to the effect of section 61 of the *Succession Act 1981* (Qld) should be included in the model legislation.⁵⁸⁷ As noted previously, the Queensland provision applies whether

582 *Administration and Probate Act 1919* (SA) s 52(1). See note 547 above in relation to the effect of the original English legislation, which was also in these terms.

583 Although Locke King's legislation in New South Wales is found in s 145 of the *Conveyancing Act 1919* (NSW), that section was amended by the *Conveyancing (Amendment) Act 1930* (NSW) and, in respect of persons dying after the commencement of that Act, applies regardless of the nature of the mortgaged property.

584 Law Reform Commission of British Columbia, *Wills and Changed Circumstances*, Report No 102 (1989) 59.

585 Ibid.

586 Ibid 60. This recommendation has not been implemented: see *Wills Act*, RSBC 1996, c 489, s 30, which still applies only to freehold and leasehold property.

587 *Administration of Estates Discussion Paper* (1999) QLRC 231; NSWLRC 330 (Proposal 79).

the interest charged with the payment of any debt consists of realty or personalty.⁵⁸⁸

Submissions

17.183 Although no respondents commented specifically on the application of the model provision to personalty, all the respondents who commented generally on the adoption of Locke King's legislation agreed that a provision to the effect of section 61 of the *Succession Act 1981* (Qld) should be included in the model legislation.⁵⁸⁹

The National Committee's view

17.184 The National Committee considers that real and personal property should, as far as possible, be assimilated in their liability to be applied towards the payment of the debts of an estate. Consequently, the National Committee is of the view that the model provision embodying the principle of Locke King's legislation should apply to all property, whether real or personal.

Application of the model provision where property is subject to a lien for unpaid purchase money

Background

17.185 As explained earlier, until recently, the ACT legislation did not apply if the property was subject to a lien for unpaid purchase money.⁵⁹⁰ With the commencement of section 500 of the *Civil Law (Property) Act 2006* (ACT), it is now the case that, in all the Australian forms of Locke King's legislation, if a testator enters into a contract for the purchase of property, but dies before paying the purchase price in full, the property is primarily liable for the outstanding balance of the purchase price (unless the testator has signified a contrary or other intention). In the ACT, however, the legislation applies only to an amount owing under a contract for the purchase of land.⁵⁹¹

17.186 Where a testator might have paid for the property out of assets that, after his or her death, formed part of the residuary estate, it could seem inequitable that the purchase price must be paid primarily out of the property itself, rather than out of the residuary estate, given that it is the residuary estate that would have been diminished if the testator had not died before completing

⁵⁸⁸ See [17.151] above.

⁵⁸⁹ See [17.159] above.

⁵⁹⁰ See note 557 above.

⁵⁹¹ *Civil Law (Property) Act 2006* (ACT) s 500(1)(b).

the purchase.⁵⁹² However, in the vast majority of cases, the acquisition of a property will be funded by a mortgage secured on the acquired property. In those circumstances, Locke King's legislation does not seem to be open to the same criticism.

Discussion Paper

17.187 In the Discussion Paper, the National Committee did not make a specific proposal about the application of the model provision where property was subject to a lien for unpaid purchase money. However, its general recommendation was that a provision to the effect of section 61 of the *Succession Act 1981* (Qld) should be included in the model legislation.⁵⁹³ As noted previously, the Queensland provision applies not only where property is charged by way of mortgage, but also where property is subject to a lien for unpaid purchase money.⁵⁹⁴

Submissions

17.188 Although no respondents commented specifically on the application of the model provision where property was subject to a lien for unpaid purchase money, all the respondents who commented generally on the adoption of Locke King's Act agreed that a provision to the effect of section 61 of the *Succession Act 1981* (Qld) should be included in the model legislation.⁵⁹⁵

The National Committee's view

17.189 In the National Committee's view, the model provision should apply where property is subject to a lien for unpaid purchase money. This is now the position in all Australian jurisdictions where Locke King's legislation applies.⁵⁹⁶

Location of an expression of a contrary or other intention

The existing law

17.190 As previously explained, in all Australian jurisdictions that have Locke King's legislation, the principle that property charged with the payment of a debt

⁵⁹² For example, in *Re Wakefield* [1943] 2 All ER 29 the testator entered into a contract for the purchase of realty and paid a deposit, but died before completing the purchase. Shortly before his death, he sold a parcel of shares to fund the purchase, and sent the broker's cheque, which he had indorsed, to his solicitors. The covering letter to his solicitors advised that the enclosed cheque was for the balance of the purchase money. The English Court of Appeal held (at 31) that the letter did not signify a contrary intention on the part of the testator as it was not a direction that was to operate after the testator's death. Consequently, the property that was purchased was primarily liable for the unpaid purchase money.

⁵⁹³ *Administration of Estates Discussion Paper* (1999) QLRC 231; NSWLRC 330 (Proposal 79).

⁵⁹⁴ See [17.152] above.

⁵⁹⁵ See [17.159] above.

⁵⁹⁶ See [17.152] above. Note, however, that s 500(1)(b) of the *Civil Law (Property) Act 2006* (ACT) applies only where a testator by will disposes of land for which an amount is owing at the time of the deceased's death under a contract of purchase.

is primarily liable for the payment of that debt applies unless the deceased has signified a contrary or other intention.⁵⁹⁷

17.191 In jurisdictions other than the ACT and Queensland, the effect of the Locke King's legislation may be displaced by a contrary or other intention that is signified by the deceased by 'will, deed or other document'.⁵⁹⁸ This follows the traditional formulation of the legislation.⁵⁹⁹

17.192 In the ACT and Queensland, however, the legislation adopts a more restrictive approach, and the deceased may signify a contrary or other intention only by will.⁶⁰⁰

17.193 The Law Reform Commission of Western Australia, in reviewing the payment of debts in solvent estates, considered the scope of the expression 'other document signifying a contrary or other intention'. It considered that the phrase 'would appear to include a note, memorandum or letter of a non-testamentary nature, whether or not signed by the testator, so long as the document could be proved to have been made by him'.⁶⁰¹ The Western Australian Commission considered the traditional formulation of Locke King's legislation to be undesirable in this respect:⁶⁰²

It presents problems of proof, and it leaves open possibilities for fraud. There seems to be no good reason why such an expression of what is essentially a testamentary intention should remain outside the normal rules relating to the form in which testamentary wishes must be expressed. (note omitted)

17.194 Consequently, the Western Australian Commission recommended that the legislation should be amended to provide that:⁶⁰³

a testator's expression of intention to oust the effect of the section must have been made by his will, and not alternatively (as in Western Australia) by 'any other document'.

17.195 A similar criticism of the traditional formulation of the legislation has been made by a commentator on the administration of assets.⁶⁰⁴

597 See [17.153] above.

598 *Conveyancing Act 1919* (NSW) s 145(1); *Administration and Probate Act 1919* (SA) s 52(1); *Administration and Probate Act 1935* (Tas) s 35(1); *Administration and Probate Act 1958* (Vic) s 40(1); *Wills Act 1970* (WA) s 28(1).

599 See *Real Estate Charges Act 1854* (UK) and the current English provision: *Administration of Estates Act 1925* (UK) s 35(1).

600 *Civil Law (Property) Act 2006* (ACT) s 500(2); *Succession Act 1981* (Qld) s 61(1).

601 Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 Pt VII (1988) [3.29].

602 Ibid.

603 Ibid [4.41].

604 RA Woodman, *Administration of Assets* (2nd ed, 1978) 93.

it is considered that the express words should be included in the will; there is no justification whatever for a situation in which a non-testamentary instrument should have such an effect upon a testamentary instrument, and indeed this part of the statute requires immediate amendment.

Discussion Paper

17.196 In the Discussion Paper, the National Committee proposed that the model provision embodying Locke King's legislation should be subject to the expression of a contrary intention, but that it should not be necessary for the contrary intention to be signified in the will.⁶⁰⁵

Submissions

17.197 The submissions received in response to the Discussion Paper were divided about whether it should be permissible to signify a contrary or other intention other than by the will.

17.198 The Queensland and New South Wales Law Societies were both of the view that a contrary intention should be able to be established only by the will,⁶⁰⁶ as is the case under the Queensland legislation.

17.199 On the other hand, the Bar Association of Queensland, the Public Trustee of New South Wales and the ACT Law Society supported the National Committee's proposal that it should not be necessary for an expression of a contrary intention to be found in the will.⁶⁰⁷

The National Committee's view

17.200 As explained earlier in this chapter, in its Wills Report, the National Committee recommended that the court should have a fairly broad dispensing power in relation to the execution of a will.⁶⁰⁸ The recommended provision gives a much broader meaning to what may be regarded as the will of a deceased person.

17.201 In light of that recommendation, the National Committee is now of the view that an expression of a contrary or other intention must be signified by will. In this respect, the model provision should follow the wording used in section 61(1) of the *Succession Act 1981* (Qld).

⁶⁰⁵ *Administration of Estates Discussion Paper* (1999) QLRC 232; NSWLRC 330 (Proposal 80).

⁶⁰⁶ Submissions 8, 15.

⁶⁰⁷ Submissions 1, 11, 14.

⁶⁰⁸ See [17.129] above.

Expressions signifying a contrary or other intention

The existing law

17.202 As observed earlier in this chapter, the Locke King's legislation in the various Australian jurisdictions provides that the rule that debts must be paid primarily out of the property on which they are charged does not apply if the deceased has signified a contrary or other intention.⁶⁰⁹

17.203 A contrary intention may be signified by a provision in a will that a beneficiary is to take the property free from the mortgage, without specifying the assets out of which the debt is to be paid.⁶¹⁰ In those circumstances, the mortgage debt is paid according to the applicable order for the application of assets.⁶¹¹

17.204 Alternatively, a contrary intention may be signified by a direction in a will that the mortgage is to be paid out of a specified fund.⁶¹² Where the specified fund is sufficient to satisfy the debt charged on the property, the payment of the debt does not present any difficulty. However, where the specified fund is insufficient to discharge the debt in full, the question arises as to whether the deficiency must be borne by the various classes of assets in the applicable order or whether the deficiency must be borne by the charged property itself.

17.205 The extent to which the charged property is exonerated from payment of the debt will depend on the intention signified by the testator. Where the testator has merely provided that the debts are to be paid out of a specified fund, without directing how the mortgage debt is to be paid if the specified fund proves insufficient, it has been held that any deficiency will be payable out of the charged property.⁶¹³

The testator has indicated that a particular fund should be used for paying debts. That seems to me to be a direction that the mortgage debt is to be paid out of that fund so far as it is available, but not a direction that the property charged is to be exonerated beyond that so as to throw the burden of the balance of the sum charged on the general personal estate.

609 *Civil Law (Property) Act 2006* (ACT) s 500(2); *Conveyancing Act 1919* (NSW) s 145(1); *Succession Act 1981* (Qld) s 61(1); *Administration and Probate Act 1919* (SA) s 52(1); *Administration and Probate Act 1935* (Tas) s 35(1); *Administration and Probate Act 1958* (Vic) s 40(1); *Wills Act 1970* (WA) s 28(1).

610 See, for example, *Haines v Goode* (1933) 33 SR (NSW) 1.

611 Depending on the particular jurisdiction, this may be the old order of application of assets or one of the statutory orders. See the discussion of the classes of assets for the payment of debts at [17.4]–[17.33] above.

612 *Re Fegan* [1928] Ch 45, 49–50 (Tomlin J).

613 *Ibid* 52.

17.206 The legislation in most Australian jurisdictions provides that certain specified expressions do not signify a contrary or other intention about the payment of a debt secured by a charge on property. There are some minor differences between the Queensland legislation on the one hand, and the legislation in the other Australian jurisdictions on the other, as to the expressions that do not signify a contrary intention about the payment of a debt charged on property.

17.207 In Queensland, section 61(2) of the *Succession Act 1981* (Qld) provides:

61 Payments of debts on property mortgaged or charged

...

- (2) A contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of the testator's estate or out of the testator's residuary estate or by a gift of any such estate after or subject to the payment of debts.

17.208 Accordingly, neither of the following signifies a contrary intention:

- a general direction, charge or trust for the payment of debts, or of all the debts of the testator, out of 'the testator's estate' or 'the testator's residuary estate'; or
- a gift of any such estate after, or subject to, the payment of debts.

17.209 In contrast, the provisions that apply in the ACT, New South Wales, South Australia, Tasmania, Victoria and Western Australia — which are expressed in virtually the same terms — provide that a contrary or other intention is not signified by a general direction for the payment of debts or of all the debts of the testator out of, or by a charge of debts upon:

- the testator's personal estate;
- the testator's residuary real and personal estate; or
- the testator's residuary real estate;

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.⁶¹⁴

614

Civil Law (Property) Act 2006 (ACT) s 500(3), (4); *Conveyancing Act 1919* (NSW) s 145(2); *Administration and Probate Act 1919* (SA) s 52(2); *Administration and Probate Act 1935* (Tas) s 35(2); *Administration and Probate Act 1958* (Vic) s 40(2); *Wills Act 1970* (WA) s 28(2). The provisions in these jurisdictions reproduce the wording of the original English legislation: see *Real Estate Charges Act 1867* (UK) s 1; *Real Estate Charges Act 1877* (UK) s 1. They are also in the same terms as the current English provision: see *Administration of Estates Act 1925* (UK) s 35(2).

17.210 These provisions perform a similar function to section 59(3) of the *Succession Act 1981* (Qld).⁶¹⁵ They are intended to ensure that the rule that charged property should be primarily liable for its own debt is not displaced by a general direction in the will to pay debts. The effect of the Victorian provision can be seen in *In the Will of Fisher*,⁶¹⁶ where the residuary clause of the will under consideration provided that the 'rest residue and remainder of my real and personal estate subject to the payment thereof of ... all my just debts funeral and testamentary expenses' was to be distributed among certain of the testator's children. The Supreme Court of Victoria held that the effect of the legislation was that the words used as to the payment of debts were insufficient to signify a contrary or other intention.

Discussion Paper

17.211 In the Discussion Paper, the National Committee sought submissions on whether the model legislation should stipulate what should or should not constitute a contrary intention for the purposes of Locke King's legislation.⁶¹⁷

Submissions

17.212 The Bar Association of Queensland was of the view that, for the sake of clarity, 'the model legislation should stipulate what does, or does not constitute a contrary intention for the purpose of Locke King's rule'.⁶¹⁸

17.213 An academic expert in succession law was strongly of the view that a provision to the effect of section 61(2) of the *Succession Act 1981* (Qld) should be adopted:⁶¹⁹

Queensland's section 61(2) places a limit on the extent to which a testator can express an intention contrary to the provision of section 61(1). That limitation is in my view absolutely correct. What it really means is that the testator who wishes a debt secured by a mortgage to be paid out of property other than the mortgaged property must make that intention very clear. The way to do that is not to give a general direction about the payment of debts, but to say specifically what property, other than the mortgaged property, is to be used to pay the mortgage debt. Section [61(2)] forces testators and their legal advisers to give proper consideration to any wish that a debt secured by a mortgage is to be paid out of property other than the mortgaged property, by virtually requiring the will to point to what other property is to be used for the purpose.

17.214 The ACT Law Society also appeared to support the adoption of the Queensland provision. In its view, the legislation should not stipulate what may constitute a contrary intention, which should be a matter for the courts.

⁶¹⁵ See [17.115], [17.131]–[17.137] above.

⁶¹⁶ [1948] VLR 8.

⁶¹⁷ *Administration of Estates Discussion Paper* (1999) QLRC 232; NSWLRC 330.

⁶¹⁸ Submission 1.

⁶¹⁹ Submission 12.

However, it suggested that the legislation should provide that a 'general statement' does not constitute a contrary intention.⁶²⁰

17.215 The Public Trustee of New South Wales, on the other hand, was opposed to the inclusion of this type of provision for what were said to be 'practical reasons'.⁶²¹

The National Committee's view

17.216 In the National Committee's view, it is only proper that a testator, by signifying a contrary or other intention, should be able to displace the general rule that charged property is primarily liable for payment of the debt so charged. However, the National Committee considers that expressions that merely direct a personal representative to do what is required by law — for example, to pay the debts out of the residuary estate or out of the estate — do not sufficiently demonstrate that a testator has turned his or her mind to the question of negating the principle that would otherwise apply. As it is not unusual for expressions of that kind to be included in wills, the National Committee is of the view that it is desirable for the model legislation to stipulate — as does the Locke King's legislation that applies in all Australian jurisdictions — that such expressions do not signify a contrary or other intention for the purposes of the legislation.

17.217 To the extent that section 61(2) of the *Succession Act 1981* (Qld) is drafted in slightly different terms from the legislation in the other Australian jurisdictions, the National Committee prefers the Queensland provision. The National Committee has earlier expressed the view that, ordinarily, debts should be paid out of the residuary estate ahead of assets the subject of specific dispositions.⁶²² In light of the proposed model order for the payment of debts, the National Committee is of the view that the expressions that are stipulated by section 61(2) to be ineffective to signify a contrary intention are more appropriate than those stipulated by the legislation in the other Australian jurisdictions. In particular, the Queensland reference to 'the testator's estate' is more appropriate than the reference in the legislation of the other Australian jurisdictions to 'the testator's personal estate', given that the personal estate is no longer the primary fund for the payment of debts.

17.218 The National Committee is therefore of the view that the model legislation should include a provision to the effect of section 61(2) of the *Succession Act 1981* (Qld). However, it would be impractical to attempt to stipulate what expressions should be sufficient to signify a contrary or other intention.

620 Submission 14.

621 Submission 11.

622 See [17.40] above.

The effect of creating Class 1 property

Background

17.219 As explained earlier, Class 1 of the Queensland statutory order for the payment of debts in a solvent estate consists of property appropriated, devised or bequeathed for the payment of debts and property charged with, or devised or bequeathed subject to a charge for, the payment of debts.⁶²³ In this Report, the National Committee has proposed that property of these two kinds should constitute Class 1 of the model statutory order.⁶²⁴

17.220 Since one of the ways in which a testator may signify a contrary or other intention about the payment of a debt charged on property is to specify a fund out of which the debt is to be paid, the question arises as to whether, if a testator creates Class 1 property (for example, by appropriating property for the payment of debts), a testator is signifying an intention that negatives the effect of Locke King's legislation.

17.221 *Lee's Manual of Queensland Succession Law* identifies the problem that can arise if a testator disposes of property that is subject to a mortgage (in this case, Whiteacre) and also creates Class 1 property (by directing the executors to pay all the debts out of Blackacre), and outlines the competing arguments about whether the direction to pay debts out of Blackacre amounts to a contrary intention so as to negative the effect of section 61 of the *Succession Act 1981* (Qld).⁶²⁵

Suppose a will says 'I direct my executors to pay all my debts out of Blackacre'; and Blackacre is worth \$80,000 but the debts amount to \$100,000, one debt of \$40,000 being secured by a mortgage of Whiteacre. How is the \$20,000 remaining outstanding after Blackacre has been exhausted to be paid: out of the general estate in accordance with s 59 or out of Whiteacre? Sections 59 and 61 may not provide a clear answer. The direction that the debts be paid out of Blackacre is arguably a contrary intention ousting s 61. This is because it is not a direction to pay out of the estate or the residue of the estate;⁶²⁶ but whether, in the absence of any other indication in the will, it does oust the section is doubtful. For it may also be argued that the effect of the direction is merely to place Blackacre in class 1 and that something more is needed to displace the debts secured by mortgage of Whiteacre onto other property. (note added)

17.222 If the direction to pay debts out of Blackacre does not amount to a contrary intention so as to negative the operation of section 61 of the *Succession Act 1981* (Qld), Whiteacre will be primarily liable to discharge the

623 See [17.25] above.

624 See [17.73] above.

625 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [11.180].

626 See *Succession Act 1981* (Qld) s 61(2).

mortgage debt secured on it and Blackacre will be applied solely towards the discharge of the unsecured debts:⁶²⁷

Blackacre will only be used to pay the remaining debts of \$60,000, leaving Whiteacre to bear the whole of the mortgage debt and \$20,000 left over for the beneficiary entitled to Blackacre, which might be the residuary beneficiary. For if the direction is ruled not to be contrary intention to s 61 there is then no authority for the remaining value of \$20,000 deriving from Blackacre to be used to defray part of Whiteacre's mortgage debt.

17.223 However, if the direction to pay debts out of Blackacre does amount to a contrary intention, Blackacre will be liable to be applied to discharge the debt secured on Whiteacre, as well as the testator's unsecured debts. If Blackacre is insufficient to discharge all these debts in full, the question arises as to how it should be applied:⁶²⁸

If the ... view is taken that the direction does amount to contrary intention under s 61, one is faced with the problem that the direction clearly also indicates that the other debts are to be paid out of Blackacre as well. As there would then be \$80,000 available to meet debts of \$100,000 one would be tempted to apply principles of rateability.⁶²⁹ On this basis, 80% of each debt and the mortgage owing on Whiteacre would be paid out of Blackacre. The remaining \$8,000 of the mortgage would then appear to have to be borne by Whiteacre as there seems to be no authority to displace this remaining debt onto any property other than Blackacre. There seems to be no basis for giving Whiteacre's mortgage the priority over the other debts that such action would require.

17.224 The Law Reform Commission of Western Australia considered the relationship between sections 59 and 61 of the Queensland legislation in its Report on the administration of assets of solvent estates.⁶³⁰ It expressed the view that:⁶³¹

It is ... highly arguable that when in Queensland a testator creates a Class 1 asset, then by that very fact he has expressed an intention contrary to section 61, and that if he wishes to retain the effect of the section he must say so ...

627 AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [11.180].

628 Ibid.

629 It is noted that 'the applicability of rateability in this case would have to be based on general legal principles such as the principle of proportionate equality in equity derived from the maxim: *equality is equity*; as the statutory principle of rateability in s 59(2) is clearly limited in its effect to the classes under s 59 and pecuniary legacies under s 60': AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [11.180] note 27.

630 Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 Pt VII (1988).

631 Ibid [4.42].

17.225 The Western Australian Commission, which recommended that provisions based on sections 59 and 61 of the *Succession Act 1981* (Qld) should be adopted in the Western Australian legislation,⁶³² was of the view that the legislation should clarify the effect of the creation of Class 1 assets on the operation of section 61.⁶³³ It suggested that the Western Australian legislation:⁶³⁴

should be drafted in such a way that the creation of what under the Queensland Act is a Class 1 asset (the creation of a trust or charge for the payment of debts) be deemed to constitute an ouster of the section, unless the will otherwise expressly provides to the contrary.

17.226 The Western Australian Commission was further of the view that, where the creation of Class 1 assets operated to oust the effect of the provision based on section 61, preference should be given to the payment of the unsecured debts:⁶³⁵

the section should also provide that in such a case Class 1 assets be first applied in the payment of *unsecured* debts, and only when they have been so discharged, in the exoneration of secured debts charged against specific property. To the extent that Class 1 proved insufficient for the latter purpose, the security would have to carry the balance of the charge against it. (emphasis in original)

The National Committee's view

17.227 In the National Committee's view, the model legislation should resolve any ambiguity about whether a testator who creates what will be Class 1 property under the model statutory order has, by doing so, expressed an intention sufficient to negative the operation of the model provision that is to embody the Locke King's legislation.

17.228 The National Committee agrees with the recommendation of the Law Reform Commission of Western Australia that the creation of Class 1 property should be effective to express a contrary intention so as to negative the effect of the model Locke King's provision. The model legislation should therefore include a separate provision setting out how the debt or charge to which encumbered property is subject is to be paid if a testator creates Class 1 property.

17.229 This additional provision should provide that the Class 1 property should be liable to discharge both the debt or charge to which the encumbered property is subject and the deceased's unsecured debts. If the Class 1 property

632 Ibid [6.2] Recommendation (1). This recommendation was subject to the further recommendation that the Western Australian legislation should omit Class 4 of the Queensland statutory order: at [6.2] Recommendation (3).

633 Ibid [5.21].

634 Ibid.

635 Ibid.

is insufficient to discharge all those debts in full, it should be applied rateably towards the discharge of the secured debt and the unsecured debts. In this respect, the National Committee disagrees with the view expressed by the Law Reform Commission of Western Australia that preference should be given to the payment of the unsecured debts.⁶³⁶

17.230 In the National Committee's view, Class 1 assets should be applied rateably towards the payment of the secured debt and the unsecured debts. To the extent that the Class 1 property is insufficient to discharge the secured debt, the balance of that debt should be paid out of the property on which the debt is charged.

17.231 To the extent that the Class 1 property is insufficient to discharge the unsecured debts, those debts will be paid according to the model statutory order for the payment of debts — that is, out of Class 2 property, if any, and then out of Class 3 property, if necessary.

17.232 Because the existence or otherwise of Class 1 property will be critical in determining which of the two recommended provisions applies in a particular situation, the model legislation should also provide that a direction for the payment of debts of the kind referred to in section 61(2) of the *Succession Act 1981* (Qld) does not constitute the property the subject of the direction as Class 1 property.

Rights of mortgagees

The existing law

17.233 In all Australian jurisdictions where Locke King's legislation is found, it does not affect the rights of mortgagees, since it is expressed to affect only the interests of 'persons claiming through the deceased'.⁶³⁷

17.234 This raises the issue of whether it is necessary for the legislation to provide additionally — as it does in the ACT, New South Wales, South Australia, Tasmania, Victoria and Western Australia⁶³⁸ — that the legislation does not affect the right of a person entitled to the mortgage or charge to obtain payment or satisfaction out of the other assets of the deceased or otherwise. For example, section 500(5) of the *Civil Law (Property) Act 2006* (ACT) provides:

⁶³⁶ See [17.225]–[17.226] above.

⁶³⁷ *Civil Law (Property) Act 2006* (ACT) s 500(2); *Conveyancing Act 1919* (NSW) s 145(1); *Succession Act 1981* (Qld) s 61(1); *Administration and Probate Act 1919* (SA) s 52(1); *Administration and Probate Act 1935* (Tas) s 35(1); *Administration and Probate Act 1958* (Vic) s 40(1); *Wills Act 1970* (WA) s 28(1).

⁶³⁸ *Civil Law (Property) Act 2006* (ACT) s 500(5); *Conveyancing Act 1919* (NSW) s 145(3); *Administration and Probate Act 1919* (SA) s 52(3); *Administration and Probate Act 1935* (Tas) s 35(3); *Administration and Probate Act 1958* (Vic) s 40(3); *Wills Act 1970* (WA) s 28(3).

500 Charges on property of deceased person to be paid primarily out of property charged

...

- (5) This section does not affect the right of a person entitled to a charge on property mentioned in subsection (1)(a), or to unpaid purchase money mentioned in subsection (1)(b), to obtain payment of the charge or purchase money out of other assets of the deceased person or in some other way.⁶³⁹ (note added)

17.235 This further provision originated in the *Real Estate Charges Act 1854* (UK). It was included in the Locke King's legislation that applied in Queensland before the enactment of section 61 of the *Succession Act 1981* (Qld),⁶⁴⁰ but was not included in section 61.

The National Committee's view

17.236 Locke King's legislation does not purport to affect the rights of the person entitled to payment of the debt charged on the property to obtain payment or satisfaction out of the other assets of the deceased or otherwise. On the contrary, the provisions in all Australian jurisdictions are expressed to affect the interests of the different persons claiming through the deceased. As a result, it is not strictly necessary for the model provision to state expressly that it does not affect the rights of the person entitled to the charge to obtain payment or satisfaction of the charge out of the other assets of the deceased or otherwise.

17.237 Nevertheless, the National Committee is of the view that the inclusion of such a provision is desirable as it provides a clear statement about the effect of the model provision. Further, as a provision to this effect is found in the Locke King's legislation of all Australian jurisdictions except Queensland, the omission of the provision from the model legislation could give rise to confusion in those other jurisdictions.

639

The reference to obtaining payment 'in some other way' would include obtaining payment from a guarantor.

640

Equity Act 1867 (Qld) s 78.

RECOMMENDATIONS

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.⁶⁴¹

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;

⁶⁴¹

See [17.51]–[17.56] above.

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.⁶⁴²

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.⁶⁴³

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.⁶⁴⁴

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.⁶⁴⁵

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

⁶⁴² See [17.40]–[17.41], [17.73]–[17.77], [17.84]–[17.90], [17.101]–[17.102], [17.104]–[17.106] above.

⁶⁴³ See [17.103] above.

⁶⁴⁴ See [17.113] above. 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.

⁶⁴⁵ See [17.119], [17.126]–[17.130] above.

Locke King's Act provisions

17-6 Subject to Recommendations 17-9 and 18-5,⁶⁴⁶ the model legislation should include a provision, to the effect of section 61(1) of the *Succession Act 1981* (Qld), that:⁶⁴⁷

- (a) applies if, on a person's death:
 - (i) the person is entitled to real or personal property⁶⁴⁸ 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');⁶⁴⁹ and
 - (ii) there is no Class 1 property in the person's estate;⁶⁵⁰
- (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.⁶⁵¹

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.⁶⁵² The model provision should:

- (a) apply if, on a person's death:

⁶⁴⁶ Recommendation 18-5 deals with the abolition of the rule in *Lutkins v Leigh* (1734) Cases T Talbot 53; 25 ER 658, which is considered at [18.82]–[18.92] below.

⁶⁴⁷ See [17.160]–[17.164], [17.175]–[17.179] above.

⁶⁴⁸ See [17.184] above.

⁶⁴⁹ See [17.189] above.

⁶⁵⁰ See [17.227] above.

⁶⁵¹ See [17.200]–[17.201] above.

⁶⁵² See [17.227]–[17.231] above.

- (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.⁶⁵³

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.⁶⁵⁴

See Administration of Estates Bill 2009 cl 509.

⁶⁵³ See [17.143]–[17.144], [17.216]–[17.218], [17.232] above.

⁶⁵⁴ See [17.236]–[17.237] above.

Chapter 18

Payment of legacies and devises

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RECOMMENDATIONS 198

TYPES OF LEGACIES AND DEVISES

18.1 The term 'devise' refers to a gift of realty contained in a will. Depending on the terms of the disposition, a devise will usually be specific or residuary.

18.2 In contrast, the term 'legacy' is commonly used to refer to a gift of personalty contained in a will. Legacies can be categorised in a number of different ways: specific, residuary, general, pecuniary and demonstrative.⁶⁵⁵ These categories of legacies and devises are considered below.

Specific legacies and devises

18.3 The distinguishing feature of a specific legacy or devise is that it refers to specific property that forms part of the testator's estate, such as a devise of Blackacre.⁶⁵⁶ If the property the subject of the specific legacy or devise does not form part of the testator's estate when the testator dies, the legacy or devise is said to have been adeemed, or 'taken out of the will'.⁶⁵⁷ Consequently, if Blackacre is sold during the testator's lifetime, the beneficiary to whom that property was devised will usually lose that benefit.⁶⁵⁸

Residuary legacies and devises

18.4 A residuary legacy or devise is a gift 'of personalty or realty not specifically bequeathed or devised by the will, but included ... in a residuary disposition'.⁶⁵⁹

Pecuniary legacies

18.5 A pecuniary legacy is a disposition of money and, depending on its particular terms, may be either a specific legacy or a general legacy. It will be a specific legacy where, for example, a testator makes a bequest of 'all the money in the ivory box in my desk'.⁶⁶⁰ However, a legacy will be general where it is not a gift of a distinguishable part of the testator's estate.

⁶⁵⁵ See AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [10.10].

⁶⁵⁶ Blackacre is a name commonly used to designate a hypothetical parcel of real property.

⁶⁵⁷ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [10.20].

⁶⁵⁸ See however *Re Viertel* [1997] 1 Qd R 110 where attorneys under an enduring power of attorney sold a property not knowing that the donor of the enduring power of attorney had in her will specifically devised that property to them. The Court held that, in the circumstances, the gift to the attorneys was not adeemed and they were entitled to the proceeds of the sale of the property.

⁶⁵⁹ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [10.70].

⁶⁶⁰ *Ibid* [10.50].

General legacies

18.6 Unlike a specific legacy, a general legacy 'does not earmark any particular property or fund as the subject of the legacy'.⁶⁶¹ Whereas a gift of 'my horse Dobbin' is a specific legacy,⁶⁶² a gift of 'a horse' is a general legacy.⁶⁶³ Where a will contains a general legacy of this kind, the duty of the personal representative is:⁶⁶⁴

to purchase a horse, or, if there are horses in the testator's estate, to allow the beneficiary to select one ... The personal representative may, instead, pay direct to the legatee the sum of money which would be required to make the purchase. (notes omitted)

18.7 If the personal representative is unable to purchase the subject matter of the general legacy within twelve months of the testator's death, the legatee is entitled to 'such a sum as at that date would have been required to purchase' the relevant item, with interest at the appropriate rate from that date.⁶⁶⁵ In this way, a general legacy that is not pecuniary in nature can become a general pecuniary legacy.⁶⁶⁶

18.8 The most common type of general legacy, however, is the general pecuniary legacy, which is a gift of money out of the general estate, such as a legacy of \$500.

18.9 It has been observed that general legacies 'are not really assets, as the funds necessary to satisfy them must be acquired out of the assets of the testator'.⁶⁶⁷

Demonstrative legacies

18.10 A demonstrative legacy is a pecuniary legacy payable out of a particular fund, for example, a gift of '\$500 charged on my property Blackacre'.⁶⁶⁸ To the extent to which a demonstrative legacy can be paid out of the property on which it is charged, it is regarded as a specific legacy. However, to the extent to which it cannot be paid out of that property, it is

⁶⁶¹ Ibid [10.40].

⁶⁶² Ibid [10.20].

⁶⁶³ Ibid [10.40].

⁶⁶⁴ Ibid.

⁶⁶⁵ *Re O'Connor* [1948] Ch 628, 634 (Roxburgh J); *Re Plowright* [1971] VR 128, 133 (Newton J).

⁶⁶⁶ RA Woodman, *Administration of Assets* (2nd ed, 1978) 67.

⁶⁶⁷ Ibid 22.

⁶⁶⁸ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [10.60].

regarded as a general legacy.⁶⁶⁹ The advantages enjoyed by demonstrative legacies as a result of their hybrid nature have been described as follows:⁶⁷⁰

A demonstrative legacy enjoys the advantage of a general legacy inasmuch as it is not adeemed if the security on which it is charged does not exist or has been disposed of, in which case the legacy is regarded as a general legacy. On the other hand, if the security on which it is charged does form part of the deceased's estate, the legacy will be regarded as specific. This may place the legatee at an advantage in respect of the liability to contribute towards the payment of the deceased's debts out of the benefit left to her or him. If the fund on which the legacy is charged is only partly sufficient to meet it, the legacy is specific to the extent of the fund but general as to the rest. (notes omitted)

PAYMENT OF LEGACIES AND DEVICES: THE EXISTING LAW

Residuary and specific legacies and devises

18.11 In Chapter 17 of this Report, the National Committee has considered the order in which assets are applied towards the payment of debts in a solvent estate. In all Australian jurisdictions, regardless of whether the old order of application of assets applies or whether a statutory order applies, assets comprising the testator's residuary estate are applied before assets that are the subject of specific dispositions.⁶⁷¹

18.12 Consequently, if a will contains a residuary disposition, the residuary beneficiaries will receive what is left of the residuary estate, if anything, after the debts have been paid. If a will contains dispositions of specific assets, those assets will usually be applied last towards the payment of debts.⁶⁷² In all jurisdictions, if it is necessary for assets that are specifically devised or bequeathed to be applied towards the payment of debts, those assets contribute rateably, with the result that all of the specific legatees and devisees bear a proportionate amount of the debts.⁶⁷³

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The legislation in Queensland, Tasmania and Victoria gives effect to this principle by providing that a 'pecuniary legacy' includes 'a demonstrative legacy, so far as it is not discharged out of the designated property': *Succession Act 1981* (Qld) s 5; *Administration and Probate Act 1935* (Tas) s 3; *Administration and Probate Act 1958* (Vic) s 5. These provisions are based on the definition of 'pecuniary legacy' found in s 55(1)(ix) of the *Administration of Estates Act 1925* (UK). The Queensland definition of 'pecuniary legacy' is set out at note 689 below.

670

AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [10.60].

671

See [17.3]–[17.4], [17.13], [17.20], [17.25] above.

672

Note that in South Australia, Tasmania and Western Australia, property the subject of a general power of appointment that is expressly exercised by the testator is applied after property that is specifically devised or bequeathed: see [17.3]–[17.4], [17.13] above.

673

The principle of rateability is considered at [17.107]–[17.113] above.

General legacies (including general pecuniary legacies)

South Australia, Western Australia

18.13 In South Australia and Western Australia, where the old order of application of assets for the payment of debts still applies,⁶⁷⁴ the personal representative is required to retain a fund for the payment of pecuniary legacies out of Class 1 assets (personalty not specifically bequeathed) before applying those assets towards the payment of debts. The fund so retained comprises Class 5 of the old order.⁶⁷⁵ Consequently, that fund is applied towards the payment of debts before assets specifically devised or bequeathed, which are found in Class 6. If the retained fund is exhausted by the payment of debts, the pecuniary legatees will receive nothing. Assets comprising Class 6 abate only if it is necessary to draw on those assets to pay debts. They do not abate to enable pecuniary legacies to be paid.

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

18.14 Under the statutory orders for the payment of debts that apply in the ACT, New South Wales, the Northern Territory and Tasmania, the personal representative must retain out of the assets comprising Class 1 (assets undisposed of by will) and Class 2 (assets contained in a residuary gift) a fund to meet any pecuniary legacies.

18.15 In Victoria, the fund must be retained out of the assets comprising Classes 1 and 4.

18.16 In each of these jurisdictions, the fund so retained constitutes Class 5 of the relevant statutory order. On that basis, the fund is applied towards the payment of debts before assets specifically devised or bequeathed, which are found in Class 6.⁶⁷⁶ If the retained fund is exhausted by the payment of debts, the pecuniary legatees receive nothing. Assets specifically devised or bequeathed do not abate to enable the payment of pecuniary legacies.

18.17 The term 'pecuniary legacy' is used in the statutory orders in each of these jurisdictions. That term is defined in the Tasmanian and Victorian legislation to include a general legacy and a demonstrative legacy to the extent to which it cannot be paid out of the property on which it is charged.⁶⁷⁷ These definitions are based on the definition of 'pecuniary legacy' contained in the

⁶⁷⁴ The old order of application of assets is considered at [17.4]–[17.9] above.

⁶⁷⁵ As a result, in the absence of a contrary intention in the will, a pecuniary legatee is entitled to have his or her legacy satisfied only out of the testator's general personal estate, that is, the testator's personalty not specifically bequeathed, and normally has no right to be paid out of the testator's real estate: EC Ryder, 'The Incidence of General Pecuniary Legacies' (1956) *Cambridge Law Journal* 80, 80.

⁶⁷⁶ See [17.13], [17.20] above.

⁶⁷⁷ *Administration and Probate Act 1935* (Tas) s 3(1) (definition of 'pecuniary legacy'); *Administration and Probate Act 1958* (Vic) s 5(1) (definition of 'pecuniary legacy').

Administration of Estates Act 1925 (UK),⁶⁷⁸ from which the Tasmanian statutory order and the original Victorian statutory order were derived.⁶⁷⁹

18.18 There is, however, no definition of ‘pecuniary legacy’ in the legislation in the ACT, New South Wales or the Northern Territory. This raises the question of what is meant by the references to pecuniary legacies in the statutory orders of these jurisdictions and, in particular, whether the term includes a general legacy that is not pecuniary.⁶⁸⁰

The question raised therefore is whether it is meant to be a description of general legacies or only those legacies having a monetary (pecuniary) component. Not all gifts involving money are general legacies. Similarly, not all general legacies are ‘pecuniary’.

18.19 A commentator on the New South Wales legislation has suggested that, having regard to the New South Wales statutory order as a whole, the term ‘pecuniary legacy’ must bear the same meaning as it does under the English legislation from which the New South Wales statutory order is derived.⁶⁸¹ Other commentators conclude that this observation would apply with equal force in the other Australian jurisdictions where the term ‘pecuniary legacy’ is not defined.⁶⁸²

18.20 Some doubt has been raised about whether the legislation in these jurisdictions has altered the old law that pecuniary legacies were ordinarily payable only out of the general personal estate not specifically bequeathed.⁶⁸³ This doubt arises from an inconsistency in the language used in the legislation in these jurisdictions. Although the statutory orders set out in the schedules to the various Acts include, as a distinct class, the fund retained for the payment of pecuniary legacies, the provisions that actually require the deceased person’s real and personal property to be applied towards the payment of debts in accordance with the statutory order set out in the particular schedule do not refer to the payment of pecuniary legacies.⁶⁸⁴ Consequently, a doubt remains as to whether the fund retained out of assets comprising Classes 1 and 2 (or

678 *Administration of Estates Act 1925 (UK)* s 55(1)(ix).

679 The Tasmanian and Victorian statutory orders are considered at [17.13]–[17.22] above.

680 RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [18.7.6].

681 GL Certoma, *The Law of Succession in New South Wales* (3rd ed, 1997) 152. A similar argument is made in RA Woodman, *Administration of Assets* (2nd ed, 1978) 66–7.

682 RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [18.7.6].

683 Under the old law, realty was in a privileged position. Pecuniary legatees did not have recourse to realty unless legacies were expressly or impliedly charged upon realty or were payable out of realty by virtue of the doctrine of marshalling: RA Woodman, *Administration of Assets* (2nd ed, 1978) 105.

684 *Administration and Probate Act 1929 (ACT)* s 41C(1); *Probate and Administration Act 1898 (NSW)* s 46C(2); *Administration and Probate Act (NT)* s 57(1); *Administration and Probate Act 1935 (Tas)* s 34(3); *Administration and Probate Act 1958 (Vic)* s 39(2).

Classes 1 and 4 in Victoria) should be retained out of those classes generally or only out of the personalty contained in those classes.⁶⁸⁵

Queensland

18.21 Unlike the statutory orders in the other Australian jurisdictions, the Queensland statutory order does not include, as a distinct class, a fund retained out of earlier classes for the payment of pecuniary legacies.⁶⁸⁶ It has been suggested that this is because pecuniary legacies 'do not consist of specific property', but merely amount to 'a direction to the representative to pay an ascertainable sum of money'.⁶⁸⁷

18.22 Instead, the payment of pecuniary legacies is dealt with by section 60 of the *Succession Act 1981* (Qld), which provides:

60 Payment of pecuniary legacies

Subject to a contrary or other intention signified by the will—

- (a) pecuniary legacies shall be paid out of the property comprised in class 2 referred to in section 59⁶⁸⁸ after the discharge of the debts or such part thereof as are payable out of that property; and
- (b) to the extent to which the property comprised in class 2 referred to in section 59 is insufficient the pecuniary legacies shall abate proportionately. (note added)

18.23 Because of the definition of 'pecuniary legacy' contained in the Queensland legislation,⁶⁸⁹ it is clear that section 60 governs the payment of pecuniary legacies, general legacies and demonstrative legacies to the extent to which they are not discharged out of the property on which they are charged.

⁶⁸⁵ This issue is considered in detail in relation to the English legislation in EC Ryder, 'The Incidence of General Pecuniary Legacies' (1956) *Cambridge Law Journal* 80. Commentators on the New South Wales legislation are of the view that, in that jurisdiction, the former law under which realty was not ordinarily liable for the payment of pecuniary legacies has been abolished, and that realty and personalty are now on the same footing in relation to the payment of debts: RA Woodman, *Administration of Assets* (2nd ed, 1978) 100; GL Certoma, *The Law of Succession in New South Wales* (3rd ed, 1997) 302–3.

⁶⁸⁶ The Queensland statutory order is set out at [17.25] above.

⁶⁸⁷ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [11.150]. See also the similar comment by Woodman in relation to the nature of general legacies at [18.9] above.

⁶⁸⁸ The property comprised in Class 2 of s 59 of the *Succession Act 1981* (Qld) is property comprising the residuary estate of the deceased, which includes, by virtue of s 55 of the *Succession Act 1981* (Qld), property not effectively disposed of by the will.

⁶⁸⁹ The term 'pecuniary legacy' is defined in s 5 of the *Succession Act 1981* (Qld) as follows:

pecuniary legacy includes an annuity, a general legacy, a demonstrative legacy, so far as it is not discharged out of the designated property, and any other general direction by the testator for the payment of money including all duties relating to the estate or property of a deceased person free from which any devise, bequest or payment is made to take effect.

18.24 The effect of section 60 is that, subject to a contrary or other intention signified by will, pecuniary legacies are to be paid out of the assets comprising the residuary estate, and, to the extent to which those assets are insufficient, the pecuniary legacies must abate proportionately. If the residuary estate has been exhausted by the payment of the debts, the pecuniary legatees receive nothing. The section preserves the privileged position of specific legacies and devises.

Demonstrative legacies

Jurisdictions other than Queensland

18.25 As explained previously, where assets in a particular class are required for the payment of debts, those assets contribute rateably according to their value. Under the general law, if a particular asset is mortgaged, its value for this purpose is the value of the asset less the amount of the debt secured by the mortgage.⁶⁹⁰ However, where an asset is merely charged with the payment of a demonstrative legacy, the value of the asset is determined without regard to that fact.⁶⁹¹ This is still the law in all Australian jurisdictions except Queensland.

Queensland

18.26 In Queensland, if an asset is required to contribute to the payment of debts and that asset is also charged with the payment of a legacy, both the asset and the demonstrative legacy that is charged on it will abate rateably. Section 59(2) of the *Succession Act 1981* (Qld) provides:

Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, the payment of pecuniary legacies rateably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied rateably. (emphasis added)

18.27 This provision was implemented as a result of a recommendation by the Queensland Law Reform Commission, which explained the injustice of the traditional rule to the legatee of the asset on which the demonstrative legacy is charged:⁶⁹²

a property worth \$10,000, charged with a legacy of \$5,000, is valued for the purposes of determining its obligation to pay debts within its class at \$10,000. If more than 50% is needed from that class to pay debts, the legatee will get nothing ...

⁶⁹⁰ *Calcino v Fletcher* [1969] Qd R 8, 23 (Hoare J).

⁶⁹¹ *Re Sloan* [1943] VLR 63. See also *Calcino v Fletcher* [1969] Qd R 8, 23 (Hoare J).

⁶⁹² Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 43.

ISSUES FOR CONSIDERATION

18.28 In Chapter 17 of this Report, the National Committee has recommended that, under the model statutory order for the application of assets, assets comprising the residuary estate should be applied towards the payment of debts before assets the subject of specific dispositions.⁶⁹³ That recommendation addresses the question of the payment of a residuary legacy or devise. If the residuary estate is exhausted by the payment of debts, the residuary beneficiary will receive nothing. However, the question still remains to be considered as to which parts of the estate should bear the payment of general and demonstrative legacies.

18.29 An examination of the law in the various jurisdictions in relation to the payment of legacies gives rise to the following issues, which are considered in turn below:

- the property out of which general pecuniary legacies should be paid and whether general pecuniary legacies should be treated as if they were gifts of specific property;
- whether the model legislation should use the term ‘pecuniary legacy’;
- how a demonstrative legacy, to the extent that it can be paid out of the property on which it is charged, should be applied towards the payment of debts; and
- whether any contrary intention must be expressed in the deceased person’s will.

GENERAL LEGACIES (INCLUDING GENERAL PECUNIARY LEGACIES)

Background

18.30 In this discussion, a reference to a pecuniary legacy is intended to refer to a general legacy, to a pecuniary legacy that is not a specific legacy, and to a demonstrative legacy to the extent to which it cannot be paid out of the property on which it is charged.

18.31 As noted previously, in all Australian jurisdictions, assets that are the subject of specific dispositions are not required to abate in order to enable the payment of pecuniary legacies.

18.32 The question of whether pecuniary legacies should be payable only out of what is left of the residuary estate after the debts have been paid, or whether pecuniary legacies should be able to be paid (at least in part) out of assets that have been specifically devised or bequeathed was considered by both the

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See [17.40] above.

Queensland Law Reform Commission and the Law Reform Commission of Western Australia when those Commissions reviewed the law in their respective jurisdictions in relation to the administration of assets.

18.33 In considering this issue, the Queensland Law Reform Commission acknowledged that it was hard to justify the rule that the fund for the payment of pecuniary legacies should be used to pay debts before property specifically devised or bequeathed.⁶⁹⁴ Notwithstanding this reservation, the Commission recommended that this aspect of the law should be retained, noting that this had always been the position historically.⁶⁹⁵

It is clearly arguable that if a testator leaves \$10,000 to A and 'Blackacre' to B, there is no particular reason to suppose that he intends the former fund to pay the debts and the latter to be protected. On the other hand, pecuniary legacies have a character of liquidity which specific legacies lack and if specific legacies and devises were to be made to share the payment of debts with the fund reserved for the payment of pecuniary legacies, properties the subject of specific legacies and devises would have to be sold more often to bring about the proportionate abatement required. We doubt whether a testator would really wish this, particularly where the subject matter of a specific legacy has some sentimental value. Accordingly, we propose to retain the existing order in this respect.

18.34 The Law Reform Commission of Western Australia also expressed some concerns about whether it could really be said that a testator's intention in giving a pecuniary legacy was not as strong as a testator's intention in giving a specific legacy or devise.⁶⁹⁶ Ultimately, however, the Western Australian Commission recommended the adoption of a provision to the effect of section 60 of the *Succession Act 1981* (Qld).⁶⁹⁷ That Commission commented:⁶⁹⁸

On balance, the Commission is of the view that in many cases general legatees will not in point of fact have been intended to be benefited by a testator quite as strongly as specific beneficiaries ...

18.35 A proposal that would treat pecuniary legacies as if they were specific legacies has been suggested by a commentator on this area of the law.⁶⁹⁹ That proposal is based on the retention out of earlier classes of assets of a fund to pay pecuniary legacies. The last class of assets in the statutory order to be applied towards the payment of debts and the payment of general legacies would, subject to the provisions, if any, contained in the will, consist of 'the fund, if any, retained to meet general legacies and assets specifically disposed of by

⁶⁹⁴ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 42.

⁶⁹⁵ Ibid.

⁶⁹⁶ Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 Pt VII (1988) [5.15].

⁶⁹⁷ Ibid [6.2] Recommendation (1).

⁶⁹⁸ Ibid [5.15].

⁶⁹⁹ RA Woodman, 'Payment of Debts and Legacies: Proposals for Reform' (1968) 6 *University of Queensland Law Journal* 84, 102–3.

the will', which would be applied 'rateably according to the amount thereof or to value'.⁷⁰⁰

Discussion Paper

18.36 In the Discussion Paper, the National Committee acknowledged that it is impossible for any arbitrary rule to do justice in all the different cases that might arise. Inevitably, regardless of the rule that is adopted, some disappointed beneficiaries may have to seek some redress by means of an application for family provision (if they are eligible to make such an application).⁷⁰¹

18.37 The National Committee expressed the view that it could not be said with any certainty that one position or the other more closely reflects the probable intentions of a testator.⁷⁰² Where the general legacy is very small, it is perhaps arguable that a testator would not want specific assets sold in order to pay that legacy. However, as the Queensland Law Reform Commission observed when it considered this issue in its 1978 Report, where a pecuniary legacy is relatively substantial, it is more difficult to make the assumption that the testator intends for the pecuniary legacy to pay the debts while the specific legacy is protected.

18.38 In the Discussion Paper, the National Committee expressed the view that it was not entirely persuaded by the argument that, as money is an amorphous thing, a pecuniary legacy should be treated differently from a specific legacy.⁷⁰³ Nevertheless, the National Committee considered that, if pecuniary legacies were to be treated on the same footing as specific legacies, this could complicate the administration of estates, as it might be necessary for assets that were the subject of specific legacies or devises to be sold in order to pay pecuniary legacies if the residuary estate were insufficient to meet those legacies.⁷⁰⁴

18.39 The National Committee therefore proposed that, subject to the expression of a contrary intention:⁷⁰⁵

⁷⁰⁰ Ibid. The proposed class also dealt with the payment of demonstrative legacies in terms consistent with s 59(2) of the *Succession Act 1981* (Qld). For present purposes, that qualification is not relevant.

⁷⁰¹ *Administration of Estates Discussion Paper* (1999) QLRC 225; NSWLRC [15.121]. See *Family Provision Report* (1997) Ch 2 and *Family Provision Supplementary Report* (2004) Ch 2 for a discussion of eligibility to apply for family provision and the National Committee's recommendations about that issue.

⁷⁰² *Administration of Estates Discussion Paper* (1999) QLRC 225; NSWLRC [15.122].

⁷⁰³ Ibid, QLRC 225; NSWLRC [15.123].

⁷⁰⁴ Ibid. However, if the beneficiary of the specific legacy or devise were willing and able to contribute to the estate an amount equal to that which the property the subject of the specific legacy or devise would otherwise be liable to contribute, it would be possible to avoid the sale of that property.

⁷⁰⁵ The National Committee also proposed that the expression of a contrary intention should not be confined to one found in the will. That issue is considered at [18.78]–[18.81] below.

- pecuniary legacies should be paid out of the residuary estate after the payment of debts; and
- if the residuary estate is insufficient, after the payment of debts, to pay the pecuniary legacies in full, they should abate proportionately.⁷⁰⁶

18.40 Notwithstanding that this proposal reflects the existing law in relation to the payment of pecuniary legacies, the National Committee specifically sought submissions on whether a general legacy (be it pecuniary or non-pecuniary) should be treated as a gift of specific property.

Submissions

18.41 The submissions that addressed the issue of the payment of pecuniary legacies were divided as to how they should be treated.

18.42 The National Committee's proposal — which was based on section 60 of the *Succession Act 1981* (Qld) — was supported by the Public Trustee of New South Wales, the New South Wales Law Society and an academic expert in succession law.⁷⁰⁷ The last of these respondents commented:⁷⁰⁸

To repeal the distinction which exists between general and specific legacies, so far as the payment of debts is concerned, would be a very major upheaval in the law. ... It has always been accepted that property from which a general or pecuniary legacy is to be paid should be used for the payment of debts before property specifically given. Even though it may be difficult to justify the distinction in absolute terms the rule is too embedded to root out without a great deal of consideration. A change of the law could not be justified in the case of existing wills.

18.43 On the other hand, the submissions from the Bar Association of Queensland, the Queensland Law Society and the ACT Law Society were of the view that pecuniary legacies and general non-pecuniary legacies should be treated as if they were gifts of specific property.⁷⁰⁹ The Queensland Law Society suggested that:⁷¹⁰

Will makers regard pecuniary legacies as having equal importance with specific legacies. This flows from the proposition that a person possessing testamentary capacity is actually making a proper judgment as to how he is to acknowledge the moral claim that all of his beneficiaries have upon him. Further, pecuniary legacies are often arranged for beneficiaries to keep them in equality with other persons mentioned in the will. The very fact that money is amorphous or fungible means that it is a perfect medium to be used for either fairly precisely tailoring the required benefit for a particular person, or for

⁷⁰⁶ *Administration of Estates Discussion Paper* (1999) QLRC 226; NSWLRC 323 (Proposal 78).

⁷⁰⁷ Submissions 11, 12, 15.

⁷⁰⁸ Submission 12.

⁷⁰⁹ Submissions 1, 8, 14.

⁷¹⁰ Submission 8.

bringing one beneficiary into equilibrium with another where it is important to the testator that one of those beneficiaries takes his or her benefit in the form of a specific asset.

18.44 The Queensland Law Society also rejected the argument that pecuniary legacies should not be treated as specific legacies because to do so might mean that it would be necessary for assets specifically devised or bequeathed to be sold in order to contribute to the payment of the pecuniary legacies.⁷¹¹

As for the argument that the subject matter of specific bequests might have to be sold, it fails to take into account the option which is always available to the specific legatee of paying money into the estate to secure the right to receive the specific subject matter. That, after all, is the acid test of the importance of the subject matter to the intended recipient. Pecuniary legacies should therefore certainly be paid out of the residuary estate after liabilities, but where pecuniary legacies cannot be paid in full as a result of the extent of the liabilities, the pecuniary legacies and the specific bequest should be treated as being on an equal footing. It follows that specific, general, pecuniary and demonstrative legacies should form one class and residuary legacies should form the other.

The National Committee's view

18.45 The National Committee notes that the submissions were divided as to whether the law should be changed to treat pecuniary legacies as if they were, in fact, specific legacies. In the National Committee's view, the question of whether the law should be changed in this respect should be decided in the light of the following matters:

- the extent to which pecuniary legacies can be placed on the same footing as specific legacies and devises, and whether this would entail a reconsideration of other settled principles;
- how any change to the existing law would need to be framed if it were considered desirable to change the law in this respect; and
- whether it is possible to say that such a change would better reflect the 'probable intentions' of a testator.

The extent to which pecuniary legacies can be assimilated with specific legacies and devises

18.46 The National Committee acknowledges that, because specific dispositions do not abate in order to enable pecuniary legacies to be paid, it may appear that pecuniary legatees are treated less favourably than the beneficiaries of specific dispositions. However, the National Committee is conscious that certain other principles operate to the advantage of pecuniary legatees, or at least ameliorate the effect of the rule that specific dispositions do

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Ibid.

not abate to enable pecuniary legacies to be paid. It is therefore necessary, in considering the payment of pecuniary legacies, to have regard to these related principles.

18.47 At present, Locke King's legislation operates to the advantage of pecuniary legatees by making property that is mortgaged primarily liable for the payment of the mortgage debt. Where the mortgaged property is specifically devised or bequeathed and is sufficient to discharge the mortgage, the effect of Locke King's legislation is that the mortgage debt is not paid out of the residuary estate, as used to be the case before legislation to that effect was enacted. Accordingly, the availability of the residuary estate for the payment of pecuniary legacies is not reduced by the payment of the mortgage. As a general rule, Locke King's legislation operates fairly because the beneficiary of the mortgaged property is nevertheless in a privileged position, compared with a pecuniary legatee, as far as the payment of unsecured debts is concerned. However, if pecuniary legacies were to be treated as specific legacies, consideration would need to be given to whether it was appropriate to retain Locke King's legislation, or whether a mortgage secured on property that was the subject of a specific disposition should simply be paid out of the residuary estate.

18.48 A further issue that would need to be considered if pecuniary legacies were to be placed on the same footing as specific dispositions is the doctrine of ademption. At present, although a specific disposition is in a privileged position in relation to the payment of unsecured debts, such a disposition is liable to be adeemed if the testator disposes of the particular asset in his or her lifetime. In contrast, there is no possibility that a pecuniary legacy, being general in nature, will be adeemed. If the two types of legacies were to be treated on the same footing, it is arguable that it would be unfair for a specific disposition to be vulnerable to being adeemed, while a pecuniary legacy was not.

Possible draft provision

18.49 In Chapter 17 of this Report, the National Committee has recommended that the model statutory order for the application of assets towards the payment of debts in a solvent estate should consist of the first three classes of the Queensland statutory order.⁷¹² Broadly, under the model statutory order, property would 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.

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See Recommendation 17-2 above.

- Class 2 Property comprising the residuary estate and property in relation to which a disposition in the will operates under section 33J of the *Succession Act 1981* (Qld), or its equivalent, as the exercise of a general power of appointment.
- Class 3 Property specifically given by will, including property specifically appointed by will in exercise of a general power of appointment, and any legacy charged on the property given or appointed.

18.50 One of the advantages of the statutory order recommended by the National Committee is its simplicity. By reducing the number of classes, the order should be easier to apply. As a result, the incidence of disputes about the application of the order should be reduced, as should the likelihood that an estate will be administered incorrectly.

18.51 In order to treat pecuniary legacies as if they were specific legacies, it seems that it would be necessary for property in Classes 1 and 2 of the model statutory order to be applied subject to the retention of a fund sufficient to meet any pecuniary legacies, and for that fund to be included with what has previously been proposed as Class 3 of the model statutory order.⁷¹³ It would not be sufficient simply to provide that pecuniary legacies must be paid out of assets that would fall within Class 3 of the National Committee's proposed statutory order (assets the subject of specific dispositions), as that would not address the fact that the residuary estate must contribute to the payment of the legacies to the extent to which it can. The balance of the new Class 3 remaining after the payment of debts could then be distributed among the pecuniary legatees and the specific legatees and devisees proportionately according to the amount of the pecuniary legacies and the value of the specific legacies and devises.

18.52 The effect of such a change in the treatment of pecuniary legacies is illustrated by the two scenarios below.

18.53 Scenario 1:

A testator leaves the family farm (valued at \$200 000) to his son, a legacy of \$200 000 to his daughter and the residuary estate to X. On the testator's death, the estate consists of the farm, and of other property to the value of \$100 000. The debts of the estate total \$50 000. The net value of the estate is therefore \$250 000, which is insufficient to meet both the specific devise of the farm and the pecuniary legacy. Obviously, X, as the residuary beneficiary, will take nothing.

18.54 At present, the son would take the farm. The daughter's legacy, being general in nature, would be payable out of what remained of the residuary estate after the payment of debts. She would therefore receive \$50 000.

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See the proposal mentioned at [18.35] above.

18.55 Under the proposal for treating pecuniary legacies as if they were specific legacies, Class 3 in this case would consist of the fund retained out of Class 2 assets (\$100 000) and the farm (valued at \$200 000), making a total of \$300 000, out of which the debts of \$50 000 would be payable. As the amount of the pecuniary legacy is the same as the value of the specific devise of the farm, the remaining \$250 000 would be divided equally between the son and the daughter. Each would therefore receive \$125 000.

18.56 However, this proposal produces quite a different result where the assets specifically devised or bequeathed are mortgaged. In the following scenario, the facts are the same as in Scenario 1, except that the farm is subject to a mortgage of \$50 000.

18.57 Scenario 2:

A testator leaves the family farm (valued at \$200 000) to his son, a legacy of \$200 000 to his daughter and the residuary estate to X. On the testator's death, the estate consists of the farm, and of other property to the value of \$100 000. The unsecured debts of the estate total \$50 000. In addition, the farm is subject to a mortgage of \$50 000. The net value of the estate is \$200 000, which is insufficient to meet both the specific devise of the farm and the pecuniary legacy. Again, X will take nothing.

18.58 At present, the farm would be liable to discharge the mortgage. Accordingly, the son would take the farm, subject to the mortgage, a benefit of \$150 000. The daughter would still receive \$50 000 in respect of her legacy.

18.59 Under the proposal for treating pecuniary legacies as if they were specific legacies, Class 3 would consist of the fund retained out of Class 2 assets (\$100 000) and the farm (valued at \$150 000 after deducting the amount of the mortgage charged on it⁷¹⁴), making a total of \$250 000, out of which the debts of \$50 000 would be payable. As the amount of the pecuniary legacy is \$200 000 and the value of the specific devise of the farm is \$150 000, the \$200 000 remaining after the payment of debts would be distributed between the son and the daughter in proportion to those amounts. The son would be entitled to three sevenths of \$200 000, giving him a benefit of \$85 714. The daughter would be entitled to four sevenths of \$200 000, giving her a benefit of \$114 286.

18.60 This scenario illustrates the difficulties of treating the payment of pecuniary legacies in isolation from related principles, such as the operation of Locke King's legislation.

The 'probable intentions' of a testator

18.61 It is difficult to say that, in each of the above scenarios, the distribution under the changed treatment of pecuniary legacies better reflects the probable

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Under the existing law, the value of a mortgaged property, for the purpose of determining its liability to contribute to the payment of debts, is the value of the property less the mortgage: see [18.25] above.

intentions of the testator. While in the first scenario it appears to produce a more equitable result for the daughter, in the second scenario, it produces what is arguably an unfair result for the son.

18.62 A further issue that arises is whether, in making a specific disposition, a testator actually intends that the beneficiary should receive that property if it is not required for the payment of debts. Even where the contribution to the payment of pecuniary legacies would be relatively small, the changed treatment of pecuniary legacies might operate to defeat the intentions of a testator.

18.63 Scenario 3:

A testator leaves her house (valued at \$90 000) to her husband, a legacy of \$10 000 to her daughter from her first marriage, and the residuary estate to her son from her first marriage. The only other asset in the estate (that is, the residuary estate) consists of an amount of \$10 000 in a bank account. The debts of the estate total \$5000. The net value of the estate is \$95 000, which is insufficient to meet both the specific devise of the house and the pecuniary legacy. The son will therefore take nothing.

18.64 At present, as the gift of the house is specific, it will not abate in order to contribute to the payment of the legacy bequeathed to the daughter. The husband will therefore receive the house. As the daughter's legacy is payable out of the residuary estate, she will receive \$5000.

18.65 If the legacy bequeathed to the daughter were to be treated as a specific legacy, it would not be limited by the value of the residuary estate. Applying the proposal previously discussed in relation to the payment of pecuniary legacies, the final class of assets to be applied towards the payment of debts and legacies would consist of the retained fund (\$10 000) and the house (\$90 000), making a total of \$100 000 out of which the debts of \$5000 would be payable. The house (valued at \$90 000) and the legacy of \$5000 would therefore have to contribute 5 per cent each to the payment of the debts.

18.66 As a result, the daughter would be entitled to 95 percent of \$10 000, giving her a benefit of \$9500. The husband would be entitled to 95 percent of \$90 000, giving him a benefit of \$85 500, rather than the full value of the house. If he did not have separate assets to the value of \$4500 to contribute to the payment of the legacy to the daughter, that sum would have to be raised by the sale of the house.

18.67 In the light of these matters, the National Committee is of the view that the existing law should be retained in relation to the payment of pecuniary legacies. It is not possible, in the National Committee's view, simply to treat pecuniary legacies as specific legacies without disturbing other settled principles, such as Locke King's legislation and the doctrine of ademption. Further, to treat pecuniary legacies as specific legacies would necessitate reverting to a more complicated order for the payment of debts, without necessarily producing a result, in terms of the distribution of the estate, that better reflects the intentions of the testator.

18.68 In the National Committee's view, the model provision for the payment of pecuniary legacies should be based on section 60 of the *Succession Act 1981* (Qld),⁷¹⁵ under which the payment of pecuniary legacies is limited by the size of the residuary estate.

REFERENCE TO 'PECUNIARY LEGACY'

Background

18.69 The Law Reform Commission of Western Australia, which recommended the adoption in that State of a provision to the effect of section 60 of the *Succession Act 1981* (Qld), suggested that section 60 would be 'more felicitously expressed' if it referred to 'general, rather than pecuniary legacies'.⁷¹⁶

18.70 Although not all pecuniary legacies are general legacies, the term 'pecuniary legacy' is defined in the Queensland legislation in terms that make it clear that the reference in section 60 to a pecuniary legacy includes a general legacy that is not pecuniary in nature.⁷¹⁷ Although the definition does not expressly exclude a pecuniary legacy that is specific, it is nevertheless clear from the Queensland statutory order set out in section 59 of the Act that a specific pecuniary legacy would be treated as property specifically bequeathed, rather than as a pecuniary legacy to be paid out of the assets comprising the residuary estate in accordance with section 60.

The National Committee's view

18.71 The National Committee notes the suggestion made by the Law Reform Commission of Western Australia that section 60 of the *Succession Act 1981* (Qld) should refer to general legacies, rather than to pecuniary legacies. That Commission is correct in its observation that not all general legacies are pecuniary legacies, and that not all pecuniary legacies are general legacies. However, the term 'pecuniary legacy' is used in the statutory orders of the other Australian jurisdictions, and the definition of that term in the *Succession Act 1981* (Qld) makes it clear that the term includes a general legacy that is not pecuniary in nature, as well as a demonstrative legacy to the extent to which it cannot be discharged out of the property on which it is charged. Accordingly, the National Committee favours the retention of the reference in section 60 to

⁷¹⁵ *Succession Act 1981* (Qld) s 60 is set out at [18.22] above.

⁷¹⁶ Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 Pt VII (1988) [4.40].

⁷¹⁷ The Queensland definition of 'pecuniary legacy' is set out at note 689 above.

pecuniary legacies, coupled with the definition of the term 'pecuniary legacy' in section 5 of the Act.⁷¹⁸

DEMONSTRATIVE LEGACIES

Background

18.72 As explained earlier, the Queensland legislation contains a specific provision that affects the extent to which property that is charged with the payment of a legacy must contribute to the payment of debts. Section 59(2) of the *Succession Act 1981* (Qld) provides:

Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, the payment of pecuniary legacies rateably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied rateably. (emphasis added)

Discussion Paper

18.73 In the Discussion Paper, the National Committee sought submissions on whether the principle of rateability should be applied to the payment of demonstrative legacies so that they abate proportionately with the property on which they are charged, as presently occurs under the Queensland legislation.⁷¹⁹

Submissions

18.74 All the submissions that addressed this issue were of the view that the principle of rateability should be applied to the payment of demonstrative legacies.⁷²⁰ One respondent commented:⁷²¹

The old rule, now changed in Queensland, was a haphazard one and not rational. The Queensland rule is logical and obviously fair as between two persons interested in the same subject matter. As between the two persons it would be difficult to justify a rule which requires one of them to pay any debt chargeable to the fund, but not the other.

18.75 The ACT Law Society expressed a similar view:⁷²²

If the testator has charged a particular asset with the payment of a legacy, then it appears a fairer result that the gifts should be affected equally if there are insufficient funds in the estate.

⁷¹⁸ Ibid.

⁷¹⁹ *Administration of Estates Discussion Paper* (1999) QLRC 227; NSWLRC 323.

⁷²⁰ Submissions 1, 8, 12, 14.

⁷²¹ Submission 12.

⁷²² Submission 14.

The National Committee's view

18.76 The model legislation should include a provision to the effect of the second limb of section 59(2) of the *Succession Act 1981* (Qld). It is only fair that, if a specific asset is required to contribute to the payment of debts, any demonstrative legacy charged on that asset should be applied rateably with the specific asset. As explained earlier, to the extent that a demonstrative legacy can be paid out of the property on which it is charged, it is regarded as a specific legacy.⁷²³ The position that applies in the other Australian jurisdictions throws an unfair burden on the beneficiary of the property on which a demonstrative legacy is charged by not taking into account the fact that the property is so charged.

18.77 However, the model provision should be framed in terms that express more clearly the intention of the Queensland Law Reform Commission when it recommended, in its 1978 Report, the provision that was later enacted as the second limb of section 59(2) of the *Succession Act 1981* (Qld).⁷²⁴ Accordingly, the model legislation should provide that, if a specific property must be applied in the discharge of the debts and a legacy is charged on the specific property:

- the legacy and the specific property must be applied rateably according to value; and
- for that purpose, the value of the specific property must be reduced by the amount of the legacy charged on it.

EXPRESSION OF A CONTRARY INTENTION

Discussion Paper

18.78 As noted above,⁷²⁵ the National Committee proposed in the Discussion Paper that its recommendations about the payment of pecuniary legacies should be subject to the expression of a contrary intention. It also proposed that the expression of a contrary intention should not be confined to one found in the will.⁷²⁶

Submissions

18.79 Although several respondents to the Discussion Paper supported the proposals about the payment of pecuniary legacies, only two of these respondents commented specifically on whether it should be possible for a

⁷²³ See [18.10] above.

⁷²⁴ See [18.27] above.

⁷²⁵ See [18.39] above.

⁷²⁶ *Administration of Estates Discussion Paper* (1999) QLRC 226; NSWLRC 323 (Proposal 78).

contrary intention to be found outside the will. The Law Societies of Queensland and New South Wales both expressed the view that an expression of a contrary intention must be contained in the will.⁷²⁷

The National Committee's view

18.80 The National Committee has previously referred to the recommendation made in its Wills Report that the court should have a fairly broad power to dispense with the formal requirements for the execution of wills.⁷²⁸ That provision provides flexibility by allowing the court to recognise the intention of a testator that is expressed in a document that, for want of compliance with the execution requirements for wills, would not otherwise be found to constitute a will. If a contrary intention could be established other than by will (using that term in its broadest sense), it could result in uncertainty as to whether the model provisions about the payment of legacies had been varied. That uncertainty, especially in relation to what constitutes sufficient proof of a contrary intention, could result in costly disputes, and erode the assets of the estate.

18.81 Accordingly, although the model legislation is to provide that the provision dealing with the payment of pecuniary legacies is to apply subject to the expression of a contrary intention, a contrary intention may not be established other than by will (using that term in its broadest sense).

RELATIONSHIP BETWEEN GENERAL LEGATEES AND PERSONS ENTITLED TO SPECIFIC PROPERTY FREE OF CHARGES

The rule in *Lutkins v Leigh*

18.82 In Chapter 17 of this Report, the National Committee has explained how the effect of Locke King's legislation can be negated by the expression of a contrary intention by a testator.⁷²⁹ Such an intention can be signified by directing that the mortgage charged on the relevant property is to be paid out of a specified fund. Alternatively, it can be signified by simply providing that the beneficiary is to take the property free of the mortgage.⁷³⁰ In the latter case, the mortgage debt is treated as an unsecured debt and is paid out of the estate according to the applicable statutory order for the payment of debts or, in the case of South Australia and Western Australia, according to the old order of application of assets.

⁷²⁷ Submissions 8, 15.

⁷²⁸ See [17.129] above.

⁷²⁹ See [17.202]–[17.218] above.

⁷³⁰ See [17.203]–[17.205] above.

18.83 Depending on the extent of assets in the estate that fall within the earlier classes, it may become necessary for funds that would otherwise be used to pay pecuniary legacies to be applied towards the payment of the mortgage debt. It has been held that, in these circumstances, the pecuniary legatees are entitled to have restored to the fund out of which their legacies are to be paid so much of that fund as has been applied towards the payment of the mortgage debt.⁷³¹ This principle is known as the rule in *Lutkins v Leigh*.⁷³² In effect, the rule means that, despite the intention expressed by the testator, the fund retained for the payment of pecuniary legacies cannot be applied towards the payment of the mortgage debt.⁷³³

I am aware that the result of this is that, although, I have held that the testatrix intended that those properties should go to the devisees free from any part of the mortgage debt, her intention in that respect is not being allowed to have any effect. That, however, is because the whole of the testatrix's intention as expressed in her will cannot be carried into effect, there being insufficient funds to pay the legacies which she undoubtedly intended should be paid.

18.84 A testator may, by an express provision in his or her will, negative the application of the rule. However, it has been held that a provision in a will that negatives the operation of Locke King's legislation does not also operate to negative the operation of the rule in *Lutkins v Leigh*.⁷³⁴

The effect of ... Locke King's Act ... was to benefit the pecuniary legatee, and not to prejudice any rights he previously had in equity. So that if a testator by his will negated the application of the Act, without directing that the rule [in *Lutkins v Leigh*] should not apply, then, of course, the rule had to be applied.

Issues for consideration

18.85 The rule in *Lutkins v Leigh* has been the subject of judicial criticism. In *Re Smith*,⁷³⁵ Romer J commented:⁷³⁶

⁷³¹ *Re Smith* [1899] 1 Ch 365; *Re McIntosh (No 2)* (1902) 2 SR Eq 247; *Perpetual Trustee Co (Ltd) v Killick* (1950) 51 SR (NSW) 36.

⁷³² The rule originated in *Lutkins v Leigh* (1734) Cases T Talbot 53; 25 ER 658, which was decided well before the enactment of *Locke King's Act* in England. The development of the rule is explained in *Re Smith* [1899] 1 Ch 365, 371 (Romer J):

after *Lutkins v Leigh* and before Locke King's Act, it became a settled rule in equity that the pecuniary legatee had priority over the devisee, although the devisee was under the will entitled as against a residuary legatee to have the mortgage debt paid off out of residue. And if the mortgagee, by virtue and in exercise of his rights as creditor, obtained payment of his debt out of residue, it was held that on the doctrine of marshalling the legatee was entitled to stand in the shoes of the mortgage creditor as against the devised realty.

⁷³³ *Perpetual Trustee Co (Ltd) v Killick* (1950) 51 SR (NSW) 36, 39 (Roper CJ in Eq).

⁷³⁴ *Re Smith* [1899] 1 Ch 365, 372 (Romer J).

⁷³⁵ [1899] 1 Ch 365.

⁷³⁶ *Ibid* 371.

It is difficult to justify this rule on principle. Seeing that the testator intended the mortgage debt to be paid off out of his residuary estate, it might have been supposed that the pecuniary legatee could not claim to be repaid by the devisee merely because the debt had been paid as contemplated out of the proper fund. Or the Courts might have been expected to hold that the devisee to the extent of the mortgage debt, and the pecuniary legatee to the extent of his legacy, were equally objects of the testator's bounty, and that the mortgage debt and legacy should therefore abate rateably, in case the residuary estate could not pay both in full.

18.86 Similar comments were made in *Re McIntosh (No 2)*:⁷³⁷

It to me seems monstrous that where a testator devises a mortgaged estate and says that the devisee is to take it freed from the mortgage debt, a pecuniary legatee is to be entitled to insist on the devisee paying that which the testator has said he need not pay.

18.87 In that case,⁷³⁸ AH Simpson CJ in Eq indicated that, had he been at liberty to decide the issue, his preference would have been for a rule under which the residue was apportioned rateably between the general legatee and the specific devisee.⁷³⁹

Where there is a deficiency I should have myself thought that the proper course to adopt, inasmuch as both the legatee and the devisee were each objects of the testator's bounty, would be to apportion the residue rateably in payment of all liabilities, and that the mortgage debt and legacy should abate rateably: but the law is apparently otherwise, and I do not see my way clear to go behind the rule laid down in the above cases.

18.88 The rule in *Lutkins v Leigh* was considered by the Law Reform Commission of Western Australia when it reviewed the administration of assets in that jurisdiction. That Commission was also of the view that the rule was difficult to justify, commenting:⁷⁴⁰

An express intention to exonerate charged property should ordinarily be treated, in the absence of any other expression of intention, as of equal weight with an intention to give a general legacy.

18.89 The Western Australian Commission therefore recommended that 'the interests of general legatees and of beneficiaries of charged but exonerated property abate rateably, so changing the rule in *Lutkins v Leigh*'.⁷⁴¹

⁷³⁷ (1902) 2 SR Eq 247, 252 (AH Simpson CJ in Eq). See also *Perpetual Trustee Co v Mackenzie* (1917) 17 SR (NSW) 660, 674 where Harvey J noted that the rule has been criticised, and held that it should not be extended to new cases.

⁷³⁸ (1902) 2 SR Eq 247.

⁷³⁹ Ibid 252.

⁷⁴⁰ Law Reform Commission of Western Australia, *The Administration of Assets of the Solvent Estates of Deceased Persons in the Payment of Debts and Legacies*, Report, Project No 34 Pt VII (1988) [3.43].

⁷⁴¹ Ibid [6.2] Recommendation (2).

The National Committee's view

18.90 In the National Committee's view, the rule in *Lutkins v Leigh* undermines the manner in which the various statutory orders provide for the application of assets, as well as the operation of the model statutory order for the application of assets proposed in this Report. It is inconsistent with the expressed wishes of a testator that, where property is specifically given free of the mortgage to which it is subject, the beneficiary of that property should be liable for so much of the mortgage debt as is necessary to enable any pecuniary legacies to be paid. Accordingly, the National Committee is of the view that the model legislation should abolish the rule in *Lutkins v Leigh*.

18.91 The National Committee is of the view, however, that the model legislation should not simply provide that the rule in *Lutkins v Leigh* is abolished, but should state the effect of its abolition.

18.92 The model provision abolishing the rule should provide that:

- if a deceased person's will expresses a contrary intention for the purposes of either of the model provisions dealing with the effect of Locke King's legislation; and
- as a result of that contrary intention, all or part of the debt or charge to which encumbered property is subject is payable out of Class 2 property (the residuary estate);

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.

18.93 In view of the National Committee's proposal that a provision to the effect of section 60 of the *Succession Act 1981* (Qld) should be included in the model legislation, the National Committee does not agree with the proposal made by the Law Reform Commission of Western Australia that the interests of general legatees and of beneficiaries of charged, but exonerated, property should abate rateably.⁷⁴² Such a proposal would be inconsistent with the policy underlying section 60, which is that the interests of the beneficiary of the exonerated property should not have to abate to enable the pecuniary legacies to be paid in part. The mere abolition of the rule in *Lutkins v Leigh* will achieve that result. Consequently, it is not necessary to make any further provision about the interests of pecuniary legatees or of beneficiaries of specific property that is given free of any mortgage charged on it.

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See [18.88]–[18.89] above.

THE PAYMENT OF INTEREST ON GENERAL LEGACIES

Background: the general rule

18.94 It has long been recognised that, if a will does not appoint a time for the payment of a general legacy⁷⁴³ and the legacy has not been paid by the end of one year from the testator's death (that is, by the end of the 'executor's year'⁷⁴⁴), the beneficiary is ordinarily entitled to interest on the legacy from that date until the date of payment.⁷⁴⁵ This rule is subject to any contrary intention that may be expressed in a testator's will.⁷⁴⁶

18.95 The purpose of the rule is to prevent injustice to the beneficiaries of general legacies:⁷⁴⁷

Where the estate is sufficient to pay the whole of the legacies in full, and there is a residue, it is unjust that the residuary legatees who are entitled to nothing until all the legacies have been paid, should benefit by the delay in paying them which they would do if the interest which the money has been earning in the meantime was paid to them, and therefore the legatees are entitled to interest on their legacies.

18.96 Where a legacy is payable at a future date, however, interest is payable on the legacy from the date on which the legacy becomes payable.⁷⁴⁸ This is also the case where the payment of a general legacy, although vested, has been postponed. Ordinarily, the beneficiary will not be entitled to interest 'until the time of payment arrives'.⁷⁴⁹

⁷⁴³ See the explanation of general legacies at [18.6]–[18.9] above.

⁷⁴⁴ See [11.218]–[11.220] in vol 1 of this Report for an explanation of the concept of the 'executor's year'.

⁷⁴⁵ *Beckford v Tobin* (1749) 1 Ves Sen 308; 27 ER 1049, 1050 (Hardwicke LC); *Wood v Penoyre* (1807) 13 Ves Jun 325; 33 ER 316; *Walford v Walford* [1912] AC 658, 663 (Viscount Haldane LC); *Re Wyles; Foster v Wyles* [1938] Ch 313, 315 (Farwell J).

However, the interest is not itself a legacy given by the testator, but is 'a sum given in the course of administration to the legatee because justice requires that owing to the failure to pay his legacy in due time he should be put in the position in which he would have been had it been so paid': *Re Wyles; Foster v Wyles* [1938] Ch 313, 316 (Farwell J). Accordingly, where the testator directed that the general legacies to certain beneficiaries were to abate if the estate was insufficient to enable the general legacies in favour of certain other beneficiaries to be paid in full, the legacies that were to bear that burden were not required also to abate to enable the payment of the interest on the preferred general legacies: at 316–17.

⁷⁴⁶ *Rubin v Rubin* [1972] Qd R 149, 158 (Lucas J).

⁷⁴⁷ *Re Wyles; Foster v Wyles* [1938] Ch 313, 315–16 (Farwell J).

⁷⁴⁸ *Donovan v Needham* (1846) 9 Beav 164; 50 ER 306, 307, where Lord Langdale MR explained that, as interest is for delay of payment, no interest is demandable until the day of payment arrives. Note, however, the exception, referred to in [18.127]–[18.131], where the legacy that is payable at a future time is from a parent or person *in loco parentis* to a minor beneficiary. Where the testator's will does not provide for the maintenance of the minor beneficiary, the legacy will carry interest from the date of death.

⁷⁴⁹ *Gleeson v Gleeson* (1886) 12 VLR 783, 787 (Webb J).

18.97 Historically, where interest has been payable on a general legacy, the courts have applied a rate of 4 per cent per annum.⁷⁵⁰

18.98 There are a number of exceptions to these rules, which are considered separately in this chapter.⁷⁵¹

Existing legislative provisions

18.99 A number of Australian jurisdictions have statutory provisions that deal, to varying degrees, with the payment of interest on general legacies.

Australian Capital Territory, New South Wales

18.100 The legislation in the ACT and New South Wales does not specify the circumstances in which interest is payable on a general legacy.

18.101 However, the ACT legislation provides a mechanism for setting the rate of interest that is to be applied *if* interest is payable on a legacy in accordance with the will under which the legacy is payable or in accordance with any enactment or rule of law. Unless the will provides otherwise or the Supreme Court orders otherwise, interest is to be payable at the rate determined by the Minister.⁷⁵²

18.102 Similarly, the New South Wales legislation provides for the rate of interest if interest is payable on any legacy in accordance with the will or instrument pursuant to which the legacy is payable or with any enactment or rule of law. Unless the will or instrument provides otherwise, or the court orders otherwise, interest is payable at 6 per cent per year or such other rate as may be prescribed by regulation.⁷⁵³

Queensland

18.103 In Queensland, the *Succession Act 1981* (Qld) specifies not only the rate of interest payable on a general legacy, but also the date from which a general legacy carries interest. Section 52(1)(e) provides:

⁷⁵⁰ *Spurway v Glynn* (1804) 9 Ves Jun 483; 32 ER 689; *Re Campbell* [1893] 3 Ch 468; *Re Tyson*; *Tyson v Webb* (1906) 7 SR (NSW) 91.

⁷⁵¹ See [18.125]–[18.131] below.

⁷⁵² *Administration and Probate Act 1929* (ACT) s 55A(1). The prescribed rate is currently 5 per cent per annum: Determination No 187 of 1992, Administration and Probate (Interest Rate on Legacy) Determination 1992, 29 December 1992.

⁷⁵³ *Probate and Administration Act 1898* (NSW) s 84A(1). The prescribed rate is currently 6 per cent per annum: *Probate and Administration Regulation 2003* (NSW) cl 6.

52 The duties of personal representatives

- (1) The personal representative of a deceased person shall be under a duty to—

...

- (e) pay interest upon any general legacy—

- (i) from the first anniversary of the death of the testator until payment of the legacy; or
- (ii) in the case of a legacy that is, pursuant to a provision of the will, payable at a future date—from that date until payment of the legacy;

at the rate of 8% per annum or at such other rate as the court may either generally or in a specific case determine, unless any contrary intention respecting the payment of the interest appears by the will.

18.104 The effect of the second limb of section 52(1A), which qualifies section 52(1)(e), is considered later in this chapter.⁷⁵⁴

18.105 Section 52(1)(e) is consistent with the rules under the general law about the payment of interest on general legacies. It has been suggested that ‘there is a potential inconsistency between the provision that the court may determine a rate other than 8 per cent “in a specific case” and the words “unless any contrary intention ... appears by the will”’.⁷⁵⁵ However, the same commentator has also suggested that:⁷⁵⁶

the court’s jurisdiction is given only where there is no contrary intention as to interest contained in the will and that a testator can exclude a general legatee’s right to interest, or enhance it.

South Australia

18.106 Section 120A of the *Administration and Probate Act 1919* (SA) provides:

120A Interest upon pecuniary legacies

- (1) Subject to any testamentary direction or provision to the contrary, where a will provides for the payment of a pecuniary legacy of a specified amount and the legacy is not paid in full on or before the relevant date, then, as from the relevant date and until the date of payment, interest accrues on the legacy, or so much of the legacy as

⁷⁵⁴ See [18.133]–[18.134] below.

⁷⁵⁵ AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [10.150].

⁷⁵⁶ *Ibid.*

remains unpaid, at the rate from time to time fixed by regulation for the purposes of this section.⁷⁵⁷

- (2) A right to interest under this section does not exist independently of a right to payment of the legacy itself, and where a legacy abates, the extent of the abatement shall be taken into account in calculating interest for the purposes of this section.
- (3) This section applies to legacies whether they become or became payable before or after the commencement of the *Administration and Probate Act Amendment Act 1981*, but it does not affect interest that may have accrued upon a legacy before the commencement of that amending Act.
- (4) In this section—

the relevant date means—

- (a) a date fixed by the will as the date on or before which the legacy is to be paid or, if no such date is fixed by the will, the date of the first anniversary of the testator's death; or
- (b) the date of commencement of the *Administration and Probate Act Amendment Act 1981*,

whichever is the later. (note added)

18.107 Although section 120A(1) of the *Administration and Probate Act 1919* (SA) is similar to section 52(1)(e) of the *Succession Act 1981* (Qld), it differs from the Queensland provision in that it is expressed to apply to 'pecuniary legacies', rather than to all general legacies.⁷⁵⁸ As the South Australian legislation does not contain a definition to enlarge the meaning of 'pecuniary legacy', it would appear that the payment of interest on general legacies that are not pecuniary in nature is still covered by the general law.

Western Australia

18.108 The Western Australian legislation does not address the issue of the date from which interest is payable on a general legacy, but only the rate of interest. It provides that the interest on a legacy is to be calculated at the rate of 5 per cent per annum unless a different rate is directed by the will or under a judgment or order of the court directing an account of legacies.⁷⁵⁹

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The current rate fixed by the *Administration and Probate (Interest on Pecuniary Legacies) Regulations 1994* (SA) cl 4 is, for any given financial year, 'the 180 day bank bill rate on the first business day of that financial year rounded down to the nearest percentage that, when multiplied by four, produces an integer'.

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See also the discussion at [18.133]–[18.1340] below of the difference between the Queensland and South Australian provisions in relation to the exceptions under which general legacies carry interest from the death of the testator.

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Administration Act 1903 (WA) s 143A.

Tasmania, Victoria

18.109 Neither the Tasmanian nor Victorian legislation deals generally with the duty to pay interest on legacies.

18.110 The Tasmanian rules provide, however, that, if a judgment directs an account of legacies, interest is to be allowed on those legacies, subject to any order or provision in the will to the contrary, at the prescribed rate of interest for each calendar year from the end of one year after the testator's death.⁷⁶⁰ The Victorian rules include a similar provision, and prescribe a rate of interest of 8 per cent per annum from the end of one year after the testator's death.⁷⁶¹

18.111 Commentators on the Victorian rules have observed that this rule 'does not authorise personal representatives to pay interest at 8% on a legacy without a judgment for an account to that effect'.⁷⁶² They suggest that, in the absence of any modern authority on the point, 'the prudent course at present is to allow interest on a legacy at the rate of 4% per annum'.⁷⁶³ The same reasoning would apply in relation to the payment of interest on general legacies in Tasmania.

Discussion Paper

18.112 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the general effect of section 52(1)(e) of the *Succession Act 1981* (Qld), except that the model provision should not stipulate the interest rate, but should refer to an interest rate prescribed by the rules.⁷⁶⁴

Submissions

18.113 The National Committee's proposal to include a provision to the effect of section 52(1)(e) of the *Succession Act 1981* (Qld), but to provide for the rate of interest in the court rules, was supported by the Bar Association of Queensland, a former ACT Registrar of Probate, the National Council of Women of Queensland, an academic expert in succession law and the ACT Law Society.⁷⁶⁵ The former ACT Registrar of Probate commented that the

⁷⁶⁰ *Supreme Court Rules 2000* (Tas) r 960. The prescribed rate of interest for that rule is 'the last cash rate published by the Reserve Bank of Australia before the close of business on the last day of business in the preceding calendar year': *Supreme Court Rules 2000* (Tas) r 5A(a).

⁷⁶¹ *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 78.05.

⁷⁶² K Collins, R Phillips and C Sparke, *Wills Probate & Administration Vic* (LexisNexis online service) [53,015] (at 21 February 2009).

⁷⁶³ *Ibid* (at 21 February 2009). In *Re Clarke* [1966] VR 321 O'Bryan J observed (at 338) that interest is usually payable at the rate of 4 per cent per annum. This is consistent with the rate that has historically been payable in respect of general legacies: see [18.97] above.

⁷⁶⁴ *Administration of Estates Discussion Paper* (1999) QLRC 60; NSWLRC 90 (Proposal 25).

⁷⁶⁵ Submissions 1, 2, 3, 12, 14.

proposal would allow interest rates to be varied more easily.⁷⁶⁶ The National Council of Women of Queensland suggested that the interest rate could be prescribed in rules or in regulations.⁷⁶⁷

18.114 The Queensland Law Society agreed that the rate of interest should be removed from the Queensland provision and relocated in subordinate legislation.⁷⁶⁸ It also suggested that the provision should be recast to avoid the approach taken by the Australian Taxation Office:⁷⁶⁹

A ruling has been obtained from the Australian Taxation Office to the effect that the legatee pays tax on the interest received but the Executor cannot claim the interest paid as a tax deduction.

It is submitted that ... the section should be recast in terms to make it clear that the payment is compensation to counter the approach that the Australian Taxation Office is currently taking.

18.115 The Public Trustee of New South Wales suggested that, in light of the prudent person investment rules, it may be inappropriate to stipulate an interest rate by law, rule or regulation.⁷⁷⁰ This respondent also commented that the National Committee's proposal did not take into account other issues in relation to legacies such as legacies for infants; legacies set aside that may earn interest at a rate that is from time to time different from the prescribed rate; or the fact that interest on legacies is generally supplemented from residue, which in some cases is to the disadvantage of the beneficiaries of the residuary estate. It was suggested that the proposal should be considered further, but not how it might be modified.⁷⁷¹

18.116 The New South Wales Law Society did not comment on the detail of the National Committee's proposal, but also suggested that the proposal should be considered further.⁷⁷²

The National Committee's view

The date from which interest is payable on a general legacy

18.117 In the National Committee's view, it is desirable for the model legislation to express the general rules that govern the payment of interest on a

⁷⁶⁶ Submission 2.

⁷⁶⁷ Submission 3.

⁷⁶⁸ Submission 8.

⁷⁶⁹ Ibid.

⁷⁷⁰ Submission 11. The 'prudent person' investment rules are considered at [11.229] in vol 1 of this Report.

⁷⁷¹ Submission 11.

⁷⁷² Submission 15.

general legacy. The model legislation should include a provision, based on section 52(1)(e) of the *Succession Act 1981* (Qld),⁷⁷³ and provide that:

- interest is payable on the general legacy from the first anniversary of the testator's death until the general legacy is paid; and
- if, under the terms of the will, the general legacy is payable at a future date, interest is payable on the general legacy from that date until the general legacy is paid.

18.118 In keeping with the Queensland provision and the general law about the payment of interest on general legacies,⁷⁷⁴ the model provision should be expressed to be subject to any contrary intention expressed in the will about:

- whether interest is payable on the general legacy;
- the time from when interest is payable on the general legacy; or
- the rate of interest that is payable on the general legacy.

The applicable rate of interest

18.119 Only the Queensland and Western Australian provisions prescribe an actual interest rate.⁷⁷⁵ The ACT, New South Wales and South Australian provisions refer to a rate prescribed by subordinate legislation.⁷⁷⁶

18.120 As mentioned previously, the National Committee expressed its concern in the Discussion Paper that the inclusion of an actual rate of interest in the legislation was likely to result in the rate of interest being reviewed less frequently than if the rate were prescribed by subordinate legislation. However, that view was based on the assumption that any rate included in the legislation would be a fixed rate, rather than a rate of interest that was referable to some other relevant, fluctuating rate.

18.121 The National Committee has given consideration to how it might achieve the accessibility of including a formula for the payment of interest in the model legislation itself, rather than in subordinate legislation, while at the same time ensuring that the formula is capable of adapting as interest rates fluctuate. It has decided that the model provision dealing with the payment of interest on a

⁷⁷³ *Succession Act 1981* (Qld) 52(1)(e) is set out at [18.103] above.

⁷⁷⁴ See [18.94]–[18.97], [18.103]–[18.105] above.

⁷⁷⁵ See [18.103], [18.108] above.

⁷⁷⁶ See [18.100]–[18.102], [18.106] above.

general legacy should link the applicable rate of interest to the cash rate published by the Reserve Bank of Australia.⁷⁷⁷

18.122 In the model intestacy legislation, the ‘relevant rate’ of interest payable on a spouse’s statutory legacy⁷⁷⁸ was defined in the following terms:⁷⁷⁹

8 Spouse’s statutory legacy

...

- (4) The **relevant rate** of interest is the rate that lies 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.

18.123 For consistency with the recommendation made in the Intestacy Report, this definition should be adopted as the rate of interest payable on a general legacy.

18.124 The National Committee notes that the current provisions in the ACT, New South Wales and Queensland provide that, unless the will provides otherwise, the rate of interest should be as prescribed by the legislation or by regulation or as the court determines either generally or in a specific case.⁷⁸⁰ Those provisions were presumably intended to allow the court to vary the applicable rate of interest when the statutory or prescribed rate became out of date. However, as the model legislation includes a rate that will remain relevant regardless of movements in interest rates generally, it is not necessary for the model legislation to provide that the court may determine that a different rate is to apply either generally or in a specific case.

EXCEPTIONS TO THE GENERAL RULE ABOUT THE PAYMENT OF INTEREST ON LEGACIES

Background

18.125 There are a number of exceptions to the rule that a general legacy carries interest from the first anniversary of the testator’s death. Under these exceptions a general legacy instead carries interest from the date of the testator’s death. This will be the case if:

⁷⁷⁷ See Reserve Bank of Australia, *Cash Rate Target Reserve Bank of Australia — Monetary Policy Changes* <http://www.rba.gov.au/Statistics/cashrate_target.html> at 21 February 2009. For a similar provision, see *Supreme Court Rules 2000* (Tas) r 5A(a), which is extracted at note 760 above.

⁷⁷⁸ In the Intestacy Report, the National Committee recommended that, if an intestate is survived by a spouse or partner and issue of another relationship, the spouse or partner should be entitled to a statutory legacy of \$350 000 (subject to annual adjustment): see *Intestacy Report* (2007) 71 (Recommendation 6).

⁷⁷⁹ *Intestacy Report* (2007) App A, Draft Intestacy Bill 2007 cl 8(4).

⁷⁸⁰ See [18.100]–[18.103] above.

- the legacy is, by the will, directed to be paid immediately after the testator's death;⁷⁸¹
- the legacy is charged on realty;⁷⁸² or
- the legacy is given in satisfaction of a debt due by the testator.⁷⁸³

18.126 There are also some complex exceptions that apply in relation to general legacies in favour of minors.

18.127 Where a general legacy (including a vested legacy the payment of which is postponed and a contingent legacy) is given by a parent or other person *in loco parentis* to a beneficiary who is a minor, and the will does not make any provision for the maintenance of the minor beneficiary, the legacy carries interest from the testator's death.⁷⁸⁴ The rationale for the rule is to create a provision for the minor's maintenance.⁷⁸⁵ However, this exception does not apply where the testator's will provides for the maintenance of the minor, as the reason for allowing interest on the legacy (namely, to provide maintenance for the minor) fails.⁷⁸⁶

18.128 Where a contingent general legacy is given by a person who is not a parent or person *in loco parentis* to a minor beneficiary, the legacy does not ordinarily carry interest until it vests.⁷⁸⁷ The reason given for the different rule is that, as the testator is a 'stranger' to the child, he or she does not have an obligation to provide for the child.⁷⁸⁸ However, there are two exceptions to this proposition.

18.129 The first exception is where it appears from the will that the testator intended that the beneficiary 'should be maintained as part of the testator's bounty', in which case 'the legacy will bear interest from the testator's death until the legacy becomes payable'.⁷⁸⁹ This exception applies whether the

⁷⁸¹ *Re Pollock; Pugsley v Pollock* [1943] 1 Ch 338, 339 (Bennett J).

⁷⁸² *Spurway v Glynn* (1804) 9 Ves Jun 483; 32 ER 689; *Shirt v Westby* (1808) 16 Ves Jun 393; 33 ER 1033. The rationale for this is not entirely clear. In *Beckford v Tobin* (1749) 1 Ves Sen 308; 27 ER 1049, 1051 (Hardwicke LC), it was suggested that the reason for paying interest from death when a legacy was charged on realty was that realty produces profits. However, that basis for the rule was rejected in *Pearson v Pearson* (1802) 1 Sch & Lef 10, 11 (Lord Redesdale LC).

⁷⁸³ *Clark v Sewell* (1744) 3 Atk 96; 26 ER 858, 860 (Hardwicke LC).

⁷⁸⁴ *A-G v Thompson* (1712) Prec Ch 337; 24 ER 158; *Beckford v Tobin* (1749) 1 Ves Sen 308; 27 ER 1049; *Gleeson v Gleeson* (1886) 12 VLR 783.

⁷⁸⁵ *Beckford v Tobin* (1749) 1 Ves Sen 308; 27 ER 1049, 150; *Gleeson v Gleeson* (1886) 12 VLR 783, 787 (Webb J).

⁷⁸⁶ *Donovan v Needham* (1846) 9 Beav 164; 50 ER 306, 307 (Lord Langdale MR).

⁷⁸⁷ *Re Boulter; Capital and Counties Bank v Boulter* [1918] 2 Ch 40, 44 (Younger J); *Re Raine; Tyerman v Stansfield* [1929] 1 Ch 716.

⁷⁸⁸ *A-G v Thompson* (1712) Prec Ch 337; 24 ER 158.

⁷⁸⁹ *Re Churchill; Hiscock v Lodder* [1909] 2 Ch 431, 433 (Warrington J). See also *Beckford v Tobin* (1749) 1 Ves Sen 308; 27 ER 1049; *Re Richards* (1869) LR 8 Eq 119.

provision in the will for the maintenance of the minor is out of the legacy itself or out of the income of the legacy, and whether the provision for maintenance is by way of a direction to maintain or a power to maintain.⁷⁹⁰

18.130 The second exception is where the testator directs that a fund be set aside for the payment of a contingent general legacy, in which case the fund carries interest from the moment it is set aside.⁷⁹¹

18.131 In the absence of these various exceptions in relation to general legacies in favour of minors, interest on contingent and postponed legacies would be payable from when the legacy ultimately becomes payable, which, in the case of a very young beneficiary, could be a period of many years.

Existing legislative provisions

Australian Capital Territory, New South Wales, Western Australia

18.132 As explained earlier, the legislative provisions in the ACT, New South Wales and Western Australia deal only with the rate of interest payable when interest is payable on a general legacy; they do not prescribe the circumstances in which a general legacy will carry interest.⁷⁹² Accordingly, the exceptions that apply under the general law in relation to the payment of interest on general legacies apply in these jurisdictions.⁷⁹³

Queensland

18.133 In Queensland, although section 52(1)(e) of the *Succession Act 1981* (Qld) provides the general rules about the payment of interest, that provision is subject to an important qualification. The second limb of section 52(1A) provides:

- (1A) Nothing in subsection (1) abrogates ... any rule or practice under which a beneficiary is entitled to receive interest upon any legacy from the date of the testator's death.

18.134 The effect of this subsection is to preserve the exceptions, noted above, under which interest on certain types of general legacies is payable from the date of the testator's death.

⁷⁹⁰ *Re Smith* [1918] SASR 1, 7–8, (Murray CJ). However, in the case of a contingent legacy that is not payable until some time after the minor attains his or her majority, interest is not payable in respect of the period between when the minor attains his or her majority and when the legacy is ultimately payable: *Re Hardgrave* [1978] Qd R 471.

⁷⁹¹ *Re Boulter; Capital and Counties Bank v Boulter* [1918] 2 Ch 40, 44–5 (Younger J); See also *Re Raine; Tyerman v Stansfield* [1929] 1 Ch 716. Note, however, the alternative view that, in this situation, the legacy carries 'actual intermediate income', rather than mere interest, 'from the end of the executor's year (or from such earlier date as the separate fund is established if such is the testator's intention)': D Hayton (ed), *Underhill and Hayton: Law Relating to Trusts and Trustees* (17th ed, 2007) [66.5].

⁷⁹² These provisions are considered at [18.100]–[18.102], [18.108] above.

⁷⁹³ This would also appear to be the case in Tasmania and Victoria, where the legislation does not deal expressly with the payment of interest on general legacies: see [18.109] above.

South Australia

18.135 Although section 120A(1) of the *Administration and Probate Act 1919* (SA) is similar to section 52(1)(e) of the Queensland Act, the South Australian provision differs from the Queensland provision in that it does not preserve the exceptions under which interest is payable on certain general legacies from the date of the testator's death.

Discussion Paper

18.136 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the effect of section 52(1A) of the *Succession Act 1981* (Qld).⁷⁹⁴ However, that proposal was made in the context of a consideration of the first limb of section 52(1A), which deals with the executor's year,⁷⁹⁵ and the National Committee did not specifically raise for consideration the desirability or otherwise of preserving the existing exceptions under which certain general legacies carry interest from the date of the testator's death.

The National Committee's view

18.137 The National Committee has considered whether the model provision dealing with the payment of interest on a general legacy should include any of the exceptions that apply under the general law. It is apparent from the earlier discussion in this chapter⁷⁹⁶ that the exceptions are quite technical in nature. To the extent that they can properly be abrogated or at least reduced in number, it will simplify the administration of estates.

General legacies payable immediately on death, charged on realty and given in satisfaction of a debt

18.138 As explained earlier in this chapter, under the general law, there are three situations in which a general legacy carries interest from the testator's death, rather than from the first anniversary of the testator's death:

- where the general legacy is, by the will, directed to be paid immediately after the testator's death;
- where the general legacy is charged on realty; and
- where the general legacy is given in satisfaction of a debt due by the testator.

⁷⁹⁴ *Administration of Estates Discussion Paper* (1999) QLRC 71; NSWLRC 104 (Proposal 30).

⁷⁹⁵ The first limb of s 52(1A) of the *Succession Act 1981* (Qld) concerns the executor's year and is considered separately at [11.238]–[11.241], [11.249]–[11.251] in vol 1 of this Report. See also Recommendation 11-19 in vol 1, where the National Committee has recommended that a provision to that effect should not be included in the model legislation.

⁷⁹⁶ See [18.125]–[18.131] above.

18.139 In the National Committee's view, the complexity that results from these exceptions is not outweighed by any strong principle that would justify their retention. In relation to the first of these categories, the National Committee is of the view that, although a will might direct that a legacy be paid immediately, the payment of any legacy is always subject to the administration of the estate. As to legacies charged on realty, the National Committee has in this Report sought to eliminate any remaining distinctions as regards the application of real and personal property towards the payment of debts and legacies. As to the third category, if a creditor has a contractual right to interest and the testator leaves a disposition that reflects the principal only, the creditor has the option of bringing proceedings against the estate to recover the interest. However, if the creditor has no contractual right to interest, but only such right as may arise under statute if proceedings are brought for the recovery of the debt,⁷⁹⁷ and the creditor does not bring any proceedings to recover the debt, the National Committee does not see why a disposition in satisfaction of the debt should carry interest from the date of death. In light of these considerations, the National Committee is of the view that these exceptions should not be preserved by the model legislation.

General legacies in favour of minors

18.140 The question of whether to retain the exceptions that apply in all jurisdictions except South Australia in respect of certain general legacies to minors⁷⁹⁸ is a more difficult one. The National Committee has considered whether, if those exceptions were abolished, the statutory provisions that enable trustees to apply the income of property held on trust for a minor towards the minor's maintenance would provide a suitable alternative mechanism for making provision for a minor whose legacy might not be payable for several years. However, this possibility is complicated by the fact that the provisions dealing with trustees' powers of maintenance in the various Australian Trustee Acts are not uniform.

18.141 The trustee legislation of all Australian jurisdictions except Tasmania provides that, where any property is held in trust for a minor, whether vested or contingent, the trustee may apply the whole or any part of the income of the property towards the maintenance, education or benefit of the minor.⁷⁹⁹

18.142 Section 61 of the *Trusts Act 1973* (Qld) provides:

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See, for example, *Supreme Court Act 1995* (Qld) s 47 (Interest up to judgment).

⁷⁹⁸

See [18.126]–[18.131] above.

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Trustee Act 1925 (ACT) s 43(1); *Trustee Act 1925* (NSW) s 43(1); *Trustee Act* (NT) s 24(1); *Trusts Act 1973* (Qld) s 61(1); *Trustee Act 1936* (SA) s 33(1); *Trustee Act 1958* (Vic) s 37(1); *Trustees Act 1962* (WA) s 58(1). The Northern Territory provision is slightly more limited in its application as it is expressed to apply where 'any property is held by trustees in trust for an infant ... whether absolutely or contingently on his attaining the age of 21 years, or on the occurrence of any event before his attaining that age'. It is doubtful that this provision would apply where a legacy was given to a minor contingently on attaining the age of, say, 25, as such a disposition would not be contingent on the minor attaining the age of 21 or on the occurrence of any event before that age.

61 Power to apply income for maintenance etc. and to accumulate surplus income during a minority

- (1) When any property is held by trustees in trust, whether absolutely or contingently for a beneficiary who is an infant, the trustee may, at the trustee's absolute discretion, pay to the infant's parent or guardian (if any) or otherwise apply for or towards the infant's maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education or not.
- (2) During the infancy of any such person, if the person's interest so long continues, the trustee shall accumulate all the residue of that income in the way of compound interest by investing the same and the resulting income thereof from time to time in authorised investments, and shall hold those accumulations as follows—
 - (a) if any such person—
 - (i) attains full age, or marries under that age, and the person's interest in such income during the person's infancy or until the person's marriage is a vested interest; or
 - (ii) on attaining full age or on marriage under that age becomes entitled to the property from which income arose in fee simple, absolute or determinable, or absolutely, or for an entailed interest;

the trustee shall hold the accumulations in trust for such person absolutely, but without prejudice to any provision with respect thereto contained in any settlement by him or her made under any statutory powers during the person's infancy, and so that the receipt of such person after marriage, and though still an infant, shall be a good discharge;
 - (b) in any other case—the trustee shall, notwithstanding that such person had a vested interest in such income, hold the accumulations as an accretion to the capital of the property from which such accumulations arose, and as 1 fund with such capital for all purposes; but the trustee may, at any time during the infancy of such person if the person's interest so long continues, apply those accumulations, or any part thereof, as if they were income arising in the then current year.
- (3) Where any property is held by a trustee in trust for a beneficiary of full age who has a contingent interest in that property, the trustee may, at the trustee's sole discretion, pay to such beneficiary or otherwise apply for or towards the beneficiary's maintenance, education (including past maintenance or education) advancement or benefit, the income of that property or any part thereof.
- (4) This section shall apply in the case of a contingent interest only if the limitation or trust carries the intermediate income of the property, but it applies to a future or contingent legacy by the parent of, or a person standing in loco parentis to, the legatee, if and for such period as,

under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case as last aforesaid the rate of interest shall (if the income available is sufficient, and subject to any rules of court to the contrary) be 4% per annum; and where in the case of a contingent interest the limitation or trust would, but for the operation of a protective trust (whether created or statutory) carry the intermediate income of the property, that limitation or trust shall for the purposes of this subsection be deemed notwithstanding the protective trust to carry the intermediate income.

- (5) This section applies to a vested annuity in like manner as if the annuity were the income of property held by a trustee in trust to pay the income thereof to the annuitant for the same period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant shall be held in trust for the annuitant or the annuitant's personal representative absolutely.
- (6) This section does not apply where the instrument (if any) under which the interest arises came into operation before the commencement of this Act.
- (7) The provisions of subsection (2) do not apply where, and to the extent that, a contrary intention is expressed in the trust instrument (if any). (emphasis added)

18.143 Although the provisions appear to confer a very broad power, the Queensland, Victorian and Western Australian provisions are subject to a qualification where the minor's interest in the property is contingent, as can be seen in section 61(4) above.⁸⁰⁰

18.144 Importantly, section 61(4) of the *Trusts Act 1973* (Qld) and the corresponding provisions in Victoria and Western Australia provide that, in the case of property held on trust contingently for a beneficiary, that section applies:

- only if the trust carries the intermediate income of the property; or
- in the case of a future or contingent legacy by the parent of, or person standing *in loco parentis* to, the legatee, only 'if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee'.⁸⁰¹

18.145 This means that it will apply in the situations mentioned at [18.127] and [18.129] above. However, because the power to apply income towards the maintenance of a minor is dependent on the continuing existence under the

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See also *Trustee Act 1958* (Vic) s 37(3); *Trustees Act 1962* (WA) s 58(3). The main difference between the provisions is that the Victorian and Western Australian provisions prescribe a rate of interest of 5 per cent per annum. These provisions are in similar terms to s 31 of the *Trustee Act 1925* (UK) and the relevant subsections are in similar terms to s 31(3) of that Act.

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It has been suggested in relation to the equivalent English provision (s 31(3) of the *Trustee Act 1925* (UK)) that, as a result of an oversight, the section is not expressed also to apply where a testator who is not a parent or person *in loco parentis* to a minor gives the minor a future or contingent general legacy and shows an intention to provide for the minor's maintenance: D Hayton (ed), *Underhill and Hayton: Law Relating to Trusts and Trustees* (17th ed, 2007) [66.5].

general law of an entitlement to interest on the legacy, the trustee's power of maintenance under this part of the provision would effectively cease if the general law exception about the payment of interest on a general legacy by a parent or person *in loco parentis* to a minor were abolished.

18.146 Although the sections are also expressed to apply where the contingent interest carries the intermediate income of the property, it is doubtful that that part of the provision would apply in the case of a contingent general legacy.⁸⁰² A contingent general legacy does not ordinarily carry what is regarded as 'intermediate income', which belongs instead to the person entitled to the residuary estate.⁸⁰³ The legacy will do so, however, where the will directs that funds be set apart for its payment.⁸⁰⁴ Although it has been suggested in some of the cases that a contingent general legacy also carries intermediate income in the two situations where a general legacy to a minor carries interest,⁸⁰⁵ the author of *Underhill and Hayton* regards the creation of a separate fund for the payment of a general legacy, in accordance with a direction in the will, as the only circumstance in which a contingent general legacy 'carries actual intermediate income'.⁸⁰⁶

18.147 The legislation in the other Australian jurisdictions takes a different approach. The ACT and New South Wales provisions that deal with the application of income towards the maintenance of minors provide specifically that, where the property held on trust for a minor is future or contingent, the interest of the minor is deemed to carry the intermediate income unless that

802 This would be relevant where the contingent disposition was specific or residuary. In its Wills Report, the National Committee recommended a provision, based originally on s 62 of the *Succession Act 1981* (Qld), under which a contingent, future or deferred disposition of property, whether specific or residuary, includes any intermediate income of the property that has not been disposed of by the will: *Wills Report* (1997) 73–5. The recommended provision applies only to specific and residuary dispositions and not to general legacies. Note, s 62 of the *Succession Act 1981* (Qld) has since been repealed and replaced by s 33H of that Act.

803 *Re Thompson; Brahe v Mason* [1910] VLR 251, 254 (a'Beckett J); *Re Gertsman* [1966] VR 45, 47 (Pape J). Intermediate income is 'the term used to describe income arising in respect of any item of property in the estate of a deceased person between the date of death and the conclusion of the administration period in relation to that property': AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [10.130].

804 *Re Thompson; Brahe v Mason* [1910] VLR 251, 255 (a'Beckett J); *Re Raine; Tyerman v Stansfield* [1929] 1 Ch 716.

805 *Re Gertsman* [1966] VR 45, 47 (Pape J). See also *Permanent Trustee Co of NSW Ltd v Pym* (1938) 39 SR (NSW) 1, 7 (Long Innes CJ in Eq).

806 D Hayton (ed), *Underhill and Hayton: Law Relating to Trusts and Trustees* (17th ed, 2007) [66.5]. In support of this view it is observed that, where, for the sake of convenience, a fund is set aside for the payment of a contingent general legacy, any excess of income over the prescribed rate will fall to be distributed as part of the residuary estate: at [66.5].

income is expressly or specifically disposed of.⁸⁰⁷ The South Australian provision provides that, where a minor has an interest in property that is not vested, and the intermediate income of that property is not specifically disposed of, the intermediate income of the property is available for the exercise of the power of maintenance conferred by the section.⁸⁰⁸ As a result, these provisions make no reference to legacies to a minor by a parent or person standing *in loco parentis* to the minor.

18.148 The scope of the Northern Territory provision⁸⁰⁹ is unclear. It does not include the specific provision in relation to contingent legacies found in the Queensland, Victorian and Western Australian legislation that limits the circumstances in which a trustee may apply trust income towards the maintenance of a minor where the minor's interest in the trust property is contingent. However, as it does not deem the minor's interest to carry the intermediate income or expressly make it available to be applied towards the minor's maintenance, as the ACT, New South Wales and South Australian provisions do, there is an ambiguity as to whether there is even trust property held on trust for the minor.⁸¹⁰

18.149 In the National Committee's view, the model legislation should not preserve (and should therefore not include a provision to the effect of the second limb of section 52(1A) of the *Succession Act 1981* (Qld)), or attempt to restate, the exceptions that apply under the general law in relation to the payment of interest on general legacies in favour of minors. The National Committee is conscious that, under the Trustee Acts of the various Australian jurisdictions, there is a lack of uniformity concerning a trustee's power to apply the income of trust property held contingently towards the maintenance of a minor. However, the National Committee considers that this issue is best addressed by the amendment of the trustee legislation in the various jurisdictions, rather than by the preservation or restatement of complex rules that create highly technical exceptions to what can otherwise be quite a straightforward provision about the payment of interest on general legacies.

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Trustee Act 1925 (ACT) s 43(4); *Trustee Act 1925* (NSW) s 43(3). In *Permanent Trustee Co of NSW Ltd v Pym* (1938) 39 SR (NSW) 1, Long Innes CJ in Eq suggested (at 9) that s 43(3) of the *Trustee Act 1925* (NSW) was undoubtedly drafted to avoid the difficulties that had resulted from a line of English authorities including *Re Dickson* (1885) 29 Ch D 331. In the latter case, the Court held that the provision empowering a trustee to apply income of property held on trust towards the maintenance of a minor applied only where the legacy was set apart by the direction of the testator, so that the income of the legacy went to the minor on fulfilling the contingency. In the absence of such a direction, the Court took the view that, even where the trustees had, for convenience, set apart an amount sufficient to meet the general legacies, the trustees did not hold any property on trust for the minors; rather, they held the property on trust for the residuary beneficiaries who would be entitled to the fund if the contingent legacies never became payable and who would, in any event, be entitled to the income produced by the fund in the meantime.

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Trustee Act 1936 (SA) s 33(3).

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Trustee Act (NT) s 24.

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See note 807 above for a discussion of the line of authority that the New South Wales provision sought to overcome.

RECOMMENDATIONS

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 order⁸¹¹ 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.⁸¹²

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.⁸¹³

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

⁸¹¹ See Recommendation 17-2 above.

⁸¹² See [18.45]–[18.68] above.

⁸¹³ See [18.71] above. The Queensland definition of ‘pecuniary legacy’ is set out at note 689 above.

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.⁸¹⁴

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.⁸¹⁵

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:⁸¹⁶

- (a) the rule in *Lutkins v Leigh*⁸¹⁷ 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:⁸¹⁸
 - (i) expresses a contrary intention; and

⁸¹⁴ See [18.76]–[18.77] above. 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.

⁸¹⁵ See [18.80]–[18.81] above.

⁸¹⁶ See [18.90]–[18.93] above.

⁸¹⁷ (1734) Cases T Talbot 53; 25 ER 658.

⁸¹⁸ See Recommendations 17-6 and 17-7 above.

- (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
- (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;⁸¹⁹

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.⁸²⁰

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

⁸¹⁹ See [18.117] above.

⁸²⁰ See [18.118] above.

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.⁸²¹

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).⁸²²

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.⁸²³

821 See [18.119]–[18.124] above.

822 See [18.137]–[18.149] above.

823 See [18.149] above. See at [18.147] above the alternative approach that applies in the ACT, New South Wales and South Australia.

Chapter 19

Partition of land

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INTRODUCTION

19.1 Partition is one way in which people who own land together as joint tenants or as tenants in common may terminate their co-ownership of that land. A partition is a 'dividing-up of the property, so that the divided parts are held by the respective owners in severalty'.⁸²⁴

19.2 In the context of the administration of the estate of a deceased person, the issue of the partition of land may arise in a number of situations — for example:

- where the deceased person was a co-owner of land with other persons;
- where the will of a deceased person makes a specific devise of land to two or more beneficiaries; and
- where the deceased person died intestate and one or more of the intestacy beneficiaries wishes to take an actual portion of land included in the estate, rather than take a share of the sale proceeds of the land.

HISTORICAL BACKGROUND

19.3 The action for partition developed as part of English property law.⁸²⁵ At common law, partition was available only to persons who held property as coparceners.⁸²⁶ Where persons held property as joint tenants or as tenants in common, they could agree to a partition of property, but could not bring an action for partition. In the sixteenth century, the right to insist on a partition was extended by statute to joint tenants and tenants in common of land.⁸²⁷

19.4 In the late sixteenth century, owing to the inadequacy of the common law remedy of partition and associated procedural difficulties, the Court of Chancery assumed jurisdiction to decree partition.

19.5 However, there were significant limitations to proceedings for partition. The court had no discretion to refuse partition, and could not order the sale of land in lieu of partition.⁸²⁸ As a result, where the physical division of land was

⁸²⁴ JW Carter and others, *Helmore: Commercial Law and Personal Property in New South Wales* (1992) 62.

⁸²⁵ See *Patel v Premabhai* [1954] AC 35, 41–3 (Lord Porter, Lord Oaksey, Mr T Rinfret and Mr LMD de Silva), where the Privy Council considered the historical development of partition.

⁸²⁶ Coparcenary was a form of co-ownership that resulted where 'a person died intestate leaving no male heirs and more than one female heir ... [and] is now extinct': MA Neave and others eds, *Sackville and Neave: Property Law Cases and Materials* (6th ed, 1999) [7.7.2], note 4.

⁸²⁷ *Statute of Partition 1539* (31 Hen VIII c 1) and the *Statute of Partition 1540* (32 Hen VIII c 32) extended the remedy of a writ *de partitione facienda* to joint tenants and tenants in common. The writ was abolished by the *Real Property Limitation Act 1833* (3 & 4 Will IV c 27).

⁸²⁸ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 27.

not practicable, the application of the remedy produced 'inconvenient and undesirable' results.⁸²⁹ For example, in *Turner v Morgan*,⁸³⁰ the court ordered the partition of a single house, with the owner of a two-thirds interest being given all the chimneys and fireplaces and the only stairs.

19.6 The English *Partition Acts* of 1868 and 1876⁸³¹ were enacted to overcome such inconvenient and undesirable consequences. The Acts empowered the court to order, in lieu of partition, the sale of co-owned land and a distribution of the proceeds. In an action for partition of co-owned land, the court could direct a sale of property if that were more beneficial for the parties interested than partition.⁸³² However, where the party requesting the sale was interested in the property to the extent of a half-share or more, the court was obliged to order sale unless it saw good reason to the contrary.⁸³³

EXISTING LEGISLATIVE PROVISIONS

19.7 In all Australian jurisdictions, legislation provides for any co-owner of land to apply to the court (or, in Victoria, to a tribunal) for the partition or sale of that property. In all jurisdictions other than Tasmania, the relevant provisions are found in the property law legislation of the jurisdiction. In Tasmania, there is still separate partition legislation.

19.8 In addition, the administration legislation of some Australian jurisdictions provides expressly for the partition of real property in certain circumstances.

Property law and partition legislation

Australian Capital Territory, South Australia, Tasmania, Western Australia

19.9 The property law legislation in the ACT, South Australia and Western Australia⁸³⁴ and the partition legislation in Tasmania⁸³⁵ substantially reproduce the material provisions of the English *Partition Acts* of 1868 and 1876.

⁸²⁹ *Patel v Prembhai* [1954] AC 35, 42. The Privy Council observed (at 42) that:

Except for the right of partition the concurrent owners had no further remedy, and there were many cases in which a fair division of the property enjoined in a decree was a matter of supreme difficulty, amounting in certain instances almost to an impossibility.

⁸³⁰ (1803) 8 Ves Jun 143; 32 ER 307.

⁸³¹ (1868) 31 and 32 Vict c 40; (1876) 39 and 40 Vict c 17.

⁸³² *Partition Act 1868* (UK) s 3.

⁸³³ *Partition Act 1868* (UK) s 4.

⁸³⁴ *Civil Law (Property) Act 2006* (ACT) ss 242–247; *Law of Property Act 1936* (SA) ss 69–84; *Property Law Act 1969* (WA) ss 126–127.

⁸³⁵ *Partition Act 1869* (Tas).

19.10 In an action for the partition of land,⁸³⁶ the court is invested with wide powers to order sale instead of partition if the nature of the property, the number of parties interested in the property, the absence or disability of any of the interested parties, or any other circumstance would make the sale of the property and distribution of the proceeds more beneficial for the parties than the partition of the property.⁸³⁷

19.11 Further, where a person or persons having collectively an interest of a half share or more in the property request the court to direct a sale of the property, the court must order the sale of the property unless it sees good reason not to do so.⁸³⁸ In this situation, the person or persons resisting sale bear the onus of establishing that partition is more beneficial.⁸³⁹

19.12 It has been held, in relation to the English partition legislation, that the court does not have jurisdiction to make an order for the partition, or for the sale, of property where there is a trust for the management of the property vested in trustees,⁸⁴⁰ or where the property is held on trust for sale,⁸⁴¹ but that the existence of a power of sale in trustees is not a bar to a decree for partition.⁸⁴²

19.13 Under the Tasmanian legislation, the court's power to order sale in lieu of partition is qualified. Section 3 of the *Partition Act 1869* (Tas) provides:⁸⁴³

3 In partition action Court may order sale instead of division

In an action for partition, where, if this Act had not been passed, an order for partition might have been made, then, if it appears to the Court that by reason of the nature of the property to which the action relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstances, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of

⁸³⁶ In the ACT and South Australia, proceedings for partition may be brought by application: see *Civil Law (Property) Act 2006* (ACT) s 243; *Law of Property Act 1936* (SA) s 69.

⁸³⁷ *Civil Law (Property) Act 2006* (ACT) s 244(1)(a); *Law of Property Act 1936* (SA) s 69(2); *Partition Act 1869* (Tas) s 3; *Property Law Act 1969* (WA) s 126(2). The South Australian legislation enables the court, where an order is made for sale instead of partition, to declare as trustees of the property any of the parties to the application: *Law of Property Act 1936* (SA) s 75.

⁸³⁸ *Civil Law (Property) Act 2006* (ACT) s 244(1)(b); *Law of Property Act 1936* (SA) s 70; *Partition Act 1869* (Tas) s 4; *Property Law Act 1969* (WA) s 126(1).

⁸³⁹ *Bray v Bray* (1926) 38 CLR 542, 545 (Knox CJ); *Rogers v Squire* (1978) 23 ALR 111, 120 (Gallop J); *Schnytzer v Wielunski* [1978] VR 418, 422 (Menhennitt J).

⁸⁴⁰ *Taylor v Grange* (1880) 15 Ch D 165. In that case, the Court held that the effect of an order for partition would be to put an end to the active trusts created by the testator's will.

⁸⁴¹ *Swaine v Denby* (1880) 14 Ch D 326; *Ward v The Trustees Executors and Agency Co Ltd* (1893) 14 ALT 274.

⁸⁴² *Boyd v Allen* (1883) 24 Ch D 622.

⁸⁴³ See also *Partition Act 1869* (Tas) ss 4, 5, which commence with the same expression as s 3.

the property accordingly, and may give all necessary or proper consequential directions. (emphasis added)

19.14 It has been suggested that the introductory words of this provision prevent the provision from applying to land held on trust for sale, 'because an order for partition could not have been made in these circumstances'.⁸⁴⁴

New South Wales, Northern Territory, Queensland

19.15 The property law legislation in New South Wales, Queensland and the Northern Territory also provides for the partition or sale of land.⁸⁴⁵ However, the legislation provides for a different approach from the jurisdictions discussed above.

19.16 The court may, on the application of one or more 'co-owners', appoint trustees of the property on a statutory trust for sale or on a statutory trust for partition, and vest the property in the trustees so appointed.⁸⁴⁶

19.17 Further, if, on an application for the appointment of trustees on a statutory trust for sale, any of the co-owners satisfies the court that partition would be more beneficial for the co-owners whose interest in the property comprise at least half of the value of the property, the court may, with the consent of the encumbrancee⁸⁴⁷ of the entirety (if any):⁸⁴⁸

- appoint trustees of the property on a statutory trust for partition; or
- appoint part of the property on a statutory trust for sale and part on a statutory trust for partition.

⁸⁴⁴ MA Neave and others eds, *Sackville and Neave: Property Law Cases and Materials* (6th ed, 1999) [7.7.4], referring to the previous Victorian provisions, *Property Law Act 1958* (Vic) ss 222–225, which were repealed and replaced by the *Property (Co-ownership) Act 1995* (Vic). The repealed Victorian provisions were in similar terms to the Tasmanian provisions. See also S Robinson, *The Property Law Act Victoria* (1992) 474.

⁸⁴⁵ *Conveyancing Act 1919* (NSW) ss 66F–66I; *Law of Property Act* (NT) ss 37–42, 44–45; *Property Law Act 1974* (Qld) ss 37–40, 42–43. Section 66G(1) of the *Conveyancing Act 1919* (NSW) refers to 'any property (other than chattels)'. Sections 40(1) of the *Law of Property Act* (NT) and 38(1) of the *Property Law Act 1974* (Qld) refer to 'any property (other than chattels personal)'. Accordingly, the provisions apply to leasehold, as well as freehold, interests in land.

⁸⁴⁶ *Conveyancing Act 1919* (NSW) s 66G(1); *Law of Property Act* (NT) s 40(1); *Property Law Act 1974* (Qld) s 38(1). The terms 'statutory trust for sale' and 'statutory trust for partition' are defined in the legislation: see *Conveyancing Act 1919* (NSW) s 66F(2), (3); *Law of Property Act* (NT) s 37(1); *Property Law Act 1974* (Qld) ss 37A, 37B.

⁸⁴⁷ Sections 66F and 66G(4) of the *Conveyancing Act 1919* (NSW) refer to 'incumbrancer' and 'incumbrancers'. It has been observed that these references are 'erroneous, since ... the incumbrancer is the person who creates the incumbrance, ie the co-owner himself, and is not the person who is entitled to the benefit of the incumbrance ...': Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 28.

⁸⁴⁸ *Conveyancing Act 1919* (NSW) s 66G(4); *Law of Property Act* (NT) s 40(7); *Property Law Act 1974* (Qld) s 38(4).

19.18 The terms 'co-ownership' and 'co-owner' are defined broadly in the legislation. 'Co-ownership' means ownership, whether at law or in equity, in possession by two or more persons as joint tenants or as tenants in common. 'Co-owner' is defined as having a corresponding meaning.⁸⁴⁹

19.19 Where the administration of an estate has reached the stage where the executors are holding land on trust for beneficiaries under a disposition, the beneficiaries are co-owners in equity for the purposes of the legislation.⁸⁵⁰ This has been held to be the case even where the testator left the residue of the estate to executors on trust to convert and pay the balance in specified portions to the residuary beneficiaries.⁸⁵¹

The administration of the estate has reached the stage where the executors are holding a parcel of land on trust for sale and payment of the proceeds to the beneficiaries. The residue having been ascertained, the principle stated in *CSD v Livingston* [1965] AC 694 which denied that a residuary beneficiary had any property in any specific asset while the administration proceeded has no application. The property in question in this case is in my own judgment held by the executors in trust for the named beneficiaries. They are, accordingly, co-owners for the purposes of s 38 of the *Property Law Act*.

19.20 Under the legislation in these jurisdictions, an appointment of trustees may be made notwithstanding that the property is already held by trustees on trust for sale under a trust instrument.⁸⁵² However, 'it may be that no order should be made in cases where it is clear that there is a subsisting trust for sale under the trust instrument and it appears that such trust is as effective as would be the statutory trust for sale'.⁸⁵³ Further, the court has a discretion to refuse to make an order for the appointment of statutory trustees, and will refrain from making such an order, where it 'would be inconsistent with some proprietary right, or some contractual or fiduciary obligation'.⁸⁵⁴

19.21 The provisions in these jurisdictions were intended to provide a superior regime for partition, and for sale in lieu of partition, than the older regimes that apply in the jurisdictions discussed earlier. Importantly, they provide a summary method for the appointment of trustees on a statutory trust for partition or on a statutory trust for sale. When the Queensland Law Reform Commission recommended the adoption of the current provisions in 1973, it considered the New South Wales provisions dealing with statutory trusts for

849 *Conveyancing Act 1919* (NSW) s 66F(1); *Law of Property Act* (NT) s 37(1); *Property Law Act 1974* (Qld) s 37.

850 *Hayward v Skinner* [1981] 1 NSWLR 590, 591 (Kearney J); *Re Gray* [1994] 1 Qd R 583, 586 (Ryan J).

851 *Re Gray* [1994] 1 Qd R 583, 586 (Ryan J).

852 *Re Cordingley* (1948) 48 SR (NSW) 248, 250 (Sugerman J); *Re Gray* [1994] 1 Qd R 583.

853 *Re Cordingley* (1948) 48 SR (NSW) 248, 251 (Sugerman J).

854 *Williams v Legg* (1993) 29 NSWLR 687, 693 (Handley, Sheller and Cripps JJA).

sale and partition to be a significant improvement on the partition legislation that applied in Queensland at the time:⁸⁵⁵

there is no doubt that the present procedure for partition under the Act of 1911 is unnecessarily cumbersome, and there can be no rational justification for continuing to require a co-owner to incur the expense and formality of a Supreme Court action (to which there is seldom, if ever, any defence) in order to obtain sale of the common property.

Victoria

19.22 The provisions of the *Property Law Act 1958* (Vic) that deal with the partition or sale of land were amended in 2006⁸⁵⁶ to give effect to recommendations made by the Victorian Law Reform Commission.⁸⁵⁷ Under the new provisions (which also apply to co-owned goods), applications by co-owners of land for the sale or physical division of the land under Part IV of the *Property Law Act 1958* (Vic) are now made to the Victorian Civil and Administrative Tribunal (VCAT).⁸⁵⁸

19.23 VCAT has wide powers to make 'any order it thinks fit to ensure that a just and fair sale or division of land ... occurs'.⁸⁵⁹ Section 228(2) of the Act provides that VCAT may order:⁸⁶⁰

- (a) the sale of the land ... and the division of the proceeds of sale among the co-owners; or
- (b) the physical division of the land ... among the co-owners; or
- (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.

19.24 Under the legislation, there is a statutory preference in favour of the sale of property and the division of the proceeds among the co-owners. Section 229(1) provides:

229 Sale and division of proceeds to be preferred

- (1) If VCAT determines that an order should be made for the sale and division of land which is ... the subject of an application under this Division, VCAT must make an order under section 228(2)(a) unless

⁸⁵⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 27–8.

⁸⁵⁶ See *Property (Co-ownership) Act 2005* (Vic), which amended the *Property Law Act 1958* (Vic).

⁸⁵⁷ See Victorian Law Reform Commission, *Disputes Between Co-owners*, Report (2002).

⁸⁵⁸ *Property Law Act 1958* (Vic) s 225. Generally, the Supreme Court of Victoria does not have jurisdiction to hear an application for the sale or division of land under pt IV of the Act: *Property Law Act 1958* (Vic) s 234C.

⁸⁵⁹ *Property Law Act 1958* (Vic) s 228(1).

⁸⁶⁰ *Property Law Act 1958* (Vic) s 228(2).

VCAT considers that it would be more just and fair to make an order under section 228(2)(b) or (c).

19.25 In deciding whether ‘an order under section 228(2)(b) or (c) would be more just and fair,’ VCAT must take the following into account:⁸⁶¹

- (a) the use being made of the land ... , including any use of the land ... for residential or business purposes;
- (b) whether the land is ... able to be divided and the practicality of dividing the land ... ;
- (c) any particular links with or attachment to the land ... , including whether the land ... [is] unique or [has] a special value to one or more of the co-owners.

19.26 If VCAT considers it ‘just and fair’, it may order that land be divided into shares that differ from the entitlement of each co-owner and order that compensation be paid by specified co-owners to compensate for any differences in value.⁸⁶²

19.27 The Victorian legislation takes a different approach to the appointment of trustees from that which applies in New South Wales, the Northern Territory and Queensland, where the primary remedy is the appointment of trustees either on a statutory trust for sale or on a statutory trust for partition.⁸⁶³ If VCAT ‘thinks that the appointment or removal of trustees is necessary or desirable’, it may order the appointment or removal of trustees.⁸⁶⁴ The Victorian Law Reform Commission did ‘not believe that it should be necessary to appoint trustees in all cases’.⁸⁶⁵ In its view, such a requirement would be ‘cumbersome, and may lead to additional expense and delay for the parties’.⁸⁶⁶ It therefore recommended that VCAT should have a discretion to appoint or remove trustees where necessary.⁸⁶⁷ However, the Victorian Commission considered that the appointment of trustees would be necessary where any of the co-owners were minors or persons incapable of looking after their own affairs, and that the appointment of trustees would be desirable where there was a history of violence between the parties.⁸⁶⁸

⁸⁶¹ *Property Law Act 1958* (Vic) s 229(2).

⁸⁶² *Property Law Act 1958* (Vic) s 230.

⁸⁶³ See [19.15]–[19.17] above.

⁸⁶⁴ *Property Law Act 1958* (Vic) s 231(1).

⁸⁶⁵ Victorian Law Reform Commission, *Disputes Between Co-owners*, Report (2002) 78.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid* 78, 80 (Recommendation 44).

⁸⁶⁸ *Ibid.*

Administration legislation

19.28 The administration legislation in the ACT, New South Wales, the Northern Territory, South Australia and Western Australia also includes a provision that empowers the court to order the partition of real property.⁸⁶⁹

19.29 The provisions are expressed in very similar terms. Section 58 of the *Probate and Administration Act 1898* (NSW), which is typical, provides:

58 Court may order partition in a summary way

- (1) In any case wherein upon such inquiry the Court is satisfied that a partition of such real estate or any part thereof will be advantageous to the parties interested therein, the Court may appoint one or more arbitrators to effect such partition.
- (2) The report and final award of the arbitrators setting forth particulars of the land allotted to each party interested shall, when signed by them and confirmed by the order of the Court, and when also registered in the office of the Registrar-General, be effectual without the necessity of any further conveyance to vest in each allottee the land so allotted to the allottee, and an office copy of such award so signed, confirmed, and registered as aforesaid, shall for all purposes be equivalent to an indenture of conveyance to each allottee of the lands allotted to the allottee as aforesaid.
- (3) In the case of land subject to the provisions of the *Real Property Act 1900*, the Registrar-General, on being served with an office copy of any such award so signed and confirmed, shall create a folio of the Register kept under that Act for the land so allotted to each allottee.
- (4) If such allotment be made subject to the charge of any money payable to any other party interested for equalising the partition, such charge shall take effect according to the terms and conditions in regard to time and mode of payment and otherwise which shall be expressed in such award without the necessity of any further instrument being made or executed.
- (5) In the case of land subject to the provisions of the *Real Property Act 1900*, the Registrar-General, when creating under subsection (3) a folio of the Register kept under that Act as a consequence of an allotment made under subsection (2), shall make in the folio such recording as the Registrar-General considers appropriate with respect to any charge referred to in subsection (4) that relates to the allotment and that is unsatisfied.

19.30 Under section 58(1) of the *Probate and Administration Act 1898* (NSW) the court's power to appoint arbitrators to effect a partition arises in 'any case wherein upon such inquiry the Court is satisfied that a partition of such real estate or any part thereof will be advantageous to the parties interested therein'.

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Administration and Probate Act 1929 (ACT) s 52; *Probate and Administration Act 1898* (NSW) s 58; *Administration and Probate Act* (NT) s 84; *Administration and Probate Act 1919* (SA) s 48; *Administration Act 1903* (WA) s 19.

That is a reference to an inquiry under section 57 of the Act.⁸⁷⁰ Under that section, the court may, in the case of a whole or partial intestacy, make directions about the 'the expediency and mode of effecting a partition [of real property] if applied for'. As a result, section 58 applies only in cases of intestacy.

19.31 This is also the case under the ACT,⁸⁷¹ Northern Territory⁸⁷² and South Australian⁸⁷³ administration provisions, which are framed in the same terms.

19.32 Only the Western Australian provision does not contain this limitation, and so would apply to both testate and intestate estates.⁸⁷⁴

19.33 There is no equivalent provision to section 58 of the *Probate and Administration Act 1898* (NSW) in the Queensland,⁸⁷⁵ Tasmanian or Victorian administration legislation.

DISCUSSION PAPER

19.34 In the Discussion Paper, the National Committee noted that, although the *Succession Act 1981* (Qld) did not include a provision to the effect of section 58 of the *Probate and Administration Act 1898* (NSW), the provisions in the *Property Law Act 1974* (Qld) dealing with statutory trusts for sale or partition had the same effect and appeared to be working well.⁸⁷⁶

19.35 The National Committee stated that its general policy was that statutory provisions should be included in the principal legislation covering the subject matter of the provisions.⁸⁷⁷ On that basis, the National Committee proposed that the model legislation should not include a provision to the effect of section 58 of the *Probate and Administration Act 1898* (NSW).⁸⁷⁸

⁸⁷⁰ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1289.1] (at 20 February 2009).

⁸⁷¹ *Administration and Probate Act 1929* (ACT) s 52, which refers to an inquiry made under s 51 of the Act.

⁸⁷² *Administration and Probate Act* (NT) s 84, which refers to an inquiry under s 82 of the Act.

⁸⁷³ *Administration and Probate Act 1919* (SA) s 48, which refers to an inquiry under s 47 of the Act.

⁸⁷⁴ See *Administration Act 1903* (WA) s 19.

⁸⁷⁵ Queensland used to have provisions in similar terms to ss 57 and 58 of the *Probate and Administration Act 1898* (NSW): see ss 22 and 23 of the *Intestacy Act 1877* (Qld). That Act was repealed by the *Succession Act 1981* (Qld).

⁸⁷⁶ *Administration of Estates Discussion Paper* (1999) QLRC 180; NSWLRC [13.5].

⁸⁷⁷ Ibid, QLRC 180; NSWLRC [13.6].

⁸⁷⁸ Ibid, QLRC 180; NSWLRC 258 (Proposal 69).

19.36 The National Committee suggested that any jurisdiction that wished to enact a provision to the effect of section 58 of the *Probate and Administration Act 1898* (NSW) should do so in its property law legislation.⁸⁷⁹

SUBMISSIONS

19.37 All the submissions that commented on this issue agreed with the National Committee's proposal.⁸⁸⁰ The New South Wales Law Society commented that there is already an adequate provision dealing with partition in the *Conveyancing Act 1919* (NSW).⁸⁸¹

19.38 Although the ACT Law Society agreed that the model legislation should not include a provision to the effect of section 58 of the *Probate and Administration Act 1898* (NSW), it was nevertheless of the view that there was no point in amending the legislation in the Territory to remove its equivalent provision.⁸⁸²

THE NATIONAL COMMITTEE'S VIEW

19.39 The National Committee considers it undesirable that, in most Australian jurisdictions, there are two regimes for dealing with partition — one under the property law legislation,⁸⁸³ and another under the administration legislation.⁸⁸⁴ Ideally, there should be one simple, uniform, summary procedure for effecting the partition of land. This procedure should be capable of applying to the partition of all land (unlike section 58 of the *Probate and Administration Act 1898* (NSW), which applies only to the partition of land in intestate estates).

19.40 The partition of land is an issue that needs to be addressed in the context of a broader review of partition legislation generally, rather than in the more specific context of the administration of estates. The National Committee is therefore of the view that the model legislation should not include a provision to the effect of section 58 of the *Probate and Administration Act 1898* (NSW) or any other provisions dealing with the partition of land.

19.41 Instead, those jurisdictions whose general partition provisions are still based on the English Partition Acts should review their legislation with a view to adopting comprehensive, modern legislation of the kind found in either the New

879 Ibid.

880 Submissions 1, 8, 11, 12, 14, 15.

881 Submission 15.

882 Submission 14, referring to s 52 of the *Administration and Probate Act 1929* (ACT).

883 See [19.9]–[19.27] above.

884 See [19.28]–[19.32] above. Queensland, Tasmania and Victoria are the exceptions in this respect: see [19.33] above.

South Wales, Northern Territory and Queensland property law legislation⁸⁸⁵ or the *Property Law Act 1958* (Vic).⁸⁸⁶

19.42 Until they conduct a general review of their partition legislation, those jurisdictions with a provision to the effect of section 58 of the *Probate and Administration Act 1898* (NSW) in their administration legislation may wish to retain that provision. It at least provides a summary procedure for partition in the relevant circumstances, whereas, for the most part, the provisions based on the original English Partition Acts still require the commencement of an action for partition.⁸⁸⁷

RECOMMENDATION

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

885 See [19.15]–[19.21] above.

886 See [19.22]–[19.27] above.

887 See [19.9]–[19.10] and note 836 above.

Chapter 20

Obtaining the court's advice or directions

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INTRODUCTION

20.1 In some circumstances a trustee or personal representative may be unsure about what course of action he or she should take in the administration of an estate. It has been observed that:⁸⁸⁸

A trustee is not obliged to take any risks by deciding in a doubtful case what are the respective rights of the beneficiaries, or ... by exercising a power or discretion where there is a possibility that the propriety of such exercise might afterwards be called in question by the beneficiaries.

20.2 Where a trustee or personal representative is in doubt as to the course of action to be adopted, he or she is entitled to seek the advice or directions of the court.⁸⁸⁹ A trustee or personal representative who follows the advice or directions of the court is protected from any claim by a beneficiary or creditor in respect of the course of action adopted.⁸⁹⁰

20.3 This jurisdiction, which was originally exercised by the Court of Chancery in England, 'was intended to assist or relieve personal representatives'.⁸⁹¹ It is said that:⁸⁹²

Without the benevolent jurisdiction of the Chancellor the lot of the personal representative would have been intolerable. Since he was liable on the one hand to account, so, on the other hand, he might for his indemnity apply to the Court of Chancery to administer the estate amongst the parties interested. Once the estate was administered in accordance with such a decree the personal representative was relieved of personal liability. In that legitimate desire he was encouraged by the Court, which interpreted its function as one of helping rather than hindering the administrator.

20.4 The protection that is afforded to a trustee or personal representative who acts in accordance with the court's advice or directions may be particularly important where the trustee or personal representative is faced with the decision of whether to commence litigation on behalf of the estate or to defend litigation brought against the estate.

20.5 In *Re Beddoe*,⁸⁹³ the English Court of Appeal stated the principle to be applied to determine whether a personal representative should be indemnified

⁸⁸⁸ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [2132].

⁸⁸⁹ *Re Atkinson* [1971] VR 612, 615 (Gillard J). See also *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 All ER 198, 201 (PC).

⁸⁹⁰ *Re Atkinson* [1971] VR 612, 615 (Gillard J). That protection is dependent on making proper disclosure to the court of the relevant facts. See [20.30], [20.44], [20.63] below.

⁸⁹¹ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 259.

⁸⁹² *Ibid* 259–60.

⁸⁹³ [1893] 1 Ch 547.

in respect of the costs he had been ordered to pay to a defendant whom he had unsuccessfully sued:⁸⁹⁴

A trustee can only be indemnified out of the pockets of his *cestui que trust* against costs, charges, and expenses properly incurred for the benefit of the trust — a proposition in which the word ‘properly’ means reasonably as well as honestly incurred. ... mere *bona fides* is not the test, and ... it is no answer in the mouth of a trustee who has embarked on idle litigation to say that he honestly believed what his solicitor told him, if his solicitor has been wrong-headed and perverse. Costs, charges, and expenses which in fact have been unreasonably incurred, do not assume in the eye of the law the character of reasonableness simply because the solicitor is the person who was in fault.

20.6 The Court noted that a trustee who is doubtful as to the ‘wisdom of prosecuting or defending a lawsuit’ may seek the court’s opinion,⁸⁹⁵ and that a trustee who commences or defends an action without the sanction of the court may be at risk as regards the costs of those proceedings, even if he or she acts on counsel’s opinion.⁸⁹⁶

20.7 This chapter examines the various means by which a trustee or personal representative may obtain the court’s advice or directions in order to be protected from liability in respect of a particular course of action.

GENERAL ADMINISTRATION PROCEEDINGS AND PARTIAL RELIEF

Historical background

20.8 Historically, in order for a trustee or personal representative to obtain the court’s advice or directions, he or she was required to institute a suit for the general administration of the estate.⁸⁹⁷

There were formerly in the Court of Chancery numbers and numbers of cases in which an administration suit was necessarily instituted, not because the parties desired the administration of the estate generally, but because there were certain questions—they may have been minute, they may have been limited, they may have been very important—over which the Court would have had no control without the existence of an administration suit. There were no means, according to the old practice, of bringing isolated questions under a will before the Court for its determination except by an administration suit.

894 Ibid 562 (Bowen LJ). These comments have been approved by Australian courts: see *Adsett v Berlouis* (1992) 37 FCR 201, 211–12 (Northrop, Wilcox and Cooper JJ); *Hypac Electronics Pty Ltd v Mead* (2004) 61 NSWLR 169, 192–4 (Campbell J); *Mead v Watson (as liquidator for Hypac Electronics)* [2005] NSWCA 133, [114], [131]–[134] (Sheller, Ipp and Tobias JJA).

895 [1893] 1 Ch 547, 562 (Bowen LJ). The procedure suggested for obtaining the court’s opinion is considered at [20.13] below.

896 *Re Beddoe* [1893] 1 Ch 547, 557 (Lindley LJ).

897 *Re Wilson* (1885) 28 Ch D 457, 460 (Pearson J). Administration proceedings may be instituted for a wide range of reasons, not merely in order to obtain advice or directions from the court. For example, administration proceedings may be instituted by beneficiaries who are dissatisfied with the conduct of the trustee or personal representative: see JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [60–01].

20.9 As a result, a practice developed by which a trustee would commence an administration action, which was stayed after the trustee had obtained the court's advice or directions:⁸⁹⁸

under the old Chancery practice, if a trustee wished to obtain the direction or opinion of the court on a matter of administration or management or as to a question of construction of the trust instrument, the trustee had to commence an administration suit. The trustee would raise on the pleadings in the suit the particular point upon which the court's advice was sought. Having obtained the court's direction or advice on that point, the trustee would then obtain a stay of all further proceedings in the administration suit.

20.10 However, the commencement of an administration action was a costly and inefficient way to obtain relief, particularly where the only relief sought was the court's advice or directions on a fairly narrow issue.⁸⁹⁹

To commence a general administration suit was ... often a cumbersome and expensive exercise as all persons interested in the estate had to be brought before the court, accounts had to be taken and enquiries had to be ordered, none of which was necessary if all that was in question was a point of construction of the trust instrument or what should be done in the management or administration of the trust assets in a particular situation.

20.11 As part of a range of reforms made in England in the nineteenth century in relation to administration actions,⁹⁰⁰ the *Rules of the Supreme Court of 1883* (Eng) provided, by Order 55 rule 3, that an executor, administrator or trustee and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next of kin, or heir-at-law or customary heir of a deceased person or as *cestui que trust* under the trust of any deed or instrument may:⁹⁰¹

take out, as of course, an originating summons returnable in the chambers of a judge of the Chancery Division for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case may require, (that is to say), the determination, without an administration of the estate or trust, of any of the following questions or matters:—

- (a) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust*:
- (b) the ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others:
- (c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts:

898 *Application of Macedonian Orthodox Community Church St Petka Inc (No 2)* (2005) 63 NSWLR 441, 445 (Palmer J).

899 Ibid. See also *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 634 (Young J).

900 See *McLean v Burns Philp Trustee Co Pty Ltd* (1985) 2 NSWLR 623, 634–5 (Young J).

901 See A Underhill, *Underhill's Trusts and Trustees* (7th ed, 1913, Special Australasian edition) 448–9.

- (d) the payment into court of any money in the hands of the executors or administrators or trustees:
- (e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees:
- (f) the approval of any sale, purchase, compromise, or other transaction:
- (g) the determination of any question arising in the administration of the estate or trust. (emphasis added)

20.12 The purpose of this rule was 'to substitute a shorter and cheaper form of procedure' than the commencement of an action for the general administration of an estate or trust.⁹⁰² It enabled the court to grant relief without making an administration order, and created a summary procedure for obtaining that relief.⁹⁰³ In so far as the rule created a procedure for obtaining inquiries or directions without administration, it was said to be 'exactly equivalent to the old practice of commencing an administration suit, raising the particular point by the pleadings, getting an inquiry or direction upon that point, and then staying further proceedings in the suit'.⁹⁰⁴

20.13 In *Re Beddoe*,⁹⁰⁵ where the English Court of Appeal held that a trustee who had unreasonably defended proceedings was not entitled to be indemnified in respect of the costs of the proceedings, the Court commented on the relative ease with which the trustee might have obtained the advice of the court:⁹⁰⁶

If a trustee is doubtful as to the wisdom of prosecuting or defending a lawsuit, he is provided by the law with an inexpensive method of solving his doubts in the interest of the trust. He has only to take out an originating summons, state the point under discussion, and ask the Court whether the point is one which should be fought out or abandoned.

20.14 However, despite the reforms made by the *Rules of the Supreme Court of 1883* (Eng) it was still necessary to commence an administration suit where the matter did not fall under any of the paragraphs of Order 55 rule 3.⁹⁰⁷ That difficulty was overcome when the 1883 Rules were replaced by the *Rules of the Supreme Court 1965* (Eng). Order 85 rule 2 of the 1965 rules, which replaced Order 55 rule 3 of the earlier rules, specifically covered "any question" and "any relief" which could be determined or granted in an administration action'.⁹⁰⁸

⁹⁰² A Underhill, *Underhill's Trusts and Trustees* (7th ed, 1913, Special Australasian edition) 449.

⁹⁰³ *Re Wilson* (1885) 28 Ch D 457, 460–1 (Pearson J).

⁹⁰⁴ *Re Medland* (1889) 41 Ch D 476, 492 (Fry LJ). For a discussion of that practice see [20.9] above.

⁹⁰⁵ [1893] 1 Ch 547.

⁹⁰⁶ Ibid 562 (Bowen LJ).

⁹⁰⁷ DJ Hayton (ed), *Underhill and Hayton Law Relating to Trusts and Trustees* (15th ed, 1995) 811.

⁹⁰⁸ Ibid 811–12. See now *Civil Procedure Rules 1998* (UK) Pt 64.

Australian court rules providing for partial relief without general administration

20.15 Most Australian jurisdictions make specific provision in their court rules for the court to grant relief without the need to make a general administration order.

Australian Capital Territory

20.16 Although the previous ACT court rules contained a rule in similar terms to Order 55 rule 3 of the *Rules of the Supreme Court 1883* (Eng),⁹⁰⁹ that rule was not carried over into the *Court Procedures Rules 2006* (ACT) in that form. However, it is still possible for the court to grant partial relief without ordering the administration of the estate. Rule 35, which deals generally with when proceedings may be commenced by originating application (instead of by an originating claim), provides, in part:

35 When originating application may be used

...

- (2) Without limiting subrule (1), a proceeding may be started by originating application if—
 - (a) the only or main issue in the proceeding is the interpretation of legislation and a substantial dispute of fact is unlikely; or
 - (b) the only or main issue in the proceeding is the interpretation of a deed, will, contract or other document and a substantial dispute of fact is unlikely; or
 - (c) the relief sought is a declaration of right and there is no opposing party to the proceeding; or
 - (d) for a question or matter in relation to the estate of a deceased person or a trust, without administration of the estate or trust—
 - (i) the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely; or
 - (ii) there is no opposing party to the proceeding or it is not intended to serve anyone with the originating process.

Examples for r (2)(d)

- 1 a question affecting the rights or interests of someone claiming to be a creditor, domestic partner or next of kin of the deceased person or beneficiary of the trust
- 2 finding out any class of creditors, next of kin or others
- 3 producing any particular accounts by the executors, administrators or trustees, and verifying the accounts (if necessary)

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See *Supreme Court Rules 1937* (ACT) O 58 r 1 (repealed).

- 4 paying into court any amount held by the executors, administrators or trustees
- 5 directing the executors, administrators or trustees to do or not do something as executor, administrator or trustee
- 6 approving any sale, purchase, compromise or other transaction
- 7 deciding any question arising in the administration of the estate or trust

New South Wales, Northern Territory, Tasmania, Victoria

20.17 In New South Wales, the Northern Territory, Tasmania and Victoria, the court rules follow Order 85, rule 2 of the *Rules of the Supreme Court 1965* (Eng), and provide that proceedings may be brought for any relief that could be granted in an administration proceeding, without the need to apply for the administration of the estate under the direction of the court.⁹¹⁰

20.18 Rule 54.3 of the *Uniform Civil Procedure Rules 2005* (NSW), which is in similar terms to its counterparts in the other Australian jurisdictions, provides:

54.3 Relief without general administration

- (1) Proceedings may be brought for any relief which could be granted in administration proceedings.⁹¹¹
- (2) Proceedings may be brought for the determination of any question which could be determined in administration proceedings, including:
 - (a) any question arising in the administration of an estate or in the execution of a trust,
 - (b) any question as to the composition of any class of persons:
 - (i) having a claim against an estate, or
 - (ii) having a beneficial interest in an estate, or
 - (iii) having a beneficial interest in property subject to a trust,
 - (c) any question as to the rights or interests of a person who claims:
 - (i) to be a creditor of an estate, or
 - (ii) to be entitled under the will, or on the intestacy, of a deceased person, or
 - (iii) to be beneficially entitled under a trust.

⁹¹⁰ *Uniform Civil Procedure Rules 2005* (NSW) r 54.3; *Supreme Court Rules* (NT) r 54.02; *Supreme Court Rules 2000* (Tas) r 604; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 54.02.

⁹¹¹ 'Administration proceedings' are defined to mean 'proceedings for the administration of an estate, or for the execution of a trust, under the direction of the Supreme Court': *Uniform Civil Procedure Rules 2005* (NSW) r 54.1.

- (3) Proceedings may be brought for an order directing any executor, administrator or trustee:
 - (a) to furnish accounts, or
 - (b) to verify accounts, or
 - (c) to pay funds of the estate or trust into court, or
 - (d) to do or abstain from doing any act.
- (4) Proceedings may be brought for:
 - (a) an order approving any sale, purchase, compromise or other transaction by an executor, administrator or trustee, or
 - (b) directing any act to be done in the administration of an estate that the Supreme Court could order to be done if the estate were being administered under the direction of the Court, or
 - (c) directing any act to be done in the execution of a trust that the Supreme Court could order to be done if the trust were being executed under the direction of the Court.
- (5) Subrules (1)–(4) do not limit the operation of each other.
- (6) In any proceedings brought pursuant to this rule, a claim need not be made for the administration of the estate, or the execution of the trust, under the direction of the Supreme Court. (note added)

20.19 The rules in New South Wales, the Northern Territory, Tasmania and Victoria also provide that the court need not make an order for the administration of an estate under the direction of the court unless the order is necessary for the determination of the questions arising between the parties.⁹¹²

20.20 These jurisdictions also have comprehensive rules about who may or must be a party to the application.⁹¹³ The Northern Territory rule is typical:⁹¹⁴

54.03 Parties

In an administration proceeding or a proceeding within rule 54.02—

- (a) all the executors of the will of the deceased or administrators of the estate or trustees of the trust, as the case may be, are parties;
- (b) where the proceeding is brought by executors, administrators or trustees, any of them who does not consent to being joined as a plaintiff shall be made a defendant;

⁹¹² *Uniform Civil Procedure Rules 2005* (NSW) r 54.6; *Supreme Court Rules* (NT) r 54.06(1); *Supreme Court Rules 2000* (Tas) r 606; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 54.06(1).

⁹¹³ *Uniform Civil Procedure Rules 2005* (NSW) rr 7.11–7.12, 54.4; *Supreme Court Rules* (NT) r 54.03; *Supreme Court Rules 2000* (Tas) r 605; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 54.03.

⁹¹⁴ *Supreme Court Rules* (NT) r 54.03.

- (c) notwithstanding anything in rule 9.03(1), and without limiting the powers of the Court under Order 9, all persons having a beneficial interest in or claim against the estate or having a beneficial interest under the trust, as the case may be, need not be parties and the plaintiff may make such of those persons parties as he thinks fit; and
- (d) where in the taking of an account of debts or liabilities under a judgment or order in the proceeding a person not a party makes a claim—
 - (i) a party other than the executors or administrators or trustees shall not be entitled to attend before the Court in relation to that claim, except by leave of the Court; and
 - (ii) the Court may direct or allow a party to attend before the Court either in addition to or in substitution for the executors, administrators or trustees.

Queensland

20.21 Although the previous Queensland rules contained a rule in similar terms to Order 55 rule 3 of the *Rules of the Supreme Court of 1883* (Eng),⁹¹⁵ that rule was not carried over into the *Uniform Civil Procedure Rules 1999* (Qld). However, it has been suggested that, because of the broad jurisdiction conferred on the Supreme Court by section 6 of the *Succession Act 1981* (Qld), this omission from the Queensland rules has not resulted in any change in the powers that the court may exercise:⁹¹⁶

the court retains an inherent jurisdiction, and also has very broad, unrestricted powers to give appropriate remedies in succession matters under the ... *Succession Act 1981* s 6. Therefore, it seems that the court retains all the powers it had under the old rules to give relief such as the power to give relief in specific matters without general administration. Thus, the court no doubt retains the power to give advice or direction to the personal representative in specific matters, while ensuring that procedures are followed which will prevent persons affected by controversial proceedings from being taken advantage of, and will protect the personal representative who acts in accordance with that advice or direction.

20.22 Where the only or main issue on which the court's advice or direction is sought is an issue of law and a substantial dispute of fact is unlikely to arise, the rules enable the proceedings to be commenced by application.⁹¹⁷

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See *Rules of the Supreme Court 1900* (Qld) O 4 r 12 (repealed). Unlike the English rule, which provided that relief was to be sought by originating summons, O 4 r 12 of the Queensland rules provided that the relevant relief was to be sought by way of an action. However, the rules made provision for the writ of summons to be specially indorsed with the a claim for the specific relief sought under O 4 r 12, and enabled an application for summary judgment to be made in those circumstances: see *Rules of the Supreme Court 1900* (Qld) O 6 r 10, O 19 r 4.

916

Halsbury's Laws of Australia, 395 Succession, '4 Administration of Estates' [395-5995] note 2 (at 21 February 2009).

917

Uniform Civil Procedure Rules 1999 (Qld) r 11.

South Australia

20.23 The *Supreme Court Rules 1987* (SA) also contained a rule in similar terms to Order 55 rule 3 of the *Rules of the Supreme Court of 1883* (Eng).⁹¹⁸ The new *Supreme Court Civil Rules 2006* (SA) contain a much briefer rule. Rule 206 provides:

206 Actions for administration

- (1) In an action related to a trust or deceased estate, the Court may (if it thinks fit) determine questions arising in the action without making an order for administration.
- (2) In any such action, the Court may make orders for the protection of persons who may be interested in the trust or deceased estate (whether or not they are parties to the action).

Examples—

- 1 The Court might make orders for the ascertainment of possible beneficiaries.
- 2 The Court might order the trustees, executors or administrators to file accounts of their administration in the Court.

20.24 The action under the rules is ‘a proceeding *inter partes*’, which ‘enables the Court to do what it could formerly have done in the course of an action for administration by the Court’.⁹¹⁹ It therefore ‘leads to a final determination of the rights of the parties’.⁹²⁰

Western Australia

20.25 The court rules in Western Australia provide for summary relief in the absence of an administration proceeding. Order 58 rule 2 of the *Rules of the Supreme Court 1971* (WA) provides:

2 Originating summons for relief without administration

The executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee or next of kin of a deceased person, or as cestui que trust under the trust of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in chambers for such relief of the nature or kind following, as may by the summons be specified and as the circumstances of the case

⁹¹⁸ *Supreme Court Rules 1987* (SA) r 63.04. Like the original English rule, r 63.04 did not refer to any question or relief that could be determined or granted in an administration action, but simply listed specific matters in respect of which the court could grant relief. The *Supreme Court Rules 1987* (SA) still apply to actions commenced before 4 September 2006.

⁹¹⁹ *In the Estate of Hunter* [1957] SASR 194, 196 (Napier CJ) referring to a proceeding under the *Supreme Court Rules 1947* (SA) O 55 r 1 (repealed). That rule was the predecessor of r 63.04 of the *Supreme Court Rules 1987* (SA), which is considered at note 918 above.

⁹²⁰ *In the Estate of Hunter* [1957] SASR 194, 196 (Napier CJ). See also RM Lunn, *Lunn's Civil Procedure SA* (LexisNexis online service) [6R 206.30] (at 21 February 2009).

may require (that is to say) the determination, without an administration of the estate or trust, of any of the following questions or matters—

- (a) any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin or cestui que trust;
- (b) the ascertainment of any class of creditors, legatees, devisees, next of kin, or others;
- (c) the furnishing of any particular accounts by the executors or administrators or trustees, and the vouching (when necessary) of such accounts;
- (d) the payment into court of any money in the hands of the executors or administrators or trustees;
- (e) directing the executors or administrators or trustees to do or abstain from doing any particular act in their character as such executors or administrators or trustees;
- (f) the approval of any sale, purchase, compromise, or other transaction;
- (g) the determination of any question arising in the administration of the estate or trust.

20.26 This provision is virtually identical to Order 55 rule 3 of the *Rules of the Supreme Court of 1883* (Eng).

20.27 The rules include detailed provisions about the persons who must be served with the originating summons.⁹²¹ The rules also provide that the court need not make a judgment or order for the administration of the estate 'if the questions between the parties can be properly determined without such judgment or order'.⁹²²

TRUSTEE LEGISLATION PROVISIONS

Historical background

20.28 In 1859, the enactment in England of *Lord St Leonards' Act*⁹²³ created a procedure under which trustees and personal representatives could, without instituting proceedings for the administration of an estate, obtain the opinion, advice or directions of the court in relation to any question concerning the 'management or administration' of the trust or estate property. As explained

⁹²¹ *Rules of the Supreme Court 1971* (WA) O 58 r 4.

⁹²² *Rules of the Supreme Court 1971* (WA) O 58 r 5.

⁹²³ 22 & 23 Vict c 35 (*An Act to Further Amend the Law of Property, and to Relieve Trustees*).

earlier, at this time, such a question could only be determined by the institution of an administration suit.⁹²⁴

20.29 Section 30 of *Lord St Leonards' Act* provided:

Any Trustee, Executor, or Administrator shall be at liberty, without the Institution of a Suit, to apply by Petition to any Judge of the High Court of Chancery, or by Summons upon a written Statement to any such Judge at Chambers, for the Opinion, Advice, or Direction of such Judge on any Question respecting the Management or Administration of the Trust Property or the Assets of any Testator or Intestate, such Application to be served upon or the Hearing thereof to be attended by all Persons interested in such Application, or such of them as the said Judge shall think expedient; and the Trustee, Executor, or Administrator acting upon the Opinion, Advice, or Direction given by the said Judge shall be deemed, so far as regards his own Responsibility, to have discharged his Duty as such Trustee, Executor, or Administrator in the Subject Matter of the said Application; provided nevertheless, that this Act shall not extend to indemnify any Trustee, Executor, or Administrator in respect of any Act done in accordance with such Opinion, Advice, or Direction as aforesaid, if such Trustee, Executor, or Administrator shall have been guilty of any Fraud or wilful Concealment or Misrepresentation in obtaining such Opinion, Advice, or Direction; and the Costs of such Application as aforesaid shall be in the Discretion of the Judge to whom the said Application shall be made.

20.30 Under this provision, a trustee or personal representative who acted on the opinion, advice or direction of the court was taken, as regards his or her own liability, to have discharged his or her duty as trustee or personal representative. However, that protection was given only if the trustee or personal representative was not guilty of any fraud, wilful concealment or misrepresentation in obtaining the opinion, advice or direction.

20.31 Although section 30 created what was, at the time, a novel procedure, it was held that it did not enable the court 'to settle questions of construction by which beneficiaries might be affected'.⁹²⁵ It has been suggested that, as a result of that interpretation, section 30 of *Lord St Leonards' Act* became obsolete when Order 55, rule 3 of the *Supreme Court Rules of 1883* (Eng) came into force.⁹²⁶ As explained earlier in this chapter, that rule provided a summary method of obtaining relief of various kinds that previously would have necessitated the institution of an administration suit, including the determination of 'any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next of kin, or heir-at-law, or *cestui que trust*'.⁹²⁷

924 See [20.8] above.

925 *Martin v Hayward* [1908] SALR 187, 192 (Way CJ).

926 *Ibid.*

927 See [20.11] above.

20.32 Section 30 of *Lord St Leonards' Act* was repealed in 1893.⁹²⁸ The current English trustee legislation, the *Trustee Act 1925* (UK), does not contain an equivalent provision.

20.33 The following observations have been made about section 30 of *Lord St Leonards' Act*.⁹²⁹

- The trustee (or personal representative) could make the application; there was no provision for beneficiaries to do so.

...

- The application could seek only the opinion, advice or direction of the judge. There was no jurisdiction for any determination of rights.
- The questions that a judge might consider were to concern the management or administration of the trust property; this would appear to have ruled out certain questions, such as the validity of the trusts and questions of construction. (notes omitted)

20.34 It has been suggested that, because of the limitations of section 30 and the provisions based on that section, the procedure available under court rules for seeking partial relief without administration, discussed earlier in this chapter, is to be preferred as a means of obtaining the court's advice.⁹³⁰

Protection is afforded only to the trustee, not to anyone else. This means that after the expense and time spent in seeking the determination of the court, the beneficiaries cannot take advantage of the result. ...

They generally have no need to rely on the express protection of the statutory provision but might want to take advantage of the decision. They probably could not do so unless there was an issue estoppel. ...

But is reliance on issue estoppel any way to administer the trust? ... The better course, surely, would be to achieve finality first time round, unless the matter is clearly one that would never arise again. Applying by administration claim is probably the better way for this. The protection is greater, even though it is not expressly provided for.

The existing Australian provisions

20.35 The trustee legislation of the ACT, New South Wales, Queensland, South Australia and Western Australia contains (or, in the case of South Australia, applies) a provision that has its origins in section 30 of *Lord St*

928 *Trustee Act 1893* (UK) s 51, sch.

929 L Sagar, 'Opinion, Advice or Direction of the Court' (2001) 7(5) *Trusts & Trustees* 15, 15–16.

930 Ibid 20–1.

Leonards' Act.⁹³¹ The effect of the provisions is that a trustee⁹³² may apply to the court for advice and directions, and will be protected from liability if he or she acts in accordance with the advice or directions given. It has been said that the relevant 'section is one of many instances in which provision is made by statute or by rules of court for a summary procedure in lieu of an administration action'.⁹³³

20.36 The provisions enable the court to provide advice and directions about a course of conduct contemplated by a trustee. They do not enable the court 'to approve of things already done and as to which a right of action for breach of trust has become vested'.⁹³⁴ Moreover, the provisions cannot be used by a person who does not establish that he or she is a trustee and who, in fact, denies that status.⁹³⁵

20.37 The trustee provisions are likely to be used where:⁹³⁶

- there is potential or actual litigation against an estate and the trustee seeks advice as to whether to sue or defend;
- a trustee is in doubt as to the extent of a power of sale or how it should be exercised;
- a trustee is unsure as to whether inquiries about next of kin should be pursued or should be continued.

20.38 In several Australian jurisdictions, the scope of the original provision has been extended, so that the court's advice or opinion may be obtained on the construction of the 'trust instrument' (ACT and New South Wales) or on 'any will, deed or document' (South Australia). The addition of these words to the matters on which the court's advice and directions may be sought was made to remedy the main cause of the failure of the provisions based on section 30 of

⁹³¹ *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63; *Trusts Act 1973* (Qld) ss 96, 97; *Trustee Act 1936* (SA) s 91 (applying s 69 of the *Administration and Probate Act 1919* (SA)); *Trustees Act 1962* (WA) ss 92, 95. For a discussion of the origins of the South Australian provision, see *Martin v Hayward* [1908] SALR 187, 191–2 (Way CJ); *Re Grose* [1949] SASR 55, 59–60 (Mayo J).

Provisions based on s 30 of *Lord St Leonards' Act* are also found in the trustee legislation of the Bahamas, the Cayman Islands and the Isle of Man: see L Sagar, 'Opinion, Advice or Direction of the Court' (2001) 7(5) *Trusts & Trustees* 15, 18–20.

⁹³² As explained at [13.2] in vol 1 of this Report, the trustee legislation in all Australian jurisdictions defines 'trustee' to include a personal representative. As a result, the various trustee provisions also enable a personal representative to seek advice or directions from the court.

⁹³³ *Martin v Hayward* [1908] SALR 187, 191 (Way CJ).

⁹³⁴ *Ibid* 197 (Way CJ), commenting on the predecessor of s 69 of the *Administration and Probate Act 1919* (SA). See also *Re Jackson* [1944] SASR 82, 85 (Mayo J).

⁹³⁵ *Application of Macedonian Orthodox Community Church St Petka Inc* (No 2) (2005) 63 NSWLR 441, 446 (Palmer J).

⁹³⁶ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [2134].

Lord St Leonards' Act.⁹³⁷ The inclusion of this further subject matter for the court's advice or directions has been described as an innovation.⁹³⁸

20.39 It is presumably because of the broader scope of the provisions in the ACT, New South Wales and South Australia that these provisions do not simply protect the trustee or personal representative who acts on the court's advice or directions, but also endeavour to bind, at least in certain circumstances, persons who are affected by the advice or directions given.

20.40 The various provisions are considered below.

Australian Capital Territory, New South Wales

20.41 The ACT and New South Wales trustee provisions are expressed in very similar terms.⁹³⁹

20.42 Section 63 of the *Trustee Act 1925* (NSW) provides:

63 Advice

- (1) A trustee may apply to the Court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument.
- (2) If the trustee acts in accordance with the opinion advice or direction, the trustee shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the application, provided that the trustee has not been guilty of any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction.
- (3) Rules of court may provide for the use, on an application under this section, of a written statement signed by the trustee or the trustee's Australian legal practitioner, or for the use of other material, instead of evidence.
- (4) Unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person, or to adduce evidence by affidavit or otherwise in support of the application.
- (5)–(7) (Repealed)
- (8) Where the question is who are the beneficiaries or what are their rights as between themselves, the trustee before conveying or distributing any property in accordance with the opinion advice or direction shall, unless the Court otherwise directs, give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.

⁹³⁷ *Martin v Hayward* [1908] SALR 187, 195 (Way CJ).

⁹³⁸ *Ibid* 193.

⁹³⁹ *Trustee Act 1925* (ACT) s 63; *Trustee Act 1925* (NSW) s 63.

- (9) The notice shall state shortly the opinion advice or direction, and the intention of the trustee to convey or distribute in accordance therewith.
- (10) Any person who claims that the person's rights as beneficiary will be prejudiced by the conveyance or distribution may within such time as may be prescribed by rules of court, or as may be fixed by the Court, apply to the Court for such order or directions as the circumstances may require, and during such time and while the application is pending, the trustee shall abstain from making the conveyance or distribution.
- (11) Subject to subsection (10), and subject to any appeal, any person on whom notice of any application under this section is served, or to whom notice is given in accordance with subsection (8), shall be bound by any opinion advice direction or order given or made under this section as if the opinion advice direction or order had been given or made in proceedings to which the person was a party.

20.43 As noted earlier,⁹⁴⁰ these provisions enable a trustee to apply for the court's opinion, advice or direction not only on any question respecting the management or administration of the trust property, but also on 'any question ... respecting the interpretation of the trust instrument'. In this respect, they extend the court's advisory jurisdiction beyond the scope of the original provision in *Lord St Leonards' Act*.

20.44 However, the ACT and New South Wales provisions still follow the original provision on which they were based by providing that:⁹⁴¹

- a trustee who acts in accordance with the court's opinion, advice or direction is deemed, so far as the trustee's own liability is concerned, to have discharged his or her duty as trustee in the subject matter of the application; and
- this protection is dependent on the trustee not being guilty of 'any fraud or wilful concealment or misrepresentation in obtaining the opinion advice or direction'.

20.45 The ACT and New South Wales provisions provide that a trustee is not generally required to serve notice of the application on any person.⁹⁴² However, where the question on which the court's advice is sought is 'who are the beneficiaries or what are their rights as between themselves', the trustee, before conveying or distributing any property in accordance with the opinion, advice or direction of the court, must ordinarily give notice to any person whose rights as beneficiary may be prejudiced by the conveyance or distribution.⁹⁴³ A person who claims that his or her rights as beneficiary will be prejudiced by the

⁹⁴⁰ See [20.38] above.

⁹⁴¹ *Trustee Act 1925 (ACT)* s 63(2); *Trustee Act 1925 (NSW)* s 63(2).

⁹⁴² *Trustee Act 1925 (ACT)* s 63(4); *Trustee Act 1925 (NSW)* s 63(4). See, however, the comment in *Application of Perpetual Trustee Company* [2003] NSWSC 1185, [16] (Young CJ in Eq), set out at [20.52] below.

⁹⁴³ *Trustee Act 1925 (ACT)* s 63(5); *Trustee Act 1925 (NSW)* s 63(8).

conveyance or distribution may apply to the court for such order or directions as the circumstances may require.⁹⁴⁴

20.46 Subject to any order or directions that the court may give and to any appeal, a person on whom notice of the trustee's application is served, or to whom notice is given because he or she is a beneficiary whose rights may be prejudiced by the conveyance or distribution, is to be bound by the court's opinion, advice, direction or order as if the opinion, advice, direction or order had been given or made in proceedings to which the person was a party.⁹⁴⁵

20.47 Although a person served under these provisions is not a party,⁹⁴⁶ the New South Wales Supreme Court has held that, despite English practice to the contrary, a person who has been served should be 'permitted to take a meaningful part in the proceedings'.⁹⁴⁷

20.48 Not every question concerning the management or administration of trust property or the interpretation of a trust instrument will be an appropriate subject for the court's opinion, advice or direction. In *Harrison v Mills*,⁹⁴⁸ the Supreme Court of New South Wales held that an application should not be made under section 63 of the *Trustee Act 1925* (NSW) to determine matters of controversy between trustees.⁹⁴⁹

I do not think it is a function of the Court sitting to hear a summons under s 63 to determine matters of such basic controversy between trustees. There are many reasons for this. The first reason is that, essentially, proceedings under s 63 are ex parte proceedings and, essentially, they are private advice given by the Court to a trustee or trustees upon information supplied by that trustee or trustees.

20.49 The Court was of the view that, notwithstanding the provisions in section 63 for giving notice to interested persons and binding them in terms of the advice given, 'the basis of the section has not been changed'.⁹⁵⁰

⁹⁴⁴ *Trustee Act 1925* (ACT) s 63(7); *Trustee Act 1925* (NSW) s 63(10).

⁹⁴⁵ *Trustee Act 1925* (ACT) s 63(8); *Trustee Act 1925* (NSW) s 63(11).

⁹⁴⁶ *Application of Perpetual Trustee Co Ltd* [2003] NSWSC 1185, [19] (Young CJ in Eq).

⁹⁴⁷ *Re Permanent Trustee Australia Ltd* (1994) 33 NSWLR 547, 550 (Young J). In that case, even though some of the material before the Court was confidential, the Court held that, in order for the person given notice to take a meaningful part in the proceedings, it was necessary for that person's counsel to be served with the non-controversial material before the court. The Court also held (at 550) that it 'should ... listen to any propositions that [the person's counsel] wishes to advance on behalf of his client to assist the Court in getting to the position where it can give meaningful advice to the trustee'.

⁹⁴⁸ [1976] 1 NSWLR 42.

⁹⁴⁹ *Harrison v Mills* [1976] 1 NSWLR 42, 45 (Needham J). Cf *Fisher v Fisher* (Unreported, Supreme Court of Western Australia, Hasluck J, 30 August 2002). In the latter case, co-executors could not agree on whether to defend a claim against the estate and one of the co-executors approached the court for directions. The Court granted an order pursuant to s 92 of the *Trustees Act 1962* (WA) directing the executors to defend the claim.

⁹⁵⁰ *Harrison v Mills* [1976] 1 NSWLR 42, 45 (Needham J).

it remains a matter of advice by the Court to a trustee who is in doubt as to the propriety of a course of action which he proposes to undertake. I would think it extremely doubtful whether any dispute between trustees—and I do not include within that designation a bona fide difference between trustees as to the proper construction of a document—would be entertained by a court under s 63. Certainly questions of interpretation of the document, if they involve the question of breach of trust by any of the trustees, would not be determined under s 63, where the basic facts upon which the Court acts are not, in any sense, proved or tested.

20.50 The Court was concerned not to give advice where there might be disputes of fact.⁹⁵¹

It is, in my opinion, quite undesirable that the rights of the parties should depend to any degree upon facts which have not been established in the normal manner. If it were answered that the defendants would be bound only if the facts were correctly stated, that answer, I think, would illustrate the undesirability of the Court proceeding to determine such matters on facts which may or may not turn out to be accurately stated. I do not think that the legislature in enacting s 63 would have had such equivocation in mind.

20.51 In that case, the Court dismissed the application and stated that the proper action would be to take proceedings against the defendants for the administration of the trust and declarations in relation to the interpretation of the instrument and the trustee's rights under it.⁹⁵²

20.52 In *Application of Perpetual Trustee Company Ltd*,⁹⁵³ the Supreme Court of New South Wales observed that, although section 63(4) of the *Trustee Act 1925* (NSW) states that it is not necessary to serve notice of the application of any person:⁹⁵⁴

it has become increasingly the practice for trustees to serve other people with notice of the application. That causes problems because those parties have usually some other point of view to put forward and so tempt the court into determining disputed questions of fact.

20.53 The Court was of the view that sometimes this may not matter very much — for example, where there is a private trust with a limited number of beneficiaries.⁹⁵⁵ In this situation:⁹⁵⁶

If everyone is before the court, then the court can proceed under s 63 without fear or alternatively, can have the summons amended ... Nowadays the usual order is to amend the summons to claim the declaration for the construction of the will.

951 Ibid 46.

952 Ibid.

953 [2003] NSWSC 1185.

954 Ibid [16] (Young CJ in Eq).

955 Ibid.

956 Ibid [17].

20.54 However, the Court commented that:⁹⁵⁷

The real difficulty arises where there are a host of other persons who are interested in the result. Under those circumstances, it is usually not wise to give judicial advice even though s 63(11) does not make the advice binding on anyone who has never been served, the reason being that those persons have never been heard.

Queensland, Western Australia

20.55 The trustee legislation in Queensland and Western Australia also deals with a trustee's application for advice and directions.⁹⁵⁸ Sections 96 and 97 of the *Trusts Act 1973* (Qld), which are in similar terms to the Western Australian provisions, provide:

96 Right of trustee to apply to court for directions

- (1) Any trustee may apply upon a written statement of facts to the court for directions⁹⁵⁹ concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
- (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient. (note added)

97 Protection of trustees while acting under direction of court

- (1) Any trustee acting under any direction of the court shall be deemed, so far as regards the trustee's own responsibility, to have discharged the trustee's duty as trustee in the subject matter of the direction, notwithstanding that the order giving the direction is subsequently invalidated, overruled, set aside or otherwise rendered of no effect, or varied.
- (2) This section does not indemnify any trustee in respect of any act done in accordance with any direction of the court if the trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the direction or in acquiescing in the court making the order giving the direction.

20.56 Unlike the provisions in the ACT and New South Wales, section 96 of the *Trusts Act 1973* (Qld) and its counterpart in Western Australia do not provide that application may be made for the construction of a trust instrument or of any will, deed or instrument. In Queensland, it has been held that an

⁹⁵⁷ Ibid [18].

⁹⁵⁸ *Trusts Act 1973* (Qld) ss 96, 97; *Trustees Act 1962* (WA) ss 92, 95. See *Loughnan v McConnell* [2006] QSC 359, where Atkinson J at [55] gave directions under the Queensland legislation that the applicant executor, on behalf of the estate, 'can and ought to commence proceedings' against the other executor.

⁹⁵⁹ *Trustees Act 1962* (WA) s 92(1) does not require the trustee to 'apply upon a written statement of facts'; it merely provides that 'any trustee may apply to the Court'.

application under the trustee legislation is not the proper avenue for seeking the construction of a will.⁹⁶⁰

20.57 The Queensland and Western Australian trustee provisions also differ from the ACT and New South Wales provisions in relation to the requirements for the service of interested persons. Under the Queensland and Western Australian provisions, a trustee must serve the application on 'all persons interested in the application or such of them as the court thinks expedient', and those persons may attend the hearing.⁹⁶¹

South Australia

20.58 In South Australia, the main provision dealing with judicial advice and directions is found in section 69 of the *Administration and Probate Act 1919* (SA).⁹⁶² That section applies to trustees generally because of the operation of section 91 of the *Trustee Act 1936* (SA). Section 91 provides:

91 Advice and directions of court and commission

Sections 69 and 70⁹⁶³ of the *Administration and Probate Act 1919* apply to trustees as defined by this Act, and section 90 of this Act⁹⁶⁴ shall extend to applications under either of the same sections, but without limiting the powers of the Supreme Court, apart from the said section 90, with regard to such applications. (notes added)

ADMINISTRATION LEGISLATION PROVISIONS

Australian Capital Territory, New South Wales, Northern Territory

20.59 The administration legislation in the ACT, New South Wales and the Northern Territory contains a provision that enables an application for directions

⁹⁶⁰ See *Re Petersen* [1920] St R Qd 42, 47 (Shand J); *Re Kirkegaard* [1950] St R Qd 144, 146 (Philp J).

⁹⁶¹ *Trusts Act 1973* (Qld) s 96(2); *Trustees Act 1962* (WA) s 92(2).

⁹⁶² *Administration and Probate Act 1919* (SA) s 69 is considered at [20.62]–[20.68] below.

⁹⁶³ *Administration and Probate Act 1919* (SA) s 70 deals with personal representatives' entitlement to commission and is set out at [27.16] in vol 3 of this Report.

⁹⁶⁴ *Trustee Act 1936* (SA) s 90 provides:

90 Parties entitled may apply to Court by summons

- (1) Any person entitled to apply for an order of the Supreme Court under this Act may apply by summons, and may give evidence, by affidavit or otherwise, in support of that summons, and may serve such person or persons with notice of the application as he may deem entitled to service thereof.
- (2) Upon hearing the application the Court may either dispose of the matter in the first instance, or may direct a reference to the Master to inquire into any facts which require investigation, or may direct the application to stand over until the right of the applicant has been declared in an action instituted for that purpose, or to enable the applicant to adduce evidence, or for further consideration, or to enable notice or any further notice of the application to be served upon any person, and may deal with the applicant, and may make such order with respect to costs as shall seem just.

to be made about certain limited, specified matters where all or a part of the estate is the subject of an intestacy.⁹⁶⁵

20.60 Section 57 of the *Probate and Administration Act 1898* (NSW), which is virtually identical to the provisions in the Territories, provides:

57 Court may make special order

The Court may upon the application of the administrator, or in the case of partial intestacy the executor or administrator with the will annexed, as the case may be, or of any person beneficially interested, and after such previous notice to other parties and inquiry as may seem fit, order and direct the course of proceedings which shall be taken in regard to:

- (a) the time and mode of sale of any real estate,
- (b) the letting and management thereof until sale,
- (c) the application for maintenance or advancement or otherwise of shares or income of shares of infants,
- (d) the expediency and mode of effecting a partition if applied for,

and generally in regard to the administration of such real estate for the greatest advantage of all persons interested.

20.61 The scope of these sections is very limited as they apply only to real estate and to shares of infant beneficiaries, and then only where the estate is wholly or partially intestate.⁹⁶⁶ The New South Wales provision has been described by commentators as being 'redundant'⁹⁶⁷ following the development of simpler procedures for obtaining advice under the court rules and trustee legislation.⁹⁶⁸

South Australia

20.62 In South Australia, section 69 of the *Administration and Probate Act 1919* (SA) enables a personal representative to apply to the court for advice or direction in relation to matters connected with the administration of an estate or in relation to the construction of any will, deed or document. Section 69 of the *Administration and Probate Act 1919* (SA) provides:

⁹⁶⁵ *Administration and Probate Act 1929* (ACT) s 51; *Probate and Administration Act 1898* (NSW) s 57; *Administration and Probate Act* (NT) s 82.

⁹⁶⁶ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1285.1] (at 20 February 2009).

⁹⁶⁷ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [57.01].

⁹⁶⁸ Note, however, that r 3117 of the *Court Procedures Rules 2006* (ACT) provides for orders made under s 51 of the *Administration and Probate Act 1929* (ACT).

69 Public Trustee and other persons may obtain judicial advice or direction

- (1) The Public Trustee shall, and any trustee, executor, or administrator may, when in difficulty or doubt, apply to a Judge for advice or direction as to matters connected with the administration of any estate, or the construction of any will, deed, or document.
- (2) Such application may be made either without notice to or upon summons served upon any of the parties interested.
- (3) Any person interested in any estate, who is dissatisfied with the conduct of the Public Trustee in any matter connected with the management or administration thereof, may apply to a Judge by summons to be served upon the Public Trustee to review such conduct.⁹⁶⁹
- (4) A Judge may, upon the hearing of an application under this section, make any order, declaratory or otherwise, that he sees fit as to the administration of the estate, or the construction of the will, deed, or document, which is the subject of the application, and also as to the costs of the application.
- (5) Any such order made in the absence of an interested party shall have the same effect, or be of the same force or validity, so far as regards protection to the Public Trustee, or other trustee, or the executor, or administrator, as if the same had been a decree or order made in an action where all parties concerned were represented.
- (6) The Judge may refer any question of law arising on an application under this section for the opinion of the Supreme Court, or may direct an issue to be tried by, or an action to be instituted in, the Supreme Court. (note added)

20.63 Although section 69 of the *Administration and Probate Act 1919* (SA) does not provide expressly that the protection afforded by that section is restricted to where the trustee or personal representative has not been guilty of any fraud or wilful concealment or misrepresentation,⁹⁷⁰ the Supreme Court of South Australia has nevertheless held that a trustee or personal representative will be protected under section 69 only when 'all material and relevant facts are substantially as submitted upon the application':⁹⁷¹

If there are omitted circumstances, that are material and relevant, which, if proved, would have altered the advice or direction given, the order may be no defence to the trustees.

⁹⁶⁹ In *Re Grose* [1949] SASR 55, Mayo J observed (at 59) that s 69(3) of the *Administration and Probate Act 1919* (SA) is extraneous to the purpose of the other subsections. See also *Martin v Hayward* [1908] SALR 187, 194 (Way CJ) for a similar view.

⁹⁷⁰ See, for example, *Trustee Act 1925* (ACT) s 63(2); *Trustee Act 1925* (NSW) s 63(2); *Trusts Act 1973* (Qld) s 97(2); *Trustees Act 1962* (WA) s 95(2), which include this restriction.

⁹⁷¹ *Re Grose* [1949] SASR 55, 60 (Mayo J).

20.64 An application under section 69 may be made either without notice to, or upon summons served upon, any of the parties interested.⁹⁷²

20.65 Section 69(5) provides that an order made in the absence of an interested party is to have the same effect and be of the same validity, 'so far as regards protection to the Public Trustee, or other trustee, or the executor, or administrator' as if the order had been a 'decree or order made in an action where all parties concerned were represented'. The effect of section 69(5) was considered by the Supreme Court of South Australia in *Re Jackson*:⁹⁷³

if I were to make such an order as asked ex parte, and it were properly within my power so to do, it would be effectual as a defence for the executor in proceedings against him for breach of duty, but the absent parties may still have enforceable rights against persons other than the executor, and might even follow the property if entitled thereto, into the hand of others who had received it ...

20.66 Generally, however, parties who appear on the application will be bound by the advice or directions given:⁹⁷⁴

Parties represented upon the application will be bound by the judicial advice and direction, but with them, too, the order may not conclude the matter, if material facts are omitted from the case presented by the trustees as against parties not represented (if any).

20.67 A trustee must consider whether an application for advice and directions is appropriate in the circumstances of the particular case:⁹⁷⁵

The question whether ex parte proceedings are appropriate will depend on many factors. It is the responsibility of the trustee to decide whether it is proper to make the application without notice to other interested parties ...

It is important to note that the application for advice and directions does not proceed to a final determination of the rights of parties. The procedure is not available for the determination of substantive issues between parties ...

20.68 Where there is some form of controversy that may require a final determination, proceedings should therefore be brought under the court rules, rather than under section 69 of the *Administration and Probate Act 1919* (SA).⁹⁷⁶

⁹⁷² *Administration and Probate Act 1919* (SA) s 69(2).

⁹⁷³ [1944] SASR 82, 86 (Mayo J). This is not as far-reaching in its consequences as the ACT and New South Wales provisions, which have the effect of binding a party to whom notice of the application has been given: see [20.46] above.

⁹⁷⁴ *Re Grose* [1949] SASR 55, 60 (Mayo J).

⁹⁷⁵ *Re IOOF Australia Trustees Ltd & the Trustee Act 1936* [1999] SASC 461, [3]–[4] (Debelle J), cited with approval in *McKinnon v Samuels* [2000] VSC 393.

⁹⁷⁶ DM Haines, *Succession Law in South Australia* (2003) [25.4]. See also RM Lunn, *Lunn's Civil Procedure SA* (LexisNexis online service) [6R 206.30] (at 21 February 2009).

Western Australia

20.69 In addition to the provision contained in its trustee legislation, Western Australia also has a provision in its administration legislation that enables the court to make an order where a question arises concerning any will or administration. Section 45 of the *Administration Act 1903* (WA) provides:

45 Court may settle all questions arising in administration

- (1) The Court may make such order with reference to any question arising in respect of any will or administration, or with reference to the distribution or application of any real and personal estate which an executor or administrator or Public Trustee may have in hand, or as to the residue of the estate, as the circumstances of the case may require.
- (2) Such order shall bind all persons whether *sui juris* or not.
- (3) No final order for distribution shall be made except upon notice to all the parties interested, or as the Court may direct.

20.70 The section enables the court to make orders affecting the rights of interested persons.

DISCUSSION PAPER

20.71 In the Discussion Paper, the National Committee sought submissions on the following issues:⁹⁷⁷

- whether the model legislation should include a provision to enable a personal representative to seek advice or directions from the court in relation to the administration of an estate, or whether such a provision should be located in court rules;
- if such a provision is to be included in the model legislation, whether it should be expressed in broad terms, for example, whether it should simply enable an application to be made for advice and directions; and
- whether the model legislation should include a provision to the effect of section 57 of the *Probate and Administration Act 1898* (NSW), which enables the court to make certain directions where there is an intestacy or a partial intestacy.

977

Administration of Estates Discussion Paper (1999) QLRC 89; NSWLRC 129.

SUBMISSIONS

Inclusion of a provision enabling an application to be made for advice and directions

20.72 The majority of respondents who commented on this issue were of the view that the model legislation should include a provision to enable a personal representative to seek advice or directions from the court in relation to the administration of an estate. This was the view of the Bar Association of Queensland, a former ACT Registrar of Probate, the Public Trustee of South Australia, the Trustee Corporations Association of Australia, the Queensland State Council of the Trustee Corporations Association of Australia, the Public Trustee of New South Wales, an academic expert in succession law, the ACT Law Society and the Law Institute of Victoria.⁹⁷⁸

20.73 The Bar Association of Queensland considered it desirable that personal representatives be alerted to the fact that they can obtain assistance from the court when necessary.⁹⁷⁹ The former ACT Registrar of Probate expressed a similar view:⁹⁸⁰

Guidance from this Court is from time to time sought pursuant to s 63 of the *Trustee Act*. It should seem more appropriate for a provision enabling a personal representative to seek advice or directions from the Court in relation to the administration of an estate to look to legislation which specifically deals with the administration of estates.

20.74 The academic expert in succession law who supported the inclusion of a specific provision in the model legislation commented:⁹⁸¹

As respects the course of administering the estate the personal representatives should be given a clear general statutory right to approach the court for advice and directions as have trustees.

20.75 However, the New South Wales Law Society was of the view that the relevant provisions should be contained in court rules, rather than in the model legislation.⁹⁸²

978 Submissions 1, 2, 4, 6, 7, 11, 12, 14, 19.

979 Submission 1.

980 Submission 2.

981 Submission 12.

982 Submission 15.

A provision in broad terms

20.76 The majority of respondents who commented on the form of the model provision were of the view that the provision should be expressed in broad terms.⁹⁸³

20.77 The Law Institute of Victoria commented that the provision ‘should be expressed in broad terms, simply enabling an application to be made for advice and directions’.⁹⁸⁴

20.78 The Public Trustee of South Australia and the Trustee Corporations Association of Australia both gave, as an example of a provision expressed in broad terms, section 69 of the *Administration and Probate Act 1919* (SA).⁹⁸⁵

20.79 However, the Public Trustee of New South Wales was of the view that a more detailed provision should be included, suggesting that the model provision should be based on sections 40, 63 and 93 of the *Trustee Act 1925* (NSW).⁹⁸⁶

983 Submissions 1, 2, 4, 6, 7, 8, 12, 14, 19.

984 Submission 19.

985 Submissions 4, 6.

986 Submission 11. *Trustee Act 1925* (NSW) s 63 is set out at [20.42] above. *Trustee Act 1925* (NSW) ss 40 and 93 provide:

40 Powers

(1) Where trust property consists of or includes any share or interest in property or the proceeds of the sale of property not vested in the trustee, or any other thing in action, the trustee on the same falling into possession, or becoming payable or transferable:

- (a) may agree upon or ascertain the amount or value thereof or any part thereof in such manner as the trustee may think fit,
- (b) may accept in or towards satisfaction thereof, at the market or current value, or upon any valuation or estimate of value which the trustee shall think fit, any securities authorised by the instrument, if any, creating the trust or by law for the investment of money subject to the trust,
- (c) may allow any deductions for duties costs charges and expenses which the trustee may think proper or reasonable, and
- (d) may execute any release in respect of the premises, so as effectually to discharge all accountable parties from all liability in respect of any matters coming within the scope of such release.

The trustee shall not be responsible for any loss occasioned by any act or thing so done by the trustee in good faith.

(2) Unless and until required in writing so to do by some person beneficially interested under the trust or by the guardian of that person's person or estate, and unless also due provision is made to the trustee's satisfaction for payment of the costs of any proceedings required to be taken, the trustee shall not be under any obligation:

- (a) to apply for any stop or other like order upon any securities or other property out of or on which such share or interest or other thing in action is derived payable or charged, or

A specific provision for wholly or partially intestate estates?

20.80 Almost all the respondents who addressed this issue were of the view that the model legislation should not include a provision to the effect of section 57 of the *Probate and Administration Act 1898* (NSW).⁹⁸⁷

20.81 The Public Trustee of South Australia, the Trustee Corporations Association of Australia and the Queensland State Council of the Trustee Corporations Association of Australia considered that section 57 is too detailed.⁹⁸⁸ An academic expert in succession law suggested that the model provision should be more general and inclusive than section 57.⁹⁸⁹

20.82 The Queensland Law Society suggested that a provision to the effect of section 57 would be unnecessary if the model legislation included a general provision enabling a personal representative to seek the advice and directions of the court.⁹⁹⁰

-
- (b) to take any proceedings on account of any act default or neglect on the part of the persons in whom the securities or other property or any of them or any part thereof are for the time being or had at any time been vested.

- (3) The trustee may if he or she thinks fit refer any of the matters mentioned in subsection (2) to the person beneficially entitled or to the guardian of that person's person or estate.
- (4) The trustee shall not be chargeable with breach of trust by reason of any omission in any of the matters mentioned in subsection (2), except when required and upon due provision made as therein mentioned.
- (5) Nothing in this section shall relieve a trustee of the obligation to get in and obtain payment or transfer of any such share or interest or other thing in action on the same falling into possession.
- (6) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.
- (7) This section applies to trusts created either before or after the commencement of this Act.

93 Costs

- (1) (Repealed)
- (2) The Court may order the costs charges and expenses of and incident to any application or any order under this Act to be paid or to be raised by sale or mortgage out of the property in respect whereof the same is made or out of the income thereof, or to be borne and paid in such manner and by such persons as to the Court may seem just.
- (3) In any proceedings with respect to the management or administration of any property subject to a trust or forming part of the estate of a testator or intestate, or with respect to the interpretation of the trust instrument, the Court may, if it thinks fit, order any costs to be paid out of such part of the property as in the opinion of the Court is the real subject matter of the proceedings.
- (4) This section shall extend to any direction opinion or advice, any payment into or out of court, and any conveyance or transfer in pursuance of an order.

987 Submissions 1, 4, 6, 7, 8, 12, 15.

988 Submissions 4, 6, 7.

989 Submission 12.

990 Submission 8.

The Committee cannot see the necessity for the provision because if there are general provisions allowing for an application to be made for advice and direction, it would cover the situation. Executors and administrators should be allowed the same powers particularly in relation to land.

20.83 However, the ACT Law Society supported the inclusion of a provision to the effect of section 57, provided that the model provision was modified as follows:⁹⁹¹

In view of the intention to assimilate executors and administrators it should be amended to read 'The Court may on the application of the legal personal representative or any person interested ...'

THE NATIONAL COMMITTEE'S VIEW

Inclusion of specific provisions for obtaining the court's advice or directions

20.84 The model legislation should include specific provisions to enable a personal representative or trustee to seek the court's advice or directions, and to protect a personal representative or trustee who acts in accordance with the advice or directions given. As noted earlier in this Report, a personal representative will, in the ordinary course of administering an estate, become a trustee.⁹⁹² In addition, it is not unusual for a personal representative to be appointed by will as the trustee of a testamentary trust. For these reasons, the model provisions should apply to both personal representatives and trustees. The National Committee wishes to avoid disputes about whether, at a particular time, a personal representative is still acting in that capacity or has become a trustee.

20.85 Although there are other mechanisms available for personal representatives and trustees to seek the court's advice or directions, the National Committee considers that the inclusion of provisions in the model legislation will serve to alert personal representatives and trustees to this aspect of the court's advisory jurisdiction.

20.86 The model legislation should include provisions based generally on sections 96 and 97 of the *Trusts Act 1973* (Qld).⁹⁹³ However, in keeping with the legislative provisions in the other Australian jurisdictions, the model provisions should refer to an application for 'advice or directions' (rather than merely to 'directions').

20.87 Further, because the model provisions apply to both personal representatives and trustees, the provisions should refer to property that forms

991 Submission 14.

992 See [13.1] in vol 1 of this Report.

993 *Trusts Act 1973* (Qld) ss 96 and 97 are set out at [20.55] above.

part of the estate of a deceased person and to property that is held on trust for a beneficiary of the estate of a deceased person.⁹⁹⁴

20.88 The National Committee favours the approach taken in section 96(2) of the *Trusts Act 1973* (Qld), which provides that an application must be served on 'all persons interested in the application or such of them as the court thinks expedient'.⁹⁹⁵ However, it is not necessary for the model legislation to provide, as section 96(2) of the *Trusts Act 1973* (Qld) presently does, that the hearing may be attended by all persons interested in the application or such of them as the court thinks expedient.

20.89 The model legislation should provide, consistent with section 97(1) of the *Trusts Act 1973* (Qld), that if a personal representative or trustee acts in accordance with the advice or directions given, the personal representative or trustee is taken to have discharged his or her duty as personal representative or trustee in the subject matter of the application. It should also provide, consistent with section 97(2) of the *Trusts Act 1973* (Qld), that a personal representative or trustee is not protected from liability in respect of any act done in accordance with the court's advice or directions if the personal representative or trustee has been guilty of any fraud or wilful concealment or misrepresentation in obtaining the advice or direction or in acquiescing in the court making the order giving the advice or direction.

20.90 Because the primary purpose of the proposed provisions is to protect a personal representative or trustee who acts in accordance with the court's advice or directions, the model provisions should not deal with the extent to which various persons are to be bound by the court's advice or directions. Where a binding determination of the rights of beneficiaries is sought, there are other more suitable procedures that may be used. For that reason, the National Committee has not recommended that the court have jurisdiction to give advice or directions about the construction of a will.

20.91 The National Committee is conscious of the limitations of the proposed provisions,⁹⁹⁶ and acknowledges that the procedure for obtaining the court's advice or directions under the model provisions will not be suitable for all

994

The Administration of Estates Bill 2009 cl 412(5) and 413 define 'estate, of a deceased person' to include 'property held on trust for a person because of the person's beneficial interest in the deceased's estate'. This is intended to capture:

- (a) property that formed part of the deceased's estate, but that has since been distributed and is now held on trust for a beneficiary of the deceased's estate; and
- (b) property that did not form part of the deceased's estate, but that is held on trust for a beneficiary of the deceased's estate because of the nature of the beneficiary's interest in the deceased's estate — for example, property acquired out of the proceeds of sale of property that was left to the beneficiary or a bonus share issue that is made because certain shares were left to, and are held on trust for, the beneficiary.

995

Cf *Trustee Act 1925* (ACT) s 63(4) and *Trustee Act 1925* (NSW) s 63(4), which provide that, unless the rules of court otherwise provide, or the Court otherwise directs, it shall not be necessary to serve notice of the application on any person.

996

See [20.33]–[20.34] above.

questions that may arise in the course of administering an estate. However, the National Committee considers that, where the question on which the court's advice or directions are sought is a discrete one, and the material facts are not in dispute, the proposed provisions provide a convenient means by which a personal representative or trustee can obtain the court's assistance.

20.92 Finally, as the model provisions dealing with applications for the court's advice or directions are not intended to limit a personal representative's or trustee's right to seek the court's advice or directions under the trustee legislation of the particular jurisdiction, or under any other law, the model legislation should include an express provision to that effect.

No specific provision for intestate estates

20.93 The National Committee notes that some jurisdictions also have provisions in their administration legislation that give the court a very limited power to make directions, primarily about the sale and management of real estate, where an estate is wholly or partially intestate.⁹⁹⁷

20.94 These provisions are of very limited utility and, in light of the proposal to include more general provisions to enable a personal representative or trustee to obtain the court's advice or directions, are unnecessary.

20.95 Accordingly, the model legislation should not include a provision to the effect of section 57 of the *Probate and Administration Act 1898* (NSW).

RECOMMENDATIONS

20-1 The model legislation should include provisions to enable a personal representative or trustee to apply to the court for advice or directions.⁹⁹⁸

20-2 The model provisions should be based on sections 96 and 97 of the *Trusts Act 1973* (Qld) and should:⁹⁹⁹

- (a) refer to an application for 'advice or directions' (rather than merely to 'directions');**
- (b) apply to a personal representative and a trustee;**

⁹⁹⁷ See *Administration and Probate Act 1929* (ACT) s 51; *Probate and Administration Act 1898* (NSW) s 57; and *Administration and Probate Act* (NT) s 82, which are considered at [20.59]–[20.61] above.

⁹⁹⁸ See [20.84]–[20.85] above.

⁹⁹⁹ See [20.86]–[20.92] above.

- (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.¹⁰⁰⁰

20-4 The model legislation should not include a provision to the effect of section 57 of the *Probate and Administration Act 1898* (NSW).¹⁰⁰¹

¹⁰⁰⁰ See [20.88] above.

¹⁰⁰¹ See [20.93]–[20.95] above.

Chapter 21

Distribution after notice

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INTRODUCTION

21.1 At common law, a personal representative is liable for the deceased person's debts to the extent of the assets that have come into the personal representative's hands.¹⁰⁰² It is generally not a defence that the personal representative has, in good faith and without notice of a debt, distributed the assets to the beneficiaries.¹⁰⁰³

HISTORICAL BACKGROUND

21.2 It has been said that, before 1859, 'no executor could safely distribute the assets of his testator except under the direction of this Court'.¹⁰⁰⁴ This 'involved great expense, and frequently great delay',¹⁰⁰⁵ as it required a decree from the court in an administration suit. The court's procedure for dealing with unknown claimants was described in *David v Frowd*¹⁰⁰⁶ (in relation to the distribution of an intestate estate):¹⁰⁰⁷

The person who takes out administration to his estate, in most cases, cannot know who are his creditors, and may not know who are his next of kin, and the administration of his estate may be exposed to great delay and embarrassment. A Court of Equity exercises a most wholesome jurisdiction for the prevention of this delay and embarrassment, and for the assistance and protection of the administrator.

Upon the application of any person claiming to be interested, the Court refers it to the Master to inquire who are creditors, and who are the next of kin, and for that purpose to cause advertisements to be published in the quarters where creditors and next of kin are most likely to be found, calling upon such creditors and next of kin to come in and make their claims before the Master within a reasonable time stated; and when that time is expired, it is considered that the best possible means having been taken to ascertain the parties really entitled, the administrator may reasonably proceed to distribute the estate amongst those who have, before the Master, established an apparent title. Such proceedings having been taken, the Court will protect the administrator against any future claim.

21.3 Compliance with this procedure protected a personal representative from liability in respect of claims made against the estate after the period of time

¹⁰⁰² RF Atherton and P Vines, *Australian Succession Law: Commentary and Materials* (1996) [18.9.4].

¹⁰⁰³ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1469.1] (at 20 February 2009). See *Norman v Baldry* (1834) 6 Sim 621; 58 ER 726; *Hill v Gomme* (1839) 1 Beav 540, 550–1; 48 ER 1050, 1054 (Lord Langdale MR).

¹⁰⁰⁴ *Clegg v Rowland* (1866) LR 3 Eq 368, 371 (Malins VC).

¹⁰⁰⁵ Ibid 371–2.

¹⁰⁰⁶ (1833) 1 My & K 200; 39 ER 657.

¹⁰⁰⁷ Ibid 660 (Sir John Leach MR).

set by the Master for notifying claims. However, '[t]he court's decree could not and was never intended to oust the rights of persons clearly entitled':¹⁰⁰⁸

They had lost their remedy against the personal representative, who had the protection of the Court's decree, but they were entitled to any fund that might still be in Court, or to claim against the persons among whom the estate had been distributed, and whose title remained defeasible. (notes omitted)

21.4 In *David v Frowd*,¹⁰⁰⁹ the Court explained the rationale for limiting protection to the personal representative:¹⁰¹⁰

it is obvious that the notice given by advertisements may, and must, in many cases, not reach the parties really entitled. They may be abroad, and in a different part of the kingdom from that where the advertisements are published, or from a multitude of circumstances they may not see or hear of the advertisements ...

21.5 The Court considered that 'it would be the height of injustice that the proceedings of the Court, wisely adopted with a view to general convenience, should have the absolute effect of conclusively transferring the property of the true owner to one who has no right to it'.¹⁰¹¹

21.6 In 1859, the enactment of *Lord St Leonards' Act*¹⁰¹² created a statutory procedure under which a personal representative could distribute an estate after publishing notices calling for the submission of any claims against the estate. The purpose of the legislation was to give the personal representative 'the same protection as he would have received under a decree for general administration, but without the grave disadvantages inseparable from that procedure'.¹⁰¹³

21.7 Section 29 of *Lord St Leonards' Act* provided:

Where an Executor or Administrator shall have given such or the like Notices as in the Opinion of the Court in which such Executor or Administrator is sought to be charged would have been given by the Court of Chancery in an Administration Suit, for Creditors and others to send in to the Executor or Administrator their Claims against the Estate of the Testator or Intestate, such Executor or Administrator shall, at the Expiration of the Time named in the said Notices or the last of the said Notices for sending in such Claims, be at liberty to distribute the Assets of the Testate or Intestate, or any part thereof, amongst the Parties entitled thereto, having regard to the Claims of which such Executor or Administrator has then Notice, and shall not be liable for the Assets or any

¹⁰⁰⁸ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 264.

¹⁰⁰⁹ (1833) 1 My & K 200; 39 ER 657.

¹⁰¹⁰ Ibid 660 (Sir John Leach MR).

¹⁰¹¹ Ibid.

¹⁰¹² 22 & 23 Vict c 35 (*An Act to Further Amend the Law of Property, and to Relieve Trustees*) s 29. See now *Trustee Act 1925* (UK) s 27.

¹⁰¹³ GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 265.

Part thereof so distributed to any Person of whose Claim such Executor or Administrator shall not have had Notice at the Time of Distribution of the said Assets or a Part or a Part thereof, as the Case may be; but nothing in the present Act contained shall prejudice the Right of any Creditor or Claimant to follow the Assets or any Part thereof into the Hands of the Person or Persons who may have received the same respectively.

21.8 Section 29 did ‘not require the personal representative to make any application to the Court, but [covered] him with the mantle of its protection if he [complied] with its conditions’.¹⁰¹⁴ The statutory protection afforded to a personal representative by the section depended on the personal representative giving such notices as would have been given by the Court of Chancery in an administration suit. As a result, the giving of a notice requiring persons to notify the personal representative of any claims against the estate did not protect a personal representative if the notice was not advertised sufficiently widely or if the period allowed to a claimant to advise of a claim against the estate was too short.¹⁰¹⁵

21.9 It has been suggested that, although a personal representative was required to ‘correctly anticipate the opinion of the Court in which he might be sued as to what advertisements or notices would have been given by the Court of Chancery in an administration suit’, this ‘was not as perilous an undertaking for the personal representative as it might at first sight appear’.¹⁰¹⁶ There were two main reasons for this:¹⁰¹⁷

At an early stage the Consolidated Orders of the Court of Chancery created the machinery for persons to settle the form of advertisements, and later the Rules of the Supreme Court of England made provision for that matter. Furthermore, there were sufficient precedents in decisions of the Court to indicate to the personal representative what was required. (note omitted)

21.10 The protection afforded by section 29 of *Lord St Leonards’ Act* was limited to the personal representative who complied with the section’s requirements; it did not afford any protection to a beneficiary to whom the estate, or a part of the estate, was distributed. In this respect it provided similar protection to the distribution of an estate under an administration decree, which, as noted above, did not protect a beneficiary to whom the estate was distributed.

¹⁰¹⁴ Ibid 266.

¹⁰¹⁵ See *Wood v Weightman* (1872) LR 13 Eq 434 where Lord Romilly MR held (at 436) that the executors were liable despite having given notices purporting to comply with s 29 of *Lord St Leonards’ Act*. Lord Romilly held that the executors, who had advertised in local newspapers in the neighbourhood where the testator had resided, but not in the *London Gazette*, had not advertised sufficiently widely. Lord Romilly also held that the period allowed by the notices for advising of a claim (three weeks) was too short.

¹⁰¹⁶ GP Barton, ‘The Ascertainment of Missing Beneficiaries: The New Zealand Experience’ (1960–1962) 5 *University of Western Australia Law Review* 257, 266

¹⁰¹⁷ Ibid 266.

21.11 However, mere compliance with the requirements of section 29 did not guarantee protection from liability. Section 29 did not protect a personal representative in respect of a claim of which the personal representative had notice, even though no claim was submitted in response to the personal representative's advertisement.¹⁰¹⁸

THE EXISTING LEGISLATIVE PROVISIONS

21.12 The trustee legislation in all Australian jurisdictions includes a provision, based on section 29 of *Lord St Leonards' Act*,¹⁰¹⁹ that protects a trustee who, after giving public notice of his or her intention to distribute property and requiring persons to send in details of any claims against the property, distributes the property having regard to the claims of which he or she then has notice. The provisions do not, however, affect the right of a claimant, after the expiry of the notice period, to pursue his or her claim against the person to whom the property has been distributed.

21.13 As explained in Chapter 13 of this Report, the trustee legislation in all Australian jurisdictions defines 'trustee' to include a personal representative.¹⁰²⁰ As a result, the provisions in the trustee legislation may be used by a personal representative who wants to distribute the estate and to be protected from liability in respect of claims of which he or she is unaware. Notwithstanding that the references to 'trustee' apply to a personal representative, most of the trustee provisions dealing with distribution after giving notice also make express reference to a personal representative.¹⁰²¹

21.14 In addition to the provisions found in the trustee legislation of each Australian jurisdiction, the ACT, New South Wales, the Northern Territory and Tasmania include a specific provision dealing with distribution after notice in their administration legislation.¹⁰²²

21.15 The various provisions are considered below.

Australian Capital Territory

21.16 Section 60 of the *Trustee Act 1925* (ACT) provides:

¹⁰¹⁸ *Re Land Credit Co of Ireland; Markwell's Case* (1872) 21 WR 135 (Lord Romilly MR).

¹⁰¹⁹ See [21.6]–[21.11] above.

¹⁰²⁰ See [13.2] in vol 1 of this Report.

¹⁰²¹ *Trustee Act 1925* (NSW) s 60(8)(a); *Trusts Act 1973* (Qld) s 67; *Trustee Act 1936* (SA) s 29; *Trustee Act 1958* (Vic) s 33; *Trustees Act 1962* (WA) s 63(4).

¹⁰²² *Administration and Probate Act 1929* (ACT) s 64; *Probate and Administration Act 1898* (NSW) s 92; *Administration and Probate Act* (NT) s 96; *Administration and Probate Act 1935* (Tas) s 54.

60 Distribution after notice

- (1) Where a trustee intends to convey or distribute any property to or among the persons entitled to it, he or she may give the requisite notice of his or her intention so to convey or distribute the property.
- (2) For subsection (1), the requisite notice is a notice published in a newspaper printed and circulating in the ACT and such other notice or notices (if any) published within or outside the ACT as would, in a special case, be necessary, in order to comply with the *Administration and Probate Act 1929*, section 64 in the case of an intended distribution of assets by an executor or administrator.
- (3) The notice shall require any person interested to send particulars of his or her claim in respect of the property or any part of it to which the notice relates to the trustee within the time, not being less than 2 months, fixed in the notice or when more than 1 notice is given in the last of the notices.
- (4) At the expiration of the time fixed by the notice the trustee may convey or distribute the property or any part of it to or among the persons entitled to it, having regard only to the claims, formal or otherwise, of which he or she then had notice.
- (5) If the requisite notice has been given, the trustee shall not, as respects the property conveyed or distributed, be liable to any person of whose claim the trustee has not had notice at the time of the conveyance or distribution.
- (6) Nothing in this section shall prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person who may have received the same.

21.17 The reference in section 60(2) of the *Trustee Act 1925* (ACT) to ‘such other notice or notices (if any) ... as would, in a special case, be necessary, in order to comply with the *Administration and Probate Act 1929*, section 64 in the case of an intended distribution of assets by an executor or administrator’ is a reference to the provision in the latter Act that also deals with the liability of a personal representative who makes a distribution of property after giving the required notices.

21.18 Section 64 of the *Administration and Probate Act 1929* (ACT) provides:

64 Distribution of assets

- (1) If an executor or administrator has given such or the like notices as, in the opinion of the Supreme Court in which the executor or administrator is sought to be charged, would have been given by the court in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, the executor or administrator may, at the end of the time stated in the notices, or the last of the notices, for sending in those claims, distribute the assets of the testator or intestate, or any part of the assets, among the persons entitled, having regard to the claims of which the executor or administrator has then notice.

- (2) An executor or administrator must not distribute the assets of the testator or intestate, or any part of them, unless he or she has—
 - (a) applied under the *Births, Deaths and Marriages Registration Act 1997* for a search of the register for information about the parents or any children—
 - (i) of the deceased person; or
 - (ii) of any other person known by the executor or administrator to be relevant to the distribution of the assets; and
 - (b) taken into account any relevant information, documents or certified copies of, or extracts from, documents obtained from the registrar-general as a result of the search.
- (3) If an executor or administrator has complied with subsection (2), the executor or administrator is not liable for the assets or any part of the assets so distributed to any person of whose claim he or she has not had notice at the time of the distribution.

21.19 Under section 64 of the *Administration and Probate Act 1929* (ACT), a personal representative is protected from liability only if, among other things, he or she has given such notices as would, in the opinion of the Supreme Court, have been given by the court in an administration suit.

21.20 Because of the reference in section 60(2) of the *Trustee Act 1925* (ACT) to section 64 of the *Administration and Probate Act 1929* (ACT), it may not be sufficient for a trustee or personal representative to give notice only in a newspaper printed and circulating in the ACT. Depending on the circumstances of the particular trust or estate, it may be necessary, in order for a trustee or personal representative to be protected from liability under section 60, for the trustee or personal representative to publish additional notices either within or outside the ACT.

New South Wales

21.21 New South Wales, like the ACT, contains provisions in both its trustee legislation and administration legislation.

21.22 Section 60 of the *Trustee Act 1925* (NSW) provides:

60 Distribution after notice

- (1) Where a trustee intends to convey or distribute any property to or among the persons entitled thereto, the trustee may give notice in the manner and form prescribed by rules of the Court of the intention so to convey or distribute the property.
- (2), (3) (Repealed)

- (4) At the expiration of the time fixed by the notice the trustee may convey or distribute the property or any part thereof to or among the persons entitled thereto, having regard only to the claims, formal or otherwise, of which the trustee then had notice.
- (5) If the notice has been given the trustee shall not, as respects the property conveyed or distributed, be liable to any person of whose claim the trustee has not had notice at the time of the conveyance or distribution.
- (6) Nothing in this section shall prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person who may have received the same.
- (7) In relation to a conveyance or distribution of property after the commencement of the *Children (Equality of Status) Act 1976*, a trustee referred to in subsection (5) shall be deemed to have notice of the claim of any person whose entitlement to the property or to any part of it would have become apparent if the trustee had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995*.
- (8) **Validation**

A notice that satisfies this subsection is taken for all purposes to be a notice that complies with this section (as in force before or after the commencement of this subsection). A notice satisfies this subsection if it is given:

 - (a) in the case of a trustee who is an executor or administrator—in accordance with Rule 91 of Part 78 of the *Supreme Court Rules 1970* as in force on or after 13 January 1992, or
 - (b) in any other case—in the manner provided for by this section as in force at any time.

21.23 Section 60(1) of the *Trustee Act 1925* (NSW) provides that a trustee may give notice ‘in the manner and form prescribed by rules of the Court’ of his or her intention to distribute trust property. Section 60(8) provides that a notice that satisfies that subsection is taken for all purposes to be a notice that complies with section 60. Section 60(8) further provides that, in the case of a trustee who is an executor or administrator, a notice satisfies section 60(8) if it is in accordance with rule 91 of part 78 of the *Supreme Court Rules 1970* (NSW). That rule provides:

91 Notice of intended distribution

- (1) A notice under section 92 of the Probate Act¹⁰²³ shall be published:
 - (a) if the deceased was resident at the date of his death in the State—in a newspaper circulating in the district where the deceased resided, or

¹⁰²³

‘The Probate Act’ is defined to mean the *Probate and Administration Act 1898* (NSW): *Supreme Court Rules 1970* (NSW) Pt 78 r 1 (definition of ‘the Probate Act’).

- (b) otherwise—in a Sydney daily newspaper.
- (2) The notice may be in or to the effect of Form 121 of Schedule F. (note added)

21.24 Rule 55.14 of the *Uniform Civil Procedure Rules 2005* (NSW) also applies to a notice under section 60(1) of the *Trustee Act 1925* (NSW) in relation to a 'deceased estate trust'.¹⁰²⁴ Rule 55.14(1) prescribes the notice requirements for a notice to which the rule applies. Those requirements are identical to the requirements prescribed by Part 78 rule 91 of the *Supreme Court Rules 1970* (NSW).

21.25 The combined effect of section 60 of the *Trustee Act 1925* (NSW), rule 55.14 of the *Uniform Civil Procedure Rules 2005* (NSW) and Part 78, rule 91 of the *Supreme Court Rules 1970* (NSW) is significant. Because the manner in which notice is to be given is prescribed by the rules, without reference to the notices that would have been given in an administration suit, a personal representative who publishes a notice in the manner prescribed by rule 55.14 of the *Uniform Civil Procedure Rules 2005* (NSW), or Part 78 rule 91 of the *Supreme Court Rules 1970* (NSW), and who distributes the estate having regard only to those claims of which he or she had notice cannot be deprived of the protection afforded by section 60 on the basis that the court, in an administration suit, would have published the notice in a wider area.

21.26 Section 92 of the *Probate and Administration Act 1898* (NSW) has a similar effect to section 60 of the *Trustee Act 1925* (NSW). It provides:

92 Distribution of assets after notice given by executor or administrator

- (1) The executor or administrator of the estate of a testator or an intestate may distribute the assets, or any part of the assets, of that estate among the persons entitled having regard to the claims of beneficiaries (including children conceived but not yet born at the date of the death of the testator or intestate), creditors and other persons in respect of the assets of the estate of which the executor or administrator has notice at the time of distribution if:
 - (a) the assets are distributed at least 6 months after the testator's or intestate's death, and
 - (b) the executor or administrator has given notice in the form approved under section 17 of the *Civil Procedure Act 2005* that the executor or administrator intends to distribute the assets in the estate after the expiration of a specified time, and
 - (c) the time specified in the notice is not less than 30 days after the notice is given, and

¹⁰²⁴

For r 55.14, 'deceased estate trust' is defined to mean 'a trust that has arisen in respect of a deceased estate for which probate or letters of administration has or have been granted, or has or have been sealed under section 107 of the *Probate and Administration Act 1898*, by the Supreme Court': *Uniform Civil Procedure Rules 2005* (NSW) r 55.14(3).

- (d) the time specified in the notice has expired.
- (2) An executor or administrator who distributes the assets or any part of the assets of the estate of a testator or an intestate in accordance with subsection (1) is not liable in respect of those assets or that part of those assets to any person who has a claim in respect of those assets or that part unless the executor or administrator had notice of the claim at the time of the distribution or the distribution was not made in the circumstances described in subsection (2) (a) or (b) of section 28 (Protection of personal representatives who distribute as if will had not been rectified) of the *Succession Act 2006*.
- (3) In relation to a distribution of the assets of a testator or intestate dying after the commencement of the *Children (Equality of Status) Act 1976*, an executor or administrator referred to in subsection (2) shall be deemed to have notice of the claim of any person whose entitlement to the assets or to any part of them would have become apparent if the executor or administrator had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995*.

21.27 Both section 60(7) of the *Trustee Act 1925* (NSW) and section 92(3) of the *Probate and Administration Act 1898* (NSW) deal with deemed notice of claims made by, or through, ex-nuptial children. These provisions are considered later in this chapter.¹⁰²⁵

Northern Territory

21.28 The Northern Territory, like the ACT and New South Wales, contains provisions in both its trustee legislation and its administration legislation.

21.29 Section 22 of the *Trustee Act* (NT) provides:

22 Distribution of estate after notice by trustee

- (1) Where a trustee has given notices such as would have been given by the Court in an administration suit for creditors, beneficiaries, and others to send in to the trustee their claims against the trust property, the trustee may, at the expiration of the time named in the notices, distribute the trust property or any part thereof amongst the persons entitled thereto, having regard only to the claims of which he then has notice, and shall not be liable for the property or any part thereof so distributed to any person of whose claim he had no notice at the time of the distribution.
- (2) Where a trustee has received a claim or notice of claim against a trust property, and he disputes the same, such trustee may give to the person making such claim, or giving such notice, a notice in writing that such claim is disputed, and requiring such claimant either to withdraw such claim or to institute proceedings to enforce such claim within 6 months of the service of such lastmentioned notice; and if such claim is not so withdrawn or prosecuted, the trustee may apply by summons in

¹⁰²⁵

See [21.94]–[21.99] below.

Chambers to any Judge of the Supreme Court, on affidavit setting out the facts for an order that, as against such trustee, such claim shall be absolutely barred, and any such Judge may make such order as he shall deem just, and the same shall bind all persons whom it purports to affect.

- (3) Nothing in this section shall prejudice the right of any person to follow the property or any part thereof into the hands of any person who has received the same.
- (4) A trustee desirous of giving notices under this section may, on application, ex parte or otherwise, obtain the direction of the Supreme Court, or of the Master thereof, as to what notices are proper to be given, and as to the mode of service.

21.30 Section 96 of the *Administration and Probate Act* (NT) provides:

96 Distribution of assets, &c.

- (1) Where an executor or administrator has given such or the like notices as, in the opinion of the Court in which the executor or administrator is sought to be charged, would have been given by the Supreme Court in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, the executor or administrator may at the expiration of the time named in the notices, or the last of the notices, for sending in those claims, distribute the assets of the testator or intestate, or any part thereof, amongst the persons entitled thereto, having regard to the claims of which the executor or administrator has then notice.
- (2) The executor or administrator shall not be liable for the assets or any part thereof so distributed to any person of whose claim he or she has not had notice at the time of the distribution.
- (3) An action shall not lie against the administrator of an intestate estate of an intestate Aboriginal by reason of the distribution of the whole or any part of the intestate estate of the Aboriginal if the distribution was a distribution made in pursuance of an order under Division 4A of Part III or if—
 - (a) the distribution was made before the administrator had notice of an application for such an order; and
 - (b) before making the distribution, the administrator had given notices under subsection (1) and the time specified in the notices or in the last of the notices for the sending in of claims had expired.

21.31 Both of these provisions still follow closely the wording of section 29 of *Lord St Leonards' Act* in that they refer to such notices as would, in the opinion of the court, have been given by the Supreme Court in an administration suit.

21.32 The Northern Territory rules provide that a notice given under section 96 of the *Administration and Probate Act* (NT) may be in, or to the effect of, the relevant form under the rules.¹⁰²⁶

Queensland

21.33 Section 67 of the *Trusts Act 1973* (Qld) provides:

67 Protection of trustees by means of advertisements

- (1) With a view to the distribution of any trust property or estate a trustee or personal representative may give notice by advertisement in—
 - (a) if the deceased's last known address is more than 150 km from Brisbane—a local newspaper circulated and sold at least once each week in the area of the deceased's last known address; or
 - (b) otherwise—a newspaper circulating throughout the State or a newspaper approved for the area of the deceased's last known address by the Chief Justice under a practice direction;and such other notices as would be directed by the court to be given in an action for administration, requiring any person having any claim, whether as creditor or beneficiary or otherwise, to send particulars of the person's claim not later than the date fixed in the notice, being a date at least 6 weeks after the date of publication of the notice.
- (2) Notice of advertisement is sufficient if given in the approved form.
- (3) After the date fixed by the last of the notices to be published the trustee or personal representative may distribute the trust property or estate having regard only to the claims, whether formal or not, of which the trustee or personal representative has notice at the time of the distribution; and the trustee or personal representative shall not, as respects any trust property or estate so distributed, be liable to any person of whose claim the trustee or personal representative had no notice at the time of the distribution.
- (4) Nothing in this section—
 - (a) prejudices the right of any person to enforce (subject to the provisions of section 109) any remedy in respect of the person's claim against a person to whom a distribution of any trust property or estate has been made; or
 - (b) relieves the trustee or personal representative of any obligation to make searches or obtain certificates of search similar to those which an intending purchaser would be advised to make or obtain.

¹⁰²⁶

Supreme Court Rules (NT) r 88.88 and Form 88ZF. There does not appear to be an equivalent form for the notice that may be given under s 22 of the *Trustee Act* (NT).

21.34 This provision was recommended by the Queensland Law Reform Commission in its 1971 Report on the law of trusts,¹⁰²⁷ which led to the enactment of the *Trusts Act 1973* (Qld).

South Australia

21.35 Section 29 of the *Trustee Act 1936* (SA) provides:

29 Distribution of estate after notice by representative or trustee

- (1) Where a representative or trustee has given notices such as would have been given by the court in an administration action for creditors, beneficiaries, and others to send in to the representative or trustee their claims against the estate of the deceased person or against the trust property, the representative or trustee may, at the expiration of the time named in the notices, distribute the estate of the deceased person or the trust property or any part thereof amongst the persons entitled thereto, having regard only to the claims of which he then has notice, and shall not be liable for the estate or property or any part thereof so distributed to any person of whose claim he had no notice at the time of the distribution.
- (2) Where a representative or trustee has received a claim or notice of claim against the estate of a deceased person or against a trust property, and he disputes the claim, that representative or trustee may give to the person making the claim, or giving the notice, a notice in writing that the claim is disputed, and requiring the claimant either to withdraw the claim or to institute proceedings to enforce it within six months of the service of the last-mentioned notice; and if the claim is not so withdrawn or prosecuted, the representative or trustee may apply by summons in chambers to any judge of the Supreme Court, on affidavit setting out the facts for an order that, as against such representative or trustee, the claim shall be absolutely barred, and any such judge may make such order as he deems just, and the order shall bind all persons whom it purports to affect.
- (3) Nothing in this section shall prejudice the right of any person to follow the estate or property or any part thereof into the hands of any person who has received it.
- (4) A representative or trustee desirous of giving notices under this section may, on application, obtain the direction of the Supreme Court, or of the Master thereof, as to what notices are proper to be given, and as to the mode of service.
- (5) The Supreme Court may require that notice be given of an application under subsection (4) to any person who has, in the opinion of the Court, a proper interest in the matter (but an order may be made, if the Court thinks fit, although no notice has been given of the application).

¹⁰²⁷

Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 51–2, 126–7.

21.36 This provision, like section 29 of *Lord St Leonards' Act*, applies where the personal representative or trustee has given such notices as would have been given by the court in an administration action. As noted previously, there can be uncertainty about whether the notice has been published in a sufficiently wide area or about the terms of the notice.¹⁰²⁸ Where a personal representative is unsure of the form the notice should take, the manner in which notice should be given, or the period of time that should be allowed for persons to give notice of a claim, he or she may apply to the court for directions under section 29(4) of the *Trustee Act 1936* (SA).¹⁰²⁹

Tasmania

21.37 Section 25A of the *Trustee Act 1898* (Tas) provides:

25A Distribution of property or estate after notice by trustee or executor or administrator

- (1) Where a trustee or an executor or administrator who has taken out representation of an estate has given notice in accordance with this section—
 - (a) that he intends to distribute the property subject to the trust or the estate to which the notice relates or any part thereof among the persons entitled thereto; and
 - (b) requiring any person interested in that property or estate to send to the trustee, executor, or administrator, on or before the date specified in the notice, particulars of his claim in respect of that property or estate—

the trustee, executor, or administrator may, at any time after that date, distribute the property or estate or any part thereof, having regard only to the claims of persons of which he then has notice and without being liable for the property or estate or any part thereof so distributed to any person of whose claim he had no notice at the time of the distribution.
- (2) Subject to subsection (3), the notice required to be given by a trustee or an executor or administrator of a deceased person for the purposes of subsection (1) is to be published—
 - (a) in the *Gazette*; and
 - (b) in at least one newspaper published or circulating in the locality in which the deceased person resided or carried on business immediately before his or her death.
- (3) Where a trustee or an executor or administrator has reason to believe that any person who has a claim against the property or estate that he wishes to distribute pursuant to subsection (1) resides in a place outside this State, the trustee, executor, or administrator shall, after

¹⁰²⁸ See [21.8] above.

¹⁰²⁹ Applications to the court for advice and directions are considered in Chapter 20 of this Report.

applying by summons to a judge in chambers for directions with respect to the notice that he is required to give for the purposes of that subsection, give the notice by causing it to be advertised in such newspaper as the judge orders.

- (4) For the purposes of subsection (1), the date specified in a notice under that subsection as the date on or before which claims in respect of the relevant property or estate are to be sent to the trustee, executor, or administrator who gave the notice—
- (a) shall be the same in every advertisement relating to the property or estate; and
 - (b) shall, if those advertisements are published—
 - (i) only in this State, be not less than one nor more than two;
 - (ii) in another State or a Territory of the Commonwealth or in New Zealand, be not less than two nor more than 4; and
 - (iii) in any other place, be not less than 4 nor more than 8—

months after the last of those publications.

...¹⁰³⁰

- (7) Where a trustee distributes property subject to a trust or an executor or administrator distributes an estate as provided by this section, nothing in this section prejudices the right of any person to follow the property or estate or any part thereof into the hands of any other person other than a purchaser who has received it, or frees the trustee, executor, or administrator from any obligation to make searches similar to those which an intending purchaser would be advised to make.
- (8) This section applies to a trust or estate notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust or relating to the estate.
- (9) In this section, “**representation**” means the probate of a will or letters of administration. (note added)

21.38 Section 25A(2) of the *Trustee Act 1898* (Tas) prescribes the manner in which the required notice is to be published. However, section 25A(3) provides that, where the trustee, executor or administrator has reason to believe that any person who has a claim against the property or estate that he or she wishes to distribute resides outside Tasmania, he or she must apply to a judge for directions as to any further notices that must be given and must cause the notice to be advertised in such newspaper as the judge orders.

¹⁰³⁰

Trustee Act 1898 (Tas) s 25A(5)–(6) deals with the barring of claims, which is considered at [22.62]–[22.103] below.

21.39 The *Administration and Probate Act 1935* (Tas) also contains provisions dealing with distribution after notice. Sections 54 and 55 provide:

54 Power of personal representative to advertise for claims

- (1) Any personal representative may, at any time after representation has been granted to him, advertise for claims against the estate of the testator or intestate as provided by this Act.
- (2) Every such advertisement shall contain the name of the testator or intestate and the names and additions of the executor or administrator, and shall require all claims against the estate of the testator or intestate to be sent to the Registrar in writing on or before a day to be specified in the advertisement as hereinafter provided.
- (3) All such advertisements shall be published in the *Gazette* and in one newspaper published in Hobart and one published in Launceston; if the testator or intestate resided elsewhere in this State than either of those cities, one of such advertisements may be published in a newspaper, if any, published at any place which is nearer than the nearer of the said cities to the place where he so resided.
- (4) If the personal representative has reason to believe that any person having any claim against the estate of the testator or intestate is resident in any other State or in New Zealand, he shall publish an advertisement in a newspaper published in the city or district in that State or in New Zealand, as the case may be, where he believes such person to have been resident at the date of the death of the testator or intestate; or, if the personal representative has reason to believe that any person having any claim against the estate is resident outside Australia and New Zealand, he shall cause an advertisement to be published in the *London Gazette*.
- (5) The executor or administrator shall have regard to the business carried on by the testator or intestate in his lifetime in determining the places at which advertisements should be published.
- (6) The day specified as that on or before which claims against the estate are to be sent to the Registrar shall be the same in every such advertisement relating to such estate.
- (7) The day to be specified as aforesaid shall, if the advertisements are published—
 - (a) only in this State, be not less than one nor more than two;
 - (b) in any other State or New Zealand, be not less than two nor more than 4;
 - (c) in London, be not less than 4 nor more than 8—months after the last of such publications.

- (8) The personal representative shall file with the Registrar an affidavit stating what advertisements have been published as aforesaid, and the gazettes and newspapers in which the advertisements are so published, and the same when so filed shall be *prima facie* evidence of the publication of the advertisements and of the dates of publication.
- (9) All claims against the estate of any testator or intestate which shall be sent to the Registrar as directed by any such advertisement shall be recorded by the Registrar in a book to be called "The Claims Book", and within one week after the receipt thereof by the Registrar shall be transmitted by him to the personal representative.

55 Power of personal representative to distribute assets

After the day specified in the advertisement for claims to be sent in, the personal representative shall be at liberty to pay and distribute the assets of the testator or intestate in his hands, in due course of administration, so far as respects the claims of which he then has notice, whether as a result of such claims being filed as provided by this Act or otherwise; and, if after satisfying, or retaining sufficient to satisfy, the claims of which he has notice as aforesaid there is any residue or surplus of assets, he may pay or distribute the same amongst the legatees or next-of-kin entitled thereto.

21.40 Although section 54 of the *Administration and Probate Act 1935* (Tas) bears some similarities to section 25A of the *Trustee Act 1898* (Tas), it differs in several important respects.

21.41 An advertisement given under section 54 must require all claims to be sent to the registrar of the Supreme Court (rather than to the personal representative), and the registrar must record any claims received in 'The Claims Book'.¹⁰³¹

21.42 The advertising requirements prescribed by section 54 also differ from those prescribed by section 25A of the *Trustee Act 1898* (Tas).¹⁰³² Curiously, section 54 provides that, if the personal representative has reason to believe that any person having a claim against the estate resides outside Australia and New Zealand, the personal representative must cause an advertisement to be published in the *London Gazette*.¹⁰³³

Victoria

21.43 Section 33 of the *Trustee Act 1958* (Vic) provides:

¹⁰³¹ *Administration and Probate Act 1935* (Tas) s 54(2), (9).

¹⁰³² *Administration and Probate Act 1935* (Tas) s 54(3), (4).

¹⁰³³ *Administration and Probate Act 1935* (Tas) s 54(4).

33 Protection by means of advertisements

- (1) (a) With a view to the conveyance to or distribution among the persons entitled to any real or personal property, the trustees of a settlement or of a disposition on trust for sale or personal representatives, or persons who have made application to the registrar of probates for a grant of representation may give notice by advertisement in the Government Gazette, and in a daily newspaper, published in Melbourne and also if the property includes land not situated within 80 kilometres of the City of Melbourne in a newspaper published at least once a week in the district in which the land is situated, and such other like notices, including notices elsewhere than in Victoria, as would in any special case have been directed by the Court in an action for administration, of their intention to make such conveyance or distribution as aforesaid, and requiring any person interested to send to the trustees or personal representatives or persons who have made application to the registrar of probates for a grant of representation within the time not being less than two months, fixed in the notice or where more than one notice is given, in the last of the notices, particulars of his claim in respect of the property or any part thereof to which the notice relates.

(b) Notice by advertisement for the purposes of this subsection given by any personal representative or by any trustee or by any person who has made an application for a grant of representation as aforesaid shall so far as regards the contents of the advertisement be deemed to be sufficient if given in the form in the Second Schedule to this Act or to the like effect.
- (2) In any case where the real and personal property of a testator or intestate are sworn not to exceed \$2000 or where State Trustees has filed an election to administer the estate of a testator or intestate notice by advertisement for the purposes of subsection (1) of this section shall as regards publication be deemed to be sufficient if inserted once in a daily newspaper published in Melbourne, and also, where the testator or intestate resided or carried on business in any place or district in Victoria situated more than 40 kilometres from Melbourne, in a daily or weekly newspaper (if any) published or circulating in such place or district.
- (3) At the expiration of the time fixed by the notice the trustees or personal representatives may convey or distribute the property or any part thereof to which the notice relates, to or among the persons entitled thereto, having regard only to the claims whether formal or not, of which the trustees or personal representatives then had notice, and shall not, as respects the property so conveyed or distributed, be liable to any person of whose claim the trustees or personal representatives have not had notice at the time of conveyance or distribution; but nothing in this section shall—

(a) prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who has received it; or

- (b) free the trustees or personal representatives from any obligation to make searches or obtain official certificates of search similar to those which an intending purchaser would be advised to make or obtain.

In this subsection **personal representatives** means any personal representatives who have (whether as such or as applicants for a grant of representation) complied with the requirements of subsection (1) of this section or (where the case allowed) with the requirements of that subsection as modified by subsection (2) of this section.

- (4) This section applies notwithstanding anything to the contrary in the will or other instrument (if any) creating the trust.
- (5) In this section **representation** means the probate of a will or letters of administration. (note omitted)

Western Australia

21.44 Section 63 of the *Trustees Act 1962* (WA) provides:

63 Deceased estate, advertising for claims against, trustees' protection

- (1) Where a trustee has given notice by advertisement published at least once in the *Government Gazette* and in a newspaper circulating in each locality in which, in the opinion of the trustee, claims are likely to arise, requiring persons having claims to which this section applies to send to the trustee, within the time fixed in the notice, particulars of their claims and warning them of the consequences of their failure to do so, then, at the expiration of that time or at any time thereafter, the trustee may administer or distribute the property or any part thereof to which the notice relates to or among the persons entitled thereto having regard only to the claims, whether formal or not, of which the trustee then has notice; and he shall not, as respects the property so administered or distributed, be liable to any person of whose claim he has not had notice at the time of the administration or distribution.
- (2) Nothing in this section affects any remedy that a person may have under section 65 or any other right or remedy available to him against any person other than the trustee, including any right that he may have to follow the property and any money or property into which it is converted.
- (3) The time to be fixed by any notice, published in accordance with subsection (1), for the sending in of claims, shall be not less than one month from the date on which the notice is given.
- (4) Where the personal representative of a deceased person gives notice by advertisement in accordance with subsection (1), the localities specified in that subsection shall include each locality in which the deceased resided or carried on business at any time during the year immediately preceding his death.

- (5) Notice by advertisement for the purposes of this section shall, so far as regards the contents of the advertisement, be sufficient if given in the form in the Second Schedule or in a form to the like effect.
- (6) Where the trustee is in doubt as to what advertisements should be published under this section, he may apply to the Court for directions.
- (7) Any advertisement published under this section may relate to more than one estate or trust property.
- (8) This section applies notwithstanding anything to the contrary in the instrument (if any) creating the trust.
- (9) Except as provided in subsection (10), this section applies to claims, whether present or future, certain or contingent, against a trustee, being claims—
 - (a) against or in respect of the estate of the deceased person or the trust property, including (without limiting the generality of the foregoing) claims that survive or lie against or in respect of the estate or property under section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941*;¹⁰³⁴ or
 - (b) against the trustee personally, by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property that he is administering.
- (10) This section does not apply to—
 - (a) any claim under the *Inheritance (Family and Dependents Provision) Act 1972*; or
 - (b) any claim by a person to be a beneficiary under the will, or to be entitled on the intestacy, of the deceased person, or to be beneficially interested under the trust. (note added)

21.45 Section 63(10)(a) of the *Trustees Act 1962* (WA) provides that section 60 does not apply to any claim under the *Inheritance (Family and Dependents Provision) Act 1972* (WA).

21.46 In view of the National Committee's recommendations in its Family Provision Report, a provision to the effect of section 63(10)(a) may not be necessary. In the National Committee's Family Provision Report, it recommended that, unless the court directs otherwise, an application for a family provision order must be made not later than 12 months after the deceased's death.¹⁰³⁵ It also recommended that, in certain circumstances, a personal representative may distribute the estate after six months. It provided that a personal representative may make such a distribution, and be protected

¹⁰³⁴ Section 4 of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA) deals with the survival of actions that, immediately before a person's death, are subsisting against or vested in the person. The survival of actions is considered in Chapter 26 of this Report.

¹⁰³⁵ National Committee for Uniform Succession Laws, *Family Provision: Supplementary Report to the Standing Committee of Attorneys General* (QLRC R 58, July 2004) App 2, Family Provision Bill 2004 cl 9(1).

from liability to a family provision claimant only if, among other things, the personal representative did not, at the time of distributing the estate, have notice of any application or intended application for family provision.¹⁰³⁶ Because of this provision, it would not be possible for a personal representative, by using the procedure in section 63 of the *Trustees Act 1962* (WA), to shorten the period in which a personal representative could distribute the estate and be protected from liability to less than six months from the deceased's death.

21.47 Section 63(10)(b) of the *Trustees Act 1962* (WA) provides that section 60 does not apply to any claim by a beneficiary under the will of a deceased person, by a person entitled on the intestacy of a deceased person, or by a person beneficially interested under the trust. The claims of those persons are dealt with separately under section 66 of the *Trustees Act 1962* (WA), which is considered later in this chapter.¹⁰³⁷

ISSUES FOR CONSIDERATION

21.48 The threshold issue for consideration is whether the model legislation should include a provision dealing with the distribution of property after giving notice of intention to distribute.

21.49 If it is decided to include a provision of this kind in the model legislation, the following further issues arise for consideration:

¹⁰³⁶

Clause 44 of the National Committee's Family Provision Bill 2004 provided:

44 Protection of administrator who distributes after giving notice

- (1) The administrator of the estate of a deceased person may distribute the property in the estate if:
 - (a) the property is distributed not earlier than 6 months after the deceased person's death, and
 - (b) the administrator has given notice in the form prescribed in Schedule 1 that the administrator intends to distribute the property in the estate after the expiration of a specified time, and
 - (c) the time specified in the notice is not less than 30 days after the notice is given, and
 - (d) the time specified in the notice has expired, and
 - (e) at the time of distribution, the administrator does not have notice of any application or intended application for a family provision order affecting the estate of the deceased person.
- (2) An administrator who distributes property in the estate of a deceased person is not liable in respect of that distribution to any person of whose application for a family provision order affecting the estate of the deceased person the administrator did not have notice at the time of the distribution if:
 - (a) the distribution was made in accordance with this section, and
 - (b) the distribution was properly made by the administrator.
- (3) The notice given by the administrator must be given in accordance with the regulations.
- (4) For the purposes of this section, notice to the administrator of an application or intention to make any application under this Act must be in writing signed by the applicant or the applicant's *[insert appropriate reference for jurisdiction to a legal practitioner]*.

¹⁰³⁷

See [21.77]–[21.89] below.

- how the model legislation should deal with the claims of beneficiaries, including the claims of ex-nuptial children — in particular, whether the claims of beneficiaries should be treated in the same way as the claims of creditors or whether their claims should be the subject of specific provisions;
- what form that provision should take and what the requirements of any statutory notice should be;
- whether it should be mandatory for a personal representative who has obtained a grant to comply with the procedure for giving notice or whether the model legislation should simply protect a personal representative who has complied with the statutory requirements for giving notice; and
- whether a person who is administering an estate without a grant should be able to obtain protection from liability to unknown claimants if he or she complies with the statutory requirements for giving notice.

INCLUSION OF A PROVISION DEALING WITH DISTRIBUTION AFTER NOTICE

Discussion Paper

21.50 In the Discussion Paper, the National Committee proposed that, subject to resolving whether compliance with the provision should be mandatory,¹⁰³⁸ the model legislation should include a provision to the effect of section 67 of the *Trusts Act 1973* (Qld) or section 92 of the *Probate and Administration Act 1898* (NSW), ‘so that a personal representative who distributes an estate after giving, in the prescribed form, notice that he or she intends to distribute the estate after a certain date, and who distributes after that date, is protected from liability to claimants of whose claims the personal representative did not have notice’.¹⁰³⁹

Submissions

21.51 The National Committee’s proposal to include a provision to the effect of section 67 of the *Trusts Act 1973* (Qld) or section 92 of the *Probate and Administration Act 1898* (NSW) was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁰⁴⁰

¹⁰³⁸ See [21.156]–[21.163] below.

¹⁰³⁹ *Administration of Estates Discussion Paper* (1999) QLRC 144; NSWLRC 205 (Proposal 63).

¹⁰⁴⁰ Submissions 1, 8, 11, 12, 14, 15.

21.52 Although the Trustee Corporations Association of Australia did not endorse any particular current legislative provision, it also agreed that the model legislation should include a provision to protect personal representatives who distribute an estate after giving prescribed notices.¹⁰⁴¹

21.53 A former ACT Registrar of Probate commented that the current requirements in relation to giving notice of intended distribution provide adequate protection.¹⁰⁴² As explained above, in the ACT, provisions are found in both the trustee and administration legislation.¹⁰⁴³

The National Committee's view

21.54 As explained earlier, every Australian jurisdiction has a provision in its trustee legislation that deals with the giving of notice of intended distribution by both trustees and personal representatives. However, because the distribution of the estate of a deceased person is one of the most important duties that is undertaken by a personal representative, the National Committee is of the view that the model legislation should contain a specific provision setting out the procedure by which a personal representative may call for claims against the estate to be submitted, and be protected from liability in respect of claims that are unknown to the personal representative at the time of distribution.

21.55 In addition, as there is still considerable variation in the scope and requirements of the existing trustee provisions, the National Committee considers that the inclusion of a specific provision in the model legislation is the only viable way to achieve uniformity in relation to the requirements with which a personal representative must comply in order to be protected from liability in respect of unknown claims.

21.56 The inclusion of a specific provision also has the added benefit of creating greater awareness among personal representatives about the availability of this avenue of securing protection from liability in respect of unknown claims.

21.57 As explained above, the National Committee proposed in the Discussion Paper that the model provision should be to the effect of section 67 of the *Trusts Act 1973* (Qld) or section 92 of the *Probate and Administration Act 1898* (NSW). Although those provisions have many features in common, they also have a number of differences, as do the equivalent provisions in the other Australian jurisdictions. Accordingly, the scope and requirements of the model provision are considered in greater detail below.

¹⁰⁴¹ Submission 6.

¹⁰⁴² Submission 2.

¹⁰⁴³ See [21.16]–[21.20] above.

CLAIMS OF BENEFICIARIES

21.58 This section of the chapter considers whether the claims of beneficiaries (whether arising under a will or under the intestacy rules) should be treated in the same manner as the claims of creditors, or whether a personal representative's protection in respect of claims by beneficiaries should be the subject of different legislative requirements. In this context, specific consideration is given to the current legislative provisions that deal with a personal representative's liability for distributing an estate to the exclusion of an unknown ex-nuptial child who is a beneficiary of the estate.

Background

21.59 Section 29 of *Lord St Leonards' Act*, in which most Australian provisions have their origins, provided for an executor or administrator to give notices for '[c]reditors and others' to send in to the executor or administrator their claims against the estate of the testator or intestate.¹⁰⁴⁴

21.60 In *Newton v Sherry*,¹⁰⁴⁵ it was held that this expression applied not only to the claims of creditors, but also to those of persons claiming as next of kin on intestacy.¹⁰⁴⁶ In that case, the intestate's sister obtained a grant of administration, and published such notices as were required by section 29 of *Lord St Leonards' Act*. The intestate had a daughter who, some 16 years before the intestate's death, changed her name and went to America without informing her relatives. She returned to England three years after the intestate's death and sought a grant of administration of the intestate's estate. The administrator did not know whether her niece was still alive and, having no reason to believe that her niece was living in America, had advertised only in London. Brett J commented:¹⁰⁴⁷

The words [creditors 'and others'], however, are large enough to embrace next of kin. ... It seems to me that the enactment was made for the protection of administrators. Now, the danger to the administrator of a claim by a next of kin being preferred after a distribution of assets is equally great as that of a claim by a creditor: and, giving to the words their ordinary construction, it seems to me that he was intended to be protected against the one as well as against the other, provided he followed the course pointed out by s 29; in other words, that that section includes next of kin as well as creditors of the intestate.

¹⁰⁴⁴ See [21.7] above.

¹⁰⁴⁵ (1876) LR 1 CPD 246.

¹⁰⁴⁶ Ibid 255 (Brett J), 257 (Archibald J), 257 (Lindley J).

¹⁰⁴⁷ Ibid 255.

21.61 Although the case did not involve a claim by the intestate's daughter against the administrator, Lindley J held that, if it had concerned such a claim, the administrator would have been protected by the Act.¹⁰⁴⁸

21.62 The expression 'creditors and others' was changed to 'any person interested' when the *Trustee Act 1925* (UK) was passed.¹⁰⁴⁹ In *Re Aldhous*,¹⁰⁵⁰ Danckwerts J held that section 27 of the *Trustee Act 1925* (UK) would protect an executor who had advertised for the testator's next of kin (the will having no residuary disposition), and who had paid the residue of the estate to the Treasury Solicitor on the basis that the testator had left no lawful next of kin.

Australian jurisdictions other than Western Australia

21.63 In the Australian jurisdictions other than Western Australia, although a variety of terminology is used to describe the persons who may be required by a published notice to send in particulars of their claims, the language of the various provisions is broad enough to cover not only the creditors of an estate, but also the beneficiaries of an estate.

21.64 The provisions in the ACT and Northern Territory administration legislation, which are based very closely on the original English provision, refer to the claims of 'creditors and others'.¹⁰⁵¹

21.65 The trustee provisions in the ACT, Tasmania and Victoria follow the language of the current English provision and require 'any person interested' to send particulars of his or her claim to the trustee (or in Tasmania and Victoria, to the trustee or personal representative).¹⁰⁵²

21.66 In New South Wales, the trustee provision does not refer to particular categories of persons,¹⁰⁵³ although the form prescribed for that provision requires 'any person having any claim upon the estate' to send in particulars of his or her claim.¹⁰⁵⁴ In contrast, section 92(1) of the *Probate and Administration Act 1898* (NSW) uses quite specific language and refers to the claims of 'beneficiaries (including children conceived but not yet born at the death of the testator or intestate), creditors and other persons'. It has been held that section

¹⁰⁴⁸ Ibid 258.

¹⁰⁴⁹ *Trustee Act 1925* (UK) s 27. See GP Barton, 'The Ascertainment of Missing Beneficiaries: The New Zealand Experience' (1960–1962) 5 *University of Western Australia Law Review* 257, 267.

¹⁰⁵⁰ [1955] 2 All ER 80.

¹⁰⁵¹ *Administration and Probate Act 1929* (ACT) s 64(1); *Administration and Probate Act* (NT) s 96(1).

¹⁰⁵² *Trustee Act 1925* (ACT) s 60(3); *Trustee Act 1898* (Tas) s 25A(1)(b); *Trustee Act 1958* (Vic) s 33(1)(a).

¹⁰⁵³ *Trustee Act 1925* (NSW) s 60.

¹⁰⁵⁴ See *Supreme Court Rules 1970* (NSW) Pt 78 r 91, sch F, Form 121.

92 applies to the claims of legatees (that is, to beneficiaries under a will), as well as to the claims of the next of kin of an intestate.¹⁰⁵⁵

21.67 The trustee provisions in the Northern Territory and South Australia provide for notices to be given requiring 'creditors, beneficiaries, and others' to send in particulars of their claims.¹⁰⁵⁶

21.68 A similar expression is used in section 67 of the *Trusts Act 1973* (Qld), which refers to 'any person having any claim, whether as creditor or beneficiary or otherwise'.¹⁰⁵⁷ In recommending this provision in its 1971 Report on the law of trusts, the Queensland Law Reform Commission commented:¹⁰⁵⁸

There are two kinds of unknown claimants against whom it seems desirable to protect trustees and personal representatives:

- (1) Claimants, eg creditors, for the settlement of whose claims the trustees may have recourse to the trust assets, eg *National Trustees Executors and Agency Co of Australasia Ltd v Barnes* (1941) 64 CLR 268; *In re Raybould* [1900] 1 Ch 199.
- (2) Claimants whose claim is to the trust assets as such ...

21.69 The effect of the various legislative provisions is that a trustee or personal representative may distribute the estate property to or among the persons entitled to it having regard only to the claims (in Queensland, Victoria and Western Australia, 'whether formal or not'¹⁰⁵⁹ and in the ACT and New South Wales, 'formal or otherwise'¹⁰⁶⁰) of which he or she has notice, and is protected from liability in respect of a claim, including the claim of a beneficiary, of which he or she did not have notice at the time of distribution.¹⁰⁶¹

21.70 However, the provisions do not protect a trustee or personal representative in respect of a claim of which he or she has notice at the time of

¹⁰⁵⁵ *In the Will of Walker* (1943) 43 SR (NSW) 305. As a result, where a person, in response to a s 92 notice, submits a claim that he or she is a beneficiary under a testator's will, the executor can use the procedures in s 93 of the *Probate and Administration Act 1898* (NSW) for barring a disputed claim. The barring of claims is considered at [22.62]–[22.103] below.

¹⁰⁵⁶ *Trustee Act* (NT) s 22(1); *Trustee Act 1936* (SA) s 29(1).

¹⁰⁵⁷ *Trusts Act 1973* (Qld) s 67(1).

¹⁰⁵⁸ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 51.

¹⁰⁵⁹ *Trusts Act 1973* (Qld) s 67(3); *Trustee Act 1958* (Vic) s 33(3); *Trustees Act 1962* (WA) s 63(1).

¹⁰⁶⁰ *Trustee Act 1925* (ACT) s 60(4); *Trustee Act 1925* (NSW) s 60(4).

¹⁰⁶¹ *Trustee Act 1925* (ACT) s 60(4), (5); *Administration and Probate Act 1929* (ACT) s 64(1), (3); *Trustee Act 1925* (NSW) s 60(4), (5); *Probate and Administration Act 1898* (NSW) s 92(1), (2); *Trustee Act* (NT) s 22(1); *Administration and Probate Act* (NT) s 96(1), (2); *Trusts Act 1973* (Qld) s 67(3); *Trustee Act 1936* (SA) s 9(1); *Trustee Act 1898* (Tas) s 25A(1); *Administration and Probate Act 1935* (Tas) s 55; *Trustee Act 1958* (Vic) s 33(3); *Trustees Act 1962* (WA) s 63(1).

distribution.¹⁰⁶² Section 55 of the *Administration and Probate Act 1935* (Tas) recognises that a personal representative may have 'notice' of a claim even though no claim has been submitted. It refers to 'claims of which [the personal representative] then has notice, whether as a result of such claims being filed as provided by this Act or otherwise'.

21.71 Ford and Lee suggest that, although it has been held that the various provisions apply to the claims of beneficiaries, a trustee will not ordinarily need to be given particulars of a beneficiary's claim in order to have notice of that claim.¹⁰⁶³

Since the trustee obviously has notice of those beneficiaries' claims that arise directly under the will, intestacy or trust instrument, the protection given by this procedure to beneficiaries' claims must be related to claims of others such as adopted children and illegitimates and assignees or mortgagees of beneficiaries, where the trustee has no notice of the assignment or mortgage. (emphasis added)

21.72 The comments of Nicholas CJ in Eq in *In the Will of Walker*¹⁰⁶⁴ lend support to that view. Although this decision is authority for the proposition that section 92 of the *Probate and Administration Act 1898* (NSW) applies to a claim by a beneficiary under a will, Nicholas CJ in Eq suggested that a claim that arises directly under the will could not be ignored, even if the beneficiary failed to submit a claim:¹⁰⁶⁵

It appears to me that in the context in which they are found in the *Wills, Probate and Administration Act, 1898–1940*, ss 92 and 93 should be treated as applicable to persons claiming to be legatees as well as to those who claim to be creditors or next-of-kin. ... A person who claims to be a legatee would be affected by an application under s 93 only if his claim were disputed by the executor. If there were no ambiguity or difficulty in the will, but the executor was doubtful where the legatee could be found, or whether he was alive or dead, payment might be made to the Public Trustee under s 47 of the *Public Trustee Act, 1913–1942*, or the money might be paid into Court, or an order might be obtained similar to that made by Joyce J in *In re Benjamin*.

21.73 These comments cast doubt on whether *Newton v Sherry*,¹⁰⁶⁶ which was decided before *Re Benjamin*,¹⁰⁶⁷ would be decided in the same way today

¹⁰⁶² *Nowell v Palmer* (1993) 32 NSWLR 574, 582 (Handley JA). See also [21.11] above. Note, however, that the trustee legislation in a number of Australian jurisdictions provides that, in the absence of fraud, a trustee who is acting for more than one trust or estate is not affected by notice of anything in relation to a particular trust or estate if the trustee has notice of it only because of the trustee acting or having acted for another trust or estate: see *Trustee Act 1925* (ACT) s 62; *Trustee Act 1925* (NSW) s 62; *Trusts Act 1973* (Qld) s 69; *Trustee Act 1958* (Vic) s 35(1); *Trustees Act 1962* (WA) s 68.

¹⁰⁶³ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16300] (at 23 February 2009).

¹⁰⁶⁴ (1943) 43 SR (NSW) 305.

¹⁰⁶⁵ *Ibid* 307.

¹⁰⁶⁶ (1876) LR 1 CPD 246. See the discussion of *Newton v Sherry* at [21.60] above.

¹⁰⁶⁷ [1902] 1 Ch 723. See the discussion of *Re Benjamin* and 'Benjamin orders' at [23.16]–[23.20] below.

or whether the proper course would be to apply for leave to distribute the estate on the basis that the intestate's daughter had died before the intestate without leaving issue.

21.74 However, even if a personal representative ordinarily has notice of the claims of the beneficiaries under a will or of the relevant categories of intestacy beneficiaries (even in the absence of a claim submitted by those beneficiaries), it is possible that a personal representative might not be aware of the persons who are entitled as next of kin on intestacy, particularly where the next of kin are reasonably remote, such as the intestate's cousins, or where the number of next of kin is quite large. This could also be the case where the beneficiaries under a will are described as members of a class, who might be even more distantly related to the deceased (or not related to the deceased at all) and greater in number than the persons who would be entitled if the deceased had died intestate — for example, 'to the grandchildren of my cousin X' or 'to the grandchildren of Y', where Y is not related to the testator.

21.75 This raises the issue of whether a personal representative who distributes the estate without notice of the claims of such persons should be protected from liability to those persons or whether a different procedure should deal with those claims.

Western Australia

21.76 In Western Australia, section 63 of the *Trustees Act 1962* (WA) applies where a trustee has given the relevant notice 'requiring persons having claims to which this section applies to send to the trustee ... particulars of their claims'.¹⁰⁶⁸ As noted earlier in this chapter, section 63 does not apply to any claim for family provision under the *Inheritance (Family and Dependents Provision) Act 1972* (WA).¹⁰⁶⁹

21.77 Further, section 63 does not apply to any claim by a person to be a beneficiary under a will, to be entitled on the intestacy of a deceased person, or to be beneficially interested under a trust.¹⁰⁷⁰ The claims of those persons are dealt with separately under section 66 of the *Trustees Act 1962* (WA).

21.78 Section 66 provides:¹⁰⁷¹

¹⁰⁶⁸ *Trustees Act 1962* (WA) s 63(1). Section 63 is set out at [21.44] above.

¹⁰⁶⁹ *Trustees Act 1962* (WA) s 63(10)(a). See [21.45]–[21.46] above.

¹⁰⁷⁰ *Trustees Act 1962* (WA) s 63(10)(b).

¹⁰⁷¹ This provision is in similar terms to s 76 of the *Trustee Act 1956* (NZ).

66 Unknown beneficiaries, advertising for, distribution of shares of

- (1) Where any property is held by a trustee and the property or any part thereof cannot be distributed because the trustee does not know—
 - (a) whether any person who is, or may be, entitled thereto is, or at any material date was, in existence; or
 - (b) whether all or any of the persons who are members of any class that is or may be entitled thereto are, or at any material date were, in existence; or
 - (c) whether any such person as is mentioned in paragraph (a) or (b) is alive or dead or where he is to be found,

the trustee may publish such advertisements (whether in the State or elsewhere) as are appropriate in the circumstances calling upon every such person and every person claiming through any such person to send in his claim within a time to be specified in the advertisements, being, in any case, not less than 2 months from the date on which the advertisement is published.

- (2) Where the trustee is in doubt as to what advertisements should be published under this section, he may apply to the Court for directions in that regard.
- (3) Where the trustee has received (whether as a result of advertisements or not) a claim that any person is a person to whom any advertisement made under this section relates, or any notice that any person may claim to be such a person, and the trustee is not satisfied that the claim is or would be valid, the trustee may serve upon the claimant or the person of whom the trustee has notice as aforesaid, a notice calling upon him, within a period of 3 months from the date of service of the notice, to take legal proceedings to enforce the claim, if he wishes to pursue it, and to prosecute the proceedings with all due diligence; and advising him that, if he fails to do so, his claim may be disregarded and application may be made to the Court without further notice for an order authorising the distribution of the property.
- (4) Nothing in subsection (3) makes it necessary for the trustee to serve a notice therein mentioned on any person; and the Court may make an order under this section, whether or not such a notice has been served on any person, if it is satisfied that the information supplied to the trustee by that person or otherwise in the possession of the trustee indicates that the person is not one of the persons specified in the advertisements or is not likely to be one of those persons.
- (5) Upon proof by affidavit of the circumstances, and of the inquiries that have been made, and of the results of the inquiries and advertisements, and of the claims of which the trustee has received notice, and of the notices that the trustee has given to claimants under subsection (3), and of the action (if any) that the claimants have taken to enforce their claims, the Court may order that the trustee be at liberty to distribute the property or part thereof, subject to such conditions as the Court may impose—

- (a) as if every person and every member of any class of person specified in the order (being all or any of the persons specified in the advertisements) is not in existence or never existed or has died before a date or event specified in the order; and
 - (b) where as a consequence of the order it is not possible or practicable to determine whether or not any condition or requirement affecting a beneficial interest in the property or any part thereof has been complied with or fulfilled, as if that condition or requirement had or had not been complied with or fulfilled, as the Court may determine.
- (6) In making any order under subsection (5), the Court may—
 - (a) disregard (without express reference thereto in the order) the claims of any persons who do not appear to the Court to be, or likely to be, any of the persons specified in the advertisements;
 - (b) disregard (without express reference thereto in the order) the claim of any person to whom the trustee has given notice under subsection (3) and who has failed to take legal proceedings to enforce the claim or to prosecute any such proceedings with all due diligence;
 - (c) exclude from the operation of the order any person to whom the trustee has not given notice under subsection (3) and who, in the opinion of the Court, may be one of the persons specified in the advertisements, or any person whom the Court considers should, for any reason, be excluded from the operation of the order;
 - (d) provide that the order shall not be acted on for such period or except on such conditions as may be specified in the order or that the effect of the order shall during a period so specified be advertised in such manner and form as may be specified in the order, or that the order be served upon such person or persons as are specified therein; and in the event of the Court exercising the jurisdiction conferred by this paragraph it may in the order direct that the order shall be of no effect in respect of any person specified therein in the event of that person instituting proceedings in the State to enforce his claim and serving the proceedings upon the trustee within such period as is specified in the order.
- (7) The Court may make an order under this section notwithstanding that there has not been strict compliance with any directions as to advertisements previously given by the Court, or that an error has been made in any advertisement (whether or not any directions have previously been given by the Court) if the Court considers that the error would not be likely to have prejudiced or misled the persons to whom the advertisement relates.
- (8) Where the Court makes an order under this section that the trustee may distribute any property or part thereof as if every person and every member of any class of persons specified in the order (not being a person expressly excluded from the operation of the order) is not in existence or never existed or has died before a date or event specified

in the order, and the trustee distributes in accordance with the order, the trustee shall be exonerated from any further liability to any such person or to any member of any such class; but nothing in this section affects any remedy that any person may have against any person other than the trustee, including any right that he may have to follow the property and any money or property into which it is converted.

- (9) The Court may make one or more orders under this section in respect of the same property.
- (10) Any order made under this section may direct how the costs of the order and of advertising under or for the purposes of the order shall be borne.
- (11) It shall not be necessary to serve notice of an application for an order under this section upon any person, unless the Court otherwise orders.
- (12) Nothing in this section affects the right of the trustee (if he so wishes) to distribute under any other law or statutory provision or affects the protection thereby afforded when he makes distribution pursuant to any such law or provision.

21.79 Section 66 of the *Trustees Act 1962* (WA) deals with the situation where a trustee holds property, but cannot distribute it, because he or she does not know:¹⁰⁷²

- whether any person who is, or may be, entitled thereto is, or at any material date was, in existence; or
- whether all or any of the persons who are members of any class that is or may be entitled thereto are, or at any material date were, in existence; or
- whether any such person mentioned above is alive or dead or where he or she is to be found.

21.80 In these circumstances, the trustee may publish:¹⁰⁷³

such advertisements (whether in the State or elsewhere) as are appropriate in the circumstances calling upon every such person and every person claiming through any such person to send in his claim within a time to be specified in the advertisements, being, in any case, not less than 2 months from the date on which the advertisement is published.

¹⁰⁷² *Trustees Act 1962* (WA) s 66(1).

¹⁰⁷³ *Trustees Act 1962* (WA) s 66(1).

21.81 If the trustee is in doubt as to what advertisements should be published under this section, he or she may apply to the court for directions.¹⁰⁷⁴

21.82 Section 66(3) provides that, where the trustee receives a claim that any person is a person to whom any advertisement made under the section relates, or any notice that any person may claim to be such a person, and the trustee is not satisfied that the claim is or would be valid, the trustee may serve a notice on the claimant calling on that person to take legal proceedings within three months to enforce the claim, and to prosecute the proceedings with all due diligence. The notice must advise the claimant that if he or she fails to take these steps, the claim may be disregarded and application may be made to the court without further notice for an order authorising the distribution of the property.

21.83 Section 66(5) provides that the court, on being satisfied of the inquiries that have been made, and of the results of the inquiries and advertisements, and of the claims of which the trustee has received notice, and of the notices that the trustee has given under section 66(3) to claimants to take legal proceedings, and of the action (if any) that the claimants have taken to enforce their claims, may order that the trustee be at liberty to distribute the property or part of the property, subject to such conditions as the court may impose.¹⁰⁷⁵

21.84 In particular, the court may:¹⁰⁷⁶

- disregard the claims of any persons who do not appear to the court to be, or likely to be, any of the persons specified in the advertisements;
- disregard the claim of any person to whom the trustee has given notice under section 66(3) and who has failed to take legal proceedings to enforce the claim or to prosecute any such proceedings with all due diligence;
- exclude from the operation of the order any person to whom the trustee has not given notice under section 66(3) and who, in the opinion of the court, may be one of the persons specified in the advertisements, or any person whom the court considers should, for any reason, be excluded from the operation of the order;
- provide that the order shall not be acted on for such period or except on such conditions as may be specified in the order or that the effect of the order shall, during a period so specified, be advertised in such manner and form as may be specified in the order, or that the order be served upon such person or persons as are specified therein.

¹⁰⁷⁴ *Trustees Act 1962* (WA) s 66(2).

¹⁰⁷⁵ See, for example, *Public Trustee v MacGregor* [2001] WASC 222.

¹⁰⁷⁶ *Trustees Act 1962* (WA) s 66(6).

21.85 Section 66 does not, however, affect the right of the trustee to distribute under any other law or statutory provision or affect the protection afforded to the trustee if he or she distributes under any such law or provision.¹⁰⁷⁷

21.86 It has been observed that section 66 of the *Trustees Act 1962* (WA) incorporates the principles of *Re Benjamin*,¹⁰⁷⁸ under which the court may grant a personal representative liberty to distribute an estate on the basis that a missing beneficiary died before the deceased person whose estate is being administered.¹⁰⁷⁹

21.87 In its 1971 Report on the law of trusts, the Queensland Law Reform Commission examined the operation of section 66 of the *Trustees Act 1962* (WA). The Commission considered that there appeared to be 'no justification for the incorporation of this unwieldy procedure into the law'.¹⁰⁸⁰ In particular, the Commission commented that:¹⁰⁸¹

The object of a Trustee Act should be to reduce, not to increase, the number of occasions on which a trustee should be obliged to seek a court order. There is no particular reason why the Court should supervise the trustee's attempts to discover unknown possible beneficiaries.

21.88 The Commission also expressed a concern that an 'over-cautious personal representative may well feel that the only real safeguard open to him is compliance with the section'.¹⁰⁸² Yet the Commission thought it could 'hardly be intended that the section must be complied with every time'.¹⁰⁸³

21.89 The Commission was also of the view that it was 'confusing and unnecessarily expensive to require two different advertisement procedures for two kinds of case which are not very different from each other'.¹⁰⁸⁴

Inquiries about children

21.90 All Australian jurisdictions have legislative provisions that are relevant to the situation where there is a child of the deceased who is a beneficiary of the deceased's estate and, at the time of distributing the estate, the personal representative has no notice of the relationship on which that child's claim is

¹⁰⁷⁷ *Trustees Act 1962* (WA) s 66(12).

¹⁰⁷⁸ *Public Trustee v The Royal Society for the Prevention of Cruelty to Animals (Inc)* (Unreported, Supreme Court of Western Australia, Templeman J, 25 February 1997) 3, referring to *Re Benjamin* [1902] 1 Ch 723.

¹⁰⁷⁹ *Re Benjamin* orders are considered at [23.16]–[23.20] below.

¹⁰⁸⁰ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 51.

¹⁰⁸¹ *Ibid.*

¹⁰⁸² *Ibid* 51–2.

¹⁰⁸³ *Ibid* 52.

¹⁰⁸⁴ *Ibid.*

based. Several different approaches are taken for dealing with the issue of whether a personal representative may be liable in respect of distributions made to the exclusion the child.

21.91 These provisions are not relevant where the child is named expressly in the will as a beneficiary. Their main relevance is where the child's entitlement arises as a result of being a member of a class of beneficiaries. This could arise where the will contains a class gift,¹⁰⁸⁵ where the deceased's children are entitled under the relevant intestacy rules or where, by operation of the statutory anti-lapse rule, the child is entitled as a member of a class of beneficiaries.

Australian Capital Territory

21.92 In the ACT, the administration legislation prohibits the distribution of the estate unless the personal representative has applied for certain searches and taken into account the results of those searches. Section 64(2) of the *Administration and Probate Act 1929* (ACT) provides:

64 Distribution of assets

...

- (2) An executor or administrator must not distribute the assets of the testator or intestate, or any part of them, unless he or she has—
 - (a) applied under the *Births, Deaths and Marriages Registration Act 1997* for a search of the register for information about the parents or any children—
 - (i) of the deceased person; or
 - (ii) of any other person known by the executor or administrator to be relevant to the distribution of the assets; and
 - (b) taken into account any relevant information, documents or certified copies of, or extracts from, documents obtained from the registrar-general as a result of the search.

21.93 This provision is of general application and is not limited to searches to ascertain the children of the deceased. A personal representative who complies with these requirements and makes a distribution of assets is not liable to any person of whose claim he or she did not have notice at the time of the distribution.¹⁰⁸⁶

¹⁰⁸⁵ An example of such a gift is 'I leave the residue of my estate to be divided equally among my children'.

¹⁰⁸⁶ *Administration and Probate Act 1929* (ACT) s 64(3).

New South Wales

21.94 Section 92(3) of the *Probate and Administration Act 1898* (NSW) is drafted in slightly different terms, but has a similar effect. It provides:

92 Distribution of assets after notice given by executor or administrator

...

- (3) In relation to a distribution of the assets of a testator or intestate dying after the commencement of the *Children (Equality of Status) Act 1976*, an executor or administrator referred to in subsection (2) shall be deemed to have notice of the claim of any person whose entitlement to the assets or to any part of them would have become apparent if the executor or administrator had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995*.

21.95 Section 50 of the *Births, Deaths and Marriages Registration Act 1995* (NSW) provides:

50 Issue of certificate relating to children of deceased person

- (1) The executor, administrator or trustee of the estate of a deceased person may apply to the Registrar for a certificate certifying whether or not the deceased person is recorded in the Register as being a parent of any children, and if so, the names of the children and such other particulars relating to the children as may be prescribed by the regulations.
- (2) On receipt of the application, together with any fee required by the regulations, the Registrar is to cause a search of the Register to be made and, on completion of that search, issue the certificate applied for.

21.96 There are, however, limitations to the information available under a section 50 certificate:¹⁰⁸⁷

A Section 50 Search is a search for the natural or adopted children of a deceased person. It may be used to locate the beneficiaries of an estate so that assets can be distributed. If the deceased person was born overseas, only their time spent as a resident in NSW will be searched.

Searches can be conducted for deceased females from ages 12 to 60, and for males from age 12 until death.

21.97 Unlike the ACT provision, section 92(3) of the *Probate and Administration Act 1898* (NSW) does not prohibit the distribution of the estate unless certain searches have been made. It provides, however, that a personal representative is 'deemed to have notice of the claim of any person whose

¹⁰⁸⁷

New South Wales, Registry of Births Deaths and Marriages, Deaths, 'Section 50 Search' <www.bdm.nsw.gov.au/deaths/section50Search.htm> at 21 February 2009.

entitlement to the assets or to any part of them would have become apparent if the executor or administrator had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995*. It therefore 'operates to impose constructive notice upon an executor or administrator with respect to any claim to assets in an estate if facts relevant to that claim would have been disclosed in a certificate under s 50 of the *Births, Deaths and Marriages Registration Act 1995* (NSW)'.¹⁰⁸⁸ In practical terms, this 'places the onus on the personal representative to obtain such a certificate if there is any possibility that an ex-nuptial child may be missed'.¹⁰⁸⁹

21.98 There is a complementary provision in the *Trustee Act 1925* (NSW). As explained above, section 60 of that Act protects a trustee who, having complied with the specified advertising requirements, conveys or distributes property having regard to claims of which he or she has notice. Section 60(7) deems a trustee who conveys or distributes property to have notice of the claim of any person whose entitlement to the property would have become apparent if the trustee had applied for and obtained a certificate under section 50 of the *Births, Deaths and Marriages Registration Act 1995* (NSW).

21.99 Where a personal representative has actual notice of facts pertaining to a claim, those facts cannot be ignored 'merely because they are not reflected in such a certificate'.¹⁰⁹⁰

The other Australian jurisdictions

21.100 The other Australian jurisdictions have taken a different approach.

21.101 In the Northern Territory, Queensland, South Australia, Tasmania and Victoria, the status of children legislation provides generally that, for all the purposes of the law of that jurisdiction, the relationship between every person and the person's father and mother is to be determined irrespective of whether the father and mother are or have been married to each other and all other relationships shall be determined accordingly.¹⁰⁹¹ However, the legislation in each of these jurisdictions contains exceptions to this general principle. It provides that a personal representative is under no obligation to inquire as to the existence of a person whose interest in the estate arises solely from the provisions of that legislation. The legislation also protects a trustee or personal representative who, in distributing property, disregards the claim of a person whose interest in the estate arises solely from the provisions of the legislation if,

¹⁰⁸⁸ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1469.6] (at 20 February 2009).

¹⁰⁸⁹ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [92.13].

¹⁰⁹⁰ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1469.6] (at 20 February 2009).

¹⁰⁹¹ *Status of Children Act* (NT) s 4(1); *Status of Children Act 1978* (Qld) s 3(1); *Family Relationships Act 1975* (SA) s 6(1); *Status of Children Act 1974* (Tas) s 3(1); *Status of Children Act 1974* (Vic) s 3(1).

at the time of the distribution, the trustee or personal representative had no notice of the relationship on which the claim is based.¹⁰⁹²

21.102 Section 6 of the *Status of Children Act 1978* (Qld), which is typical of these provisions, provides:

6 Protection of executors, administrators and trustees

- (1) For the purposes of the administration or distribution of an estate or of property held on trust or of an application under Part 4 of the *Succession Act 1981* or for any other purposes, an executor, administrator or trustee is not under any obligation to inquire as to the existence of any person who could claim an interest in the estate or the property by reason only of the provisions of this Act.
- (2) Action shall not lie against an executor of the will or administrator or trustee of the estate of any person or the trustee under a document by any person who could claim an interest in the estate or property by reason only of any of the provisions of this Act to enforce a claim arising by reason of the executor, administrator or trustee having made any distribution of the estate or of the property held upon trust or otherwise acted in the administration of the estate or property held on trust disregarding the claims of that person where at the time of making the distribution or otherwise so acting the executor, administrator or trustee had no notice of the relationship on which the claim is based.

21.103 In Western Australia, the relevant provision is found in the administration legislation, but has the same effect as the more general provisions found in the status of children legislation in the other Australian jurisdictions. Section 47A of the *Administration Act 1903* (WA) provides:

47A Protection of executors, administrators and trustees

- (1) Notwithstanding—
 - (a) the provisions of section 12A,¹⁰⁹³ or
 - (b) the provisions of Part IX of the *Wills Act 1970*,¹⁰⁹⁴

¹⁰⁹² *Status of Children Act* (NT) s 7; *Status of Children Act 1978* (Qld) s 6; *Family Relationships Act 1975* (SA) s 12(1)(a); *Status of Children Act 1974* (Tas) s 6; *Status of Children Act 1974* (Vic) s 6.

¹⁰⁹³ *Administration Act 1903* (WA) s 12A deals with entitlement to participate in the distribution of an intestate's estate. Section 12A(1) provides:

12A Entitlement to participation in distribution of intestate estates

- (1) Where, after the coming into operation of the *Administration Act Amendment Act 1971*, any person dies intestate as respects all or any of his property, for the purpose of determining who is entitled to participate in the distribution of that part of his estate to which the intestacy applies the relationship between a child and his parents shall be determined irrespective of whether the parents are or have been married to each other, and all other relationships, whether lineal or collateral, shall be determined accordingly. (note omitted)

¹⁰⁹⁴ *Wills Act 1970* (WA) pt IX includes s 31 (Determination of relationships). Section 31, which applies to interests arising under a will, has a similar effect to s 12A(1) of the *Administration Act 1903* (WA), which is set out at note 1093 above.

for the purposes of the administration or distribution of any estate or any property no executor or administrator or trustee shall be under any obligation to inquire as to the existence of any person who could claim an interest in the estate or the property by virtue only of those provisions in so far as they confer any interest on illegitimate children or any person claiming through an illegitimate child.

- (2) No executor or administrator or trustee shall be liable to any such person as is referred to in subsection (1) in relation to any claim arising by reason of an executor or administrator or trustee having made any distribution of the estate or property held on trust, or otherwise acted in the administration of the estate or property held on trust, disregarding the interest of that person, if at the time he made the distribution or so acted the executor or administrator or trustee had no notice of the relationship on which the claim is based.
- (3) Nothing in this section shall prejudice the right of any person to follow the property, or any property representing it, into the hands of any person, other than a purchaser, who may have received it. (notes added)

21.104 It has been suggested that, although section 47A(1) and (2) 'may have served some useful purpose when introduced in 1971', the provisions now 'appear to discriminate against illegitimate children'.¹⁰⁹⁵

Discussion Paper

21.105 In the Discussion Paper, the National Committee did not raise the specific issue of whether the model provisions dealing with notices of intended distribution should deal with the claims of both creditors and beneficiaries.

21.106 The National Committee did, however, consider whether the model legislation should include a provision to the effect of section 92(3) of the *Probate and Administration Act 1898* (NSW), section 47A of the *Administration Act 1903* (WA) or section 6 of the *Status of Children Act 1978* (Qld) or whether it was more appropriate to deal with this issue in the status of children legislation of the jurisdictions.¹⁰⁹⁶

21.107 The National Committee's preliminary view was that the model legislation should not include a provision to the effect of section 92(3) of the *Probate and Administration Act 1898* (NSW) as it would place an undue burden on personal representatives.¹⁰⁹⁷ The National Committee preferred the approach taken by section 47A of the *Administration Act 1903* (WA), but

¹⁰⁹⁵ JJ Hockley, PR Macmillan and JC Curthoys, *Wills Probate & Administration WA* (LexisNexis online service) [1265.1] (at 21 February 2009).

¹⁰⁹⁶ *Administration of Estates Discussion Paper* (1999) QLRC 66–7; NSWLRC [8.35].

¹⁰⁹⁷ *Ibid*, QLRC 67; NSWLRC [8.36].

considered that such a provision was more appropriately located in status of children legislation.¹⁰⁹⁸

21.108 It therefore proposed that the model legislation should not contain a provision to the effect of section 92(3) of the *Probate and Administration Act 1898* (NSW) or section 47A of the *Administration Act 1903* (WA).¹⁰⁹⁹

Submissions

21.109 The majority of submissions that considered this issue agreed with the National Committee's preliminary view that the model legislation should not include a provision dealing with notice of claims by, or through, ex-nuptial children.¹¹⁰⁰

21.110 The National Council of Women of Queensland considered that the duty implicit in the New South Wales provision would impose a heavy obligation on personal representatives:¹¹⁰¹

A provision such as section 92(3) of the *Wills, Probate and Administration Act 1898* (NSW) could impose a heavy obligation on personal representatives of deceased estates and should not be incorporated into the proposed legislation. A provision to the effect of section 47A of the *Administration Act 1903* (WA) would be better located in legislation relating to the status and rights of children generally.

21.111 The Queensland Law Society agreed with the National Committee's preliminary view noting the efficiency of the provisions in the *Status of Children Act 1978* (Qld). It stated:¹¹⁰²

Reference is made to the *Status of Children Act 1978* (Qld) which appears to have achieved similar results to the Western Australian ... provisions but in a more efficient way.

21.112 An academic expert in succession law also agreed with the National Committee's proposal.¹¹⁰³ He considered that a person might be unaware that he or she was in fact the ex-nuptial child of the deceased, and could be distressed to receive a notice from a personal representative informing him or her of that fact. He therefore suggested that it was preferable simply to leave it

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ Ibid, QLRC 67; NSWLRC 99 (Proposal 28).

¹¹⁰⁰ Submissions 1, 3, 8, 12, 14.

¹¹⁰¹ Submission 3.

¹¹⁰² Submission 8.

¹¹⁰³ Submission 12.

to the ex-nuptial child to notify the personal representative of the child's status:¹¹⁰⁴

That empowers but does not threaten the child. If the child is under age then the child's mother or a next friend could notify the father's personal representative of the status of the child. That is, the Queensland precedent is sufficient.

21.113 The ACT Law Society also agreed that the model legislation should not impose a requirement on personal representatives to search for ex-nuptial children:¹¹⁰⁵

Our view is that a requirement to undertake a search of parentage or children search in respect of an estate where a Will exists serves no useful purpose. In respect of an estate where no Will exists, our view is that a search only in the jurisdiction in which the Grant is made may be insufficient, but are not convinced that a mandatory requirement to obtain the relevant search in all jurisdictions should be imposed.

21.114 However, the New South Wales Law Society suggested that dealing with this issue in the status of children legislation, rather than in the model legislation, could make it difficult for personal representatives if they, or the persons advising them, were not aware that relevant provisions were contained in the status of children legislation.¹¹⁰⁶

21.115 The Public Trustee of New South Wales disagreed with the National Committee's preliminary view, expressing a similar view to the New South Wales Law Society:¹¹⁰⁷

The model legislation should be a guide to the personal representative of the duties and responsibilities of that appointment. The model legislation is the best place for a prompt that an ex-nuptial child may need to be notified of a possible interest in the estate. Many personal representatives would not be aware of the status of children legislation.

The National Committee's view

Children

21.116 The National Committee has considered how the model legislation should deal with the interests of children (including ex-nuptial children) whose existence is unknown to the personal representative at the time the estate is distributed.

1104 Ibid.

1105 Submission 14.

1106 Submission 15.

1107 Submission 11.

21.117 As noted above, section 47A of the *Administration Act 1903* (WA) provides expressly that a personal representative or trustee is not obliged to inquire as to the existence of any person whose claim against an estate arises only by reason of certain specified legislative provisions that make the marital status of the person's parents irrelevant for the purpose of determining the person's entitlement under the intestacy rules or under a will. Similar provisions are also found in the status of children legislation in the Northern Territory, Queensland, South Australia, Tasmania and Victoria. Section 47A of the *Administration Act 1903* (WA) and the equivalent provisions in the status of children legislation in these jurisdictions also protect a personal representative or trustee who distributes an estate or property held on trust to the exclusion of an ex-nuptial child (or a person claiming through an ex-nuptial child) if, at the time of making the distribution, the personal representative or trustee does not have notice of the relationship on which the claim is based.¹¹⁰⁸

21.118 Although the National Committee expressed some preference in the Discussion Paper for this approach, on further consideration, it now considers that these provisions discriminate against ex-nuptial children. The claim of an ex-nuptial child, and of a person claiming through an ex-nuptial child, should not be treated any differently from the claim of any other beneficiary of whose existence a personal representative may be unaware. Under the proposal set out below, the model provision will enable a personal representative to advertise for the claims of unknown beneficiaries, including any children, and, if no claims are received, to distribute the estate having regard to the claims of which he or she has notice at that time.

21.119 Accordingly, the model legislation should not include a provision to the effect of section 47A of the *Administration Act 1903* (WA). Further, the equivalent provisions in the status of children legislation in the Northern Territory, Queensland, South Australia, Tasmania and Victoria¹¹⁰⁹ should be repealed. Although the National Committee has not generally made recommendations about provisions in other Acts, those provisions are directly concerned with the entitlement of beneficiaries and the liability of personal representatives and are the direct counterparts of section 47A of the *Administration Act 1903* (WA).

21.120 Further, the National Committee does not favour the inclusion in the model legislation of provisions to the effect of section 64(2) of the *Administration and Probate Act 1929* (ACT),¹¹¹⁰ section 60(7) of the *Trustee Act 1925* (NSW)¹¹¹¹ or section 92(3) of the *Probate and Administration Act 1898* (NSW),¹¹¹² which require certain searches to be undertaken or deem a personal

¹¹⁰⁸ See [21.100]–[21.103] above.

¹¹⁰⁹ See note 1092 above.

¹¹¹⁰ *Administration and Probate Act 1929* (ACT) s 64 is set out at [21.18] above.

¹¹¹¹ *Trustee Act 1925* (NSW) s 60 is set out at [21.22] above.

¹¹¹² *Probate and Administration Act 1898* (NSW) s 92 is set out at [21.26] above.

representative to have notice of the claims of certain persons. These provisions are not suitable for inclusion in the model legislation, where a personal representative's capacity to obtain a search identifying, in particular, the children of a deceased person, will vary from jurisdiction to jurisdiction, depending on the way in which information recorded in the registry of births, deaths and marriages in each jurisdiction can be searched.

21.121 Even in New South Wales, where section 50 of the *Births, Deaths and Marriages Registration Act 1995* (NSW) enables the personal representative of a deceased person to obtain a certificate certifying whether 'the deceased' is recorded as being the parent of any child, such a certificate would not assist the personal representative to identify beneficiaries who are described in the will as the children of some other person.

21.122 Further, the searches referred to in the ACT and New South Wales legislation will not necessarily reveal information from which all the children of a deceased person can be ascertained. The *Births, Deaths and Marriages Registration Act 1997* (ACT) and the *Births, Deaths and Marriages Registration Act 1995* (NSW) require the birth of a child born in the particular jurisdiction and the death of a person who dies in the particular jurisdiction to be registered under the relevant Act.¹¹¹³ However, where the child's birth or the person's death has occurred outside, respectively, the ACT or New South Wales, those events will not ordinarily be registered under those Acts.¹¹¹⁴ Although the National Committee considered the possibility of requiring a personal representative to conduct searches in each Australian jurisdiction, it was of the view that such a requirement would be too onerous and should not be included in the model legislation.

Separate provision for advertising for the claims of unknown or missing beneficiaries

21.123 The purpose of including a provision in the model legislation to deal with distribution after the giving of public notice is to allow estates to be administered efficiently, while at the same time protecting the interests of persons who have an interest in the estate. The National Committee has considered whether, in striking the appropriate balance between those competing interests, the same provision should deal with the claims of creditors and beneficiaries or whether different considerations might apply in relation to the claims of beneficiaries that would warrant dealing with their claims separately from the provision dealing with creditors and other claimants.

¹¹¹³ *Births, Deaths and Marriages Registration Act 1997* (ACT) ss 7(1), 33(2); *Births, Deaths and Marriages Registration Act 1995* (NSW) ss 13(1), 36(1).

¹¹¹⁴ In limited circumstances, the birth of a child born outside the ACT or outside New South Wales may be registered in those jurisdictions: see, for example, *Births, Deaths and Marriages Registration Act 1997* (ACT) s 7(2), (3) and *Births, Deaths and Marriages Registration Act 1995* (NSW) s 13(3), (4), which apply where a child is born outside Australia, but is to become a resident of, respectively, the ACT or New South Wales, and where a child is born in an aircraft during a flight to an airport in, respectively, the ACT or New South Wales.

21.124 With any provision requiring the giving of public notice there is a risk that the persons who may be affected by the notice may not become aware that such a notice has been given — either because they simply ‘miss’ seeing the published notice or because the notice appears in a publication that is not available in the jurisdiction where they reside. In the National Committee’s view, that risk is best addressed by the manner in which a personal representative must give notice of intended distribution in order to secure the protection afforded by the model provision.

21.125 The National Committee does not favour the inclusion of a separate provision for dealing with the claims of beneficiaries, as is the case under section 66 of the *Trustees Act 1962* (WA). It agrees with the concerns expressed by the Queensland Law Reform Commission in its 1971 Report on the law of trusts that section 66 of the Western Australian trustee legislation has the potential to encourage applications to the court by an overcautious representative.¹¹¹⁵ In view of the above proposal that the status of children provisions dealing with a personal representative’s liability to ex-nuptial children should be repealed, there could well be an even greater likelihood that personal representatives (especially professional executors and administrators, such as public trustees and trustee companies) would apply to the court for an order that they be at liberty to distribute the estate.

21.126 The preferred approach is for the model provision to deal with the claims of all types of claimants, including the claims of beneficiaries. This approach places the onus on a beneficiary of whose existence the personal representative is unaware to give notice of his or her claim to the personal representative. It thereby avoids the risk that estates will be unnecessarily burdened with the expense of court applications for liberty to distribute. In the National Committee’s view, it is appropriate that the court’s supervision of the distribution of estates should be invoked where there is a real issue, for example, concerning whether a missing beneficiary is alive or the identity of the persons comprising a particular class of beneficiary. However, the model legislation should not include a provision that encourages the routine making of applications for leave to distribute in order to obtain protection from liability to otherwise unknown claimants.

The scope of the general provision

21.127 In view of the decision to include a provision that deals with the claims of all claimants, the National Committee favours the wording of section 67(1) of the *Trusts Act 1973* (Qld), which refers to ‘any person having any claim, whether as creditor or beneficiary or otherwise’.

¹¹¹⁵

See [21.88] above.

THE MANNER IN WHICH NOTICE IS TO BE GIVEN

Existing legislative provisions

21.128 In New South Wales, a personal representative will have given notice in the required manner if the notice is given in accordance with the rules, namely:¹¹¹⁶

- if the deceased was resident at the date of his death in the State — in a newspaper circulating in the district where the deceased resided; or
- in any other case — in a Sydney daily newspaper.

21.129 In the other Australian jurisdictions, the possibility remains that, even where quite specific advertising requirements are set out in the legislation, additional notices may need to be given to satisfy the requirements of the legislation.

21.130 In the ACT, Queensland and Victoria, for example, although the trustee provisions refer to the manner of advertising that is necessary to obtain the protection afforded by the provisions, the provisions also require a trustee or personal representative to publish such other notices, if any, as would be directed by the court to be given in an administration action or suit (or words to that effect).¹¹¹⁷

21.131 In Tasmania, a trustee or personal representative must publish additional notices if he or she has reason to believe that any person who has a claim against the property or estate resides outside Tasmania.¹¹¹⁸

21.132 The Western Australian trustee legislation provides that a trustee must, in addition to publishing a notice in the *Gazette*, publish a notice in a newspaper circulating in each locality in which, in the opinion of the trustee, claims are likely to arise. Those localities must include each locality in which the deceased resided or carried on business at any time during the year preceding his or her death.¹¹¹⁹

¹¹¹⁶ See the discussion of this issue at [21.23]–[21.25] above.

¹¹¹⁷ See *Trustee Act 1925* (ACT) s 60(2); *Trusts Act 1973* (Qld) s 67(1); *Trustee Act 1958* (Vic) s 33(1)(a).

¹¹¹⁸ *Trustee Act 1898* (Tas) s 25A(3), which is discussed at [21.38] above.

¹¹¹⁹ *Trustees Act 1962* (WA) s 63(1), (4).

Submissions

21.133 As noted earlier, the majority of respondents supported the inclusion of a provision to the effect of section 67 of the *Trusts Act 1973* (Qld) or section 92 of the *Probate and Administration Act 1898* (NSW).¹¹²⁰

21.134 Two respondents commented specifically on the manner of giving notice under the proposed provision. Both respondents were critical of requirements to give notice by way of a newspaper or the Gazette.¹¹²¹

21.135 One respondent, an academic expert in succession law, commented:¹¹²²

Notice by way of an advertisement in a local newspaper should be abandoned as a general rule. It is not helpful and merely benefits local newspapers. It is a cost and delays administration. Appropriate notice to persons reasonably likely to be interested in the distribution is all that should be required.

21.136 Another respondent commented:¹¹²³

The requirement that the Government Gazette be used is unrealistic: who reads it? A local 'free' newspaper might suffice in a small locality.

The National Committee's view

21.137 In the National Committee's view, the manner in which notice must be given in order to secure the protection afforded by the model provision should be set out in the model legislation, rather than in court rules.

21.138 The model legislation should prescribe a procedure for the giving of notice, without which a personal representative cannot be protected from liability in respect of an unknown claim. This procedure should consist of a notice published:

- in a newspaper circulating throughout the jurisdiction and sold at least once a week;¹¹²⁴ or
- on a dedicated, publicly searchable section of the website of the Supreme Court of the jurisdiction.¹¹²⁵

¹¹²⁰ See [21.51] above.

¹¹²¹ Submissions 12, 13A.

¹¹²² Submission 13A.

¹¹²³ Submission 12.

¹¹²⁴ This requirement would be satisfied by publishing a notice in, for example, *The Australian*, *The Age*, *The Sydney Morning Herald*, *The Daily Telegraph* or *The Courier-Mail*.

¹¹²⁵ In Victoria, the facility is now available to give notice of intention to apply for a grant on the Supreme Court website: see [8.12]–[8.16] in vol 1 of this Report.

21.139 However, it is important that the localities in which the notice is to be given are referable to the localities in which claims are likely to arise. For this reason, the National Committee does not favour the New South Wales approach, as it enables a personal representative to be protected from liability solely on the basis of having advertised in either the district where the deceased resided or in a Sydney daily newspaper.

21.140 Accordingly, the model provision should additionally provide, as a condition of obtaining protection, that the personal representative has given such other notices as would be directed by the court in an administration action.¹¹²⁶ Depending on the circumstances of the case, that requirement may have the effect that a personal representative will need to give additional notices outside the jurisdiction if there is a likelihood that there are creditors or other claimants in other localities. Although the reference to notices that would be directed by the court in an administration action is necessarily somewhat open-ended, the National Committee considers that it is more capable of adapting to changing means of giving notice than a more prescriptive provision, such as section 25A(2) of the *Trustee Act 1898* (Tas) or section 63(1) and (4) of the *Trustees Act 1962* (WA). If a personal representative is unsure of what notices will satisfy this requirement, he or she may apply to the court for directions under the provision recommended by the National Committee for that purpose.¹¹²⁷

REQUIREMENTS OF THE PRESCRIBED NOTICE

Existing legislative provisions

21.141 The requirements in relation to the statutory notice that may be given differ from jurisdiction to jurisdiction.

21.142 In New South Wales¹¹²⁸ and the Northern Territory¹¹²⁹ the form of notice required is prescribed by the rules. In Queensland, notice of advertisement is sufficient if given in the approved form.¹¹³⁰ Similarly, in Victoria and Western Australia, the contents of the notice are deemed to be

¹¹²⁶ For similar requirements, see *Administration and Probate Act 1929* (ACT) s 64(1); *Trustee Act 1925* (ACT) s 60(2); *Administration and Probate Act* (NT) s 96(1); *Trustee Act* (NT) s 22(1); *Trusts Act 1973* (Qld) s 67(1); *Trustee Act 1936* (SA) s 29(1); *Trustee Act 1958* (Vic) s 33(1)(a).

¹¹²⁷ See Chapter 20 of this Report.

¹¹²⁸ *Trustee Act 1925* (NSW) s 60(1), (8); *Probate and Administration Act 1898* (NSW) s 92(1); *Supreme Court Rules 1970* (NSW) Pt 78 r 91, sch F, Form 121; *Uniform Civil Procedure Rules 2005* (NSW) r 55.14.

¹¹²⁹ *Administration and Probate Act* (NT) s 96; *Supreme Court Rules* (NT) r 88.88, Form 88ZF. There does not appear to be an equivalent form for the notice that may be given under s 22 of the *Trustee Act* (NT).

¹¹³⁰ *Trusts Act 1973* (Qld) s 67(2).

sufficient if given in the form contained in the schedule to the trustee legislation.¹¹³¹

Discussion Paper

21.143 In the Discussion Paper, the National Committee sought submissions on what the requirements of the prescribed notice should be.¹¹³²

Submissions

21.144 Only a small number of respondents addressed this issue.

21.145 The Bar Association of Queensland suggested that the requirements should be those contained in the approved form for section 67 of the *Trusts Act 1973* (Qld),¹¹³³ while the New South Wales Law Society commented that the prescribed form of notice in that jurisdiction appears to be adequate.¹¹³⁴

21.146 A former ACT Registrar of Probate considered that any prescribed notice should be left to the court rules.¹¹³⁵

21.147 The ACT Law Society stated that the notice should require all claims to be sent to the personal representative.¹¹³⁶

The National Committee's view

21.148 The model provision should include a provision to the effect of section 67(2) of the *Trusts Act 1973* (Qld) and provide that the notice of advertisement is sufficient if given in the prescribed or approved form (depending on the individual jurisdiction's practice in relation to forms).

PERIOD OF TIME FOR SUBMITTING CLAIM

Existing legislative provisions

21.149 In most Australian jurisdictions there is now a minimum period of time that must be allowed for a claimant to send in particulars of his or her claim.¹¹³⁷

¹¹³¹ *Trustee Act 1958* (Vic) s 33(1)(b), sch 2; *Trustees Act 1962* (WA) s 63(5), sch 2.

¹¹³² *Administration of Estates Discussion Paper* (1999) QLRC 144; NSWLRC 206.

¹¹³³ Submission 1.

¹¹³⁴ Submission 15.

¹¹³⁵ Submission 2.

¹¹³⁶ Submission 14.

¹¹³⁷ Submission 14.

The shortest period that is allowed is one month.¹¹³⁸ The longest period that must be allowed is not less than four months nor more than eight months.¹¹³⁹

21.150 A statutory minimum period for claimants to send in particulars of their claims creates a more certain situation for a personal representative than existed under the original English provision, where there was a risk that the period allowed by the personal representative might be held to be insufficient.¹¹⁴⁰

The National Committee's view

21.151 The model provision should provide that a personal representative may give notice, in accordance with the requirements of the provision, requiring persons to whom the provision applies to send particulars of their claim not later than the date fixed in the notice, which is to be a date at least two months after the publication of the notice.

PROTECTION OF PERSONAL REPRESENTATIVE

Existing legislative provisions

21.152 The various legislative provisions provide that, after the prescribed period, a trustee or personal representative may distribute the estate property to or among the persons entitled to it having regard only to the claims (in Queensland, Victoria and Western Australia, 'whether formal or not'¹¹⁴¹ and in the ACT and New South Wales, 'formal or otherwise'¹¹⁴²) of which he or she has notice, and is protected from liability in respect of a claim of which he or she did not have notice at the time of distribution.¹¹⁴³ Section 55 of the

¹¹³⁷ *Trustee Act 1925* (ACT) s 60(3) (two months); *Trustee Act 1925* (NSW) s 60(1), (8), *Probate and Administration Act 1898* (NSW) s 92(1), *Supreme Court Rules 1970* (NSW) Pt 78 r 91, Form 121, *Uniform Civil Procedure Rules 2005* (NSW) r 55.14 (one month); *Administration and Probate Act* (NT) s 96, *Supreme Court Rules* (NT) r 88.88, Form 88ZF (two months); *Trusts Act 1973* (Qld) s 67(1) (six weeks); *Trustee Act 1898* (Tas) s 25A(4) (not less than one month nor more than two months if the notice is published only in Tasmania; not less than two months nor more than four months if the notice is published in another Australian jurisdiction or in New Zealand; not less than four months nor more than eight months where the notice is published in any other place); *Trustee Act 1958* (Vic) s 33(1)(a) (two months); *Trustees Act 1962* (WA) s 63(3) (one month).

¹¹³⁸ This applies in New South Wales, Tasmania (where the notice is required to be published only in that State) and Western Australia: see note 1137 above.

¹¹³⁹ This applies in Tasmania if the notice is published other than in Tasmania, another Australian jurisdiction or New Zealand: *Trustee Act 1898* (Tas) s 25A(4)(b)(iii).

¹¹⁴⁰ See [21.8] and note 1015 above.

¹¹⁴¹ *Trusts Act 1973* (Qld) s 67(3); *Trustee Act 1958* (Vic) s 33(3); *Trustees Act 1962* (WA) s 63(1).

¹¹⁴² *Trustee Act 1925* (ACT) s 60(4); *Trustee Act 1925* (NSW) s 60(4).

¹¹⁴³ *Trustee Act 1925* (ACT) s 60(4), (5); *Administration and Probate Act 1929* (ACT) s 64(1), (3); *Trustee Act 1925* (NSW) s 60(4), (5); *Probate and Administration Act 1898* (NSW) s 92(1), (2); *Trustee Act* (NT) s 22(1); *Administration and Probate Act* (NT) s 96(1), (2); *Trusts Act 1973* (Qld) s 67(3); *Trustee Act 1936* (SA) s 9(1); *Trustee Act 1898* (Tas) s 25A(1); *Administration and Probate Act 1935* (Tas) s 55; *Trustee Act 1958* (Vic) s 33(3); *Trustees Act 1962* (WA) s 63(1).

Administration and Probate Act 1935 (Tas) refers specifically to ‘claims of which [the personal representative] then has notice, whether as a result of such claims being filed as provided by this Act or otherwise’.

The National Committee’s view

21.153 The model legislation should include a provision to the general effect of section 67(3) of the *Trusts Act 1973* (Qld). However, that provision should incorporate a reference, similar to that found in section 55 of the *Administration and Probate Act 1935* (Tas), to claims of which the personal representative has notice, whether as a result of claims submitted in response to the published notice or otherwise.

NOTICE OF CHARGES OVER LAND

Existing legislative provisions

21.154 The trustee provisions in Queensland, Tasmania and Victoria that deal with distribution after notice provide that nothing in those sections relieves the trustee or personal representative of any obligation to make searches or to obtain certificates of search similar to those that an intending purchaser would be advised to make or obtain.¹¹⁴⁴ These provisions are based on section 27 of the *Trustee Act 1925* (UK). In effect, they confirm that a personal representative may be taken to have notice of certain claims that could be ascertained by obtaining such searches as would be obtained by an intending purchaser.¹¹⁴⁵

The National Committee’s view

21.155 Although the model provision is to contain a number of features of section 67 of the *Trusts Act 1973* (Qld), it should not contain a provision to the effect of section 67(4)(b) of that Act.

¹¹⁴⁴ *Trusts Act 1973* (Qld) s 67(4)(b); *Trustee Act 1898* (Tas) s 25A(7); *Trustee Act 1958* (Vic) s 33(3)(b).

¹¹⁴⁵ *Halsbury’s Statutes of England and Wales* (4th ed) vol 48, 484:

Registration of any instrument or matter in any register kept under the *Land Charges Act 1972* or any local land charges register is deemed to constitute actual notice of such instrument or matter, and of the fact of such registration to all persons ... Where a land charge which secures money is created by a company ... registration under the *Companies Act 1985* ... is of the same effect as registration under the *Land Charges Act 1972* ... Accordingly, an intending purchaser would be advised to obtain official certificates of search under the *Land Charges Act 1972* ... and, if there is a company on the title, to search under s 408 of the 1985 Act ...

WHETHER IT SHOULD BE MANDATORY TO COMPLY WITH THE STATUTORY PROCEDURE FOR GIVING NOTICE OF INTENDED DISTRIBUTION

21.156 Under the current law, a personal representative is not required to give notice that he or she intends to distribute the estate. The incentive for a personal representative to comply with the statutory procedure is that it provides a way for a personal representative to obtain protection from liability to a person of whose claim the personal representative did not have notice when the estate was distributed. The Ontario Law Reform Commission has observed, however, that, since a creditor may still advance his or her claim against a beneficiary, 'there would be little purpose in advertising where the personal representative is also the sole beneficiary of the estate'.¹¹⁴⁶

Discussion Paper

21.157 In the Discussion Paper, the National Committee sought submissions on whether it should be mandatory for a personal representative to give various notices before distributing an estate or whether the model legislation should simply provide for a personal representative to be protected from liability to unknown claimants if the prescribed notices have been given.¹¹⁴⁷

Submissions

21.158 A number of submissions were of the view that the model legislation should not make it mandatory for a personal representative to give notice of intended distribution.¹¹⁴⁸

21.159 The Bar Association of Queensland and the Queensland Law Society were both of the view that the giving of notice of intended distribution should be at the discretion of the personal representative.¹¹⁴⁹ The Bar Association of Queensland commented:¹¹⁵⁰

It should not be mandatory for a personal representative to advertise an intention to distribute before doing so; and, it is sufficient if the legislation provides for the representative to be protected if prescribed notices are given: eg, *Trusts Act 1973* (Qld) s 67.

¹¹⁴⁶ Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 199.

¹¹⁴⁷ *Administration of Estates Discussion Paper* (1999) QLRC 144; NSWLRC 205.

¹¹⁴⁸ Submissions 1, 6, 7, 8, 12, 14, 15.

¹¹⁴⁹ Submissions 1, 8.

¹¹⁵⁰ Submission 1.

21.160 The Trustee Corporations Association of Australia expressed a similar view:¹¹⁵¹

The Association believes that it should not be mandatory for a personal representative who has obtained a grant, to give various notices before distributing the estate. The model legislation should simply provide for a personal representative to be protected from liability to certain claimants only if the prescribed notices have been given.

The personal representative should decide the extent to which he/she wishes to reduce their liability.

21.161 A former ACT Registrar of Probate also considered that the current requirements, which do not impose a mandatory requirement, provide adequate protection.¹¹⁵²

21.162 An academic expert in succession law pointed out that making advertising mandatory could result in unnecessary costs:¹¹⁵³

To insist on the insertion of advertisements is an unnecessary expense where there is no possibility of loss.

The National Committee's view

21.163 The purpose of the proposed model provision is to protect a personal representative who gives notice, in accordance with the provision, from liability in respect of a claim of which he or she did not have notice at the time of distribution. While there is an obvious incentive for a personal representative to publish notices in accordance with the provision, it should not be mandatory for a personal representative to do so. As noted above, there are circumstances, such as where the personal representative is also the sole beneficiary, where he or she might consider that the expense of doing so is not justified.

PROTECTION OF PERSON ADMINISTERING ESTATE WITHOUT A GRANT

Existing legislative provisions

21.164 In most jurisdictions, it appears that the provisions discussed above are not applicable to persons who are administering an estate without a grant.

21.165 In the ACT trustee legislation, 'trustee' is defined to include 'a legal representative', which in turn is defined to include an 'executor and administrator'.¹¹⁵⁴ 'Executor' is defined to mean 'the executor to whom probate

¹¹⁵¹ Submission 6.

¹¹⁵² Submission 2.

¹¹⁵³ Submission 12.

¹¹⁵⁴ *Trustee Act 1925* (ACT) s 2, dictionary (definitions of 'trustee' and 'legal representative').

has been granted, and includes an executor by right of representation'.¹¹⁵⁵ As a result, the ACT trustee provisions dealing with distribution after giving notice apply only to a personal representative who is acting under a grant.

21.166 This would also appear to be the case under the *Trustee Act 1925* (NSW), which contains similar definitions of 'trustee', 'legal representative' and 'executor'.¹¹⁵⁶ It has been suggested that the procedure under section 92 of the *Probate and Administration Act 1898* (NSW) is available only to a personal representative who is acting under a grant.¹¹⁵⁷

It seems clear that the protection of s 92 is not available to a personal representative who is administering an estate informally — without a grant.

21.167 In Tasmania, section 25A of the *Trustee Act 1898* (Tas) is expressed to apply to 'a trustee or an executor or administrator who has taken out representation of an estate'.¹¹⁵⁸

21.168 In Victoria, the trustee provision applies to 'trustees of a settlement or of a disposition on trust for sale or personal representatives, or persons who have made application to the registrar of probates for a grant of representation'.¹¹⁵⁹ The expression 'personal representatives' is defined to mean 'any personal representatives who have (whether as such or as applicants for a grant of representation) complied with the requirements of subsection (1) of this section ...'.¹¹⁶⁰

21.169 In the Northern Territory, section 22 of the *Trustee Act* (NT) applies to 'a trustee'. This term is defined as including 'a representative of a deceased person'.¹¹⁶¹ It is not clear whether this definition encompasses an executor who is administering the estate without a grant of probate.

21.170 In South Australia, the relevant provision applies to 'a representative or trustee'.¹¹⁶² The term 'representative' is defined to mean an 'executor or administrator, and includes the Public Trustee in cases where the Supreme Court has authorised him to administer the estate of a deceased person'.¹¹⁶³

¹¹⁵⁵ *Trustee Act 1925* (ACT) s 2, dictionary (definition of 'executor').

¹¹⁵⁶ *Trustee Act 1925* (NSW) s 5.

¹¹⁵⁷ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [92.12]. See *Supreme Court Rules 1970* (NSW) Pt 78 r 91 and sch F, Form 121, which provides the form of the Notice of Intended Distribution of Estate in New South Wales. That form requires the date on which probate or letters of administration were granted in New South Wales to be stated.

¹¹⁵⁸ *Trustee Act 1898* (Tas) s 25A(1).

¹¹⁵⁹ *Trustee Act 1958* (Vic) s 33(1)(a).

¹¹⁶⁰ *Trustee Act 1958* (Vic) s 33(3).

¹¹⁶¹ *Trustee Act* (NT) s 82.

¹¹⁶² *Trustee Act 1936* (SA) s 29(1).

¹¹⁶³ *Trustee Act 1936* (SA) s 4(1).

'Executor' is not defined but, given its ordinary meaning, would include an executor named in a will who has not formally been granted probate of the will. Accordingly, the South Australian provision appears to apply to an executor who is administering the estate of a deceased person without a grant of probate.

21.171 In Queensland, the relevant provision applies to 'a trustee or personal representative'.¹¹⁶⁴ The term 'personal representative' is defined as 'the executor, original or by representation, or the administrator for the time being of the estate of a deceased person'.¹¹⁶⁵ This definition is wide enough to include an executor who is administering an estate without a grant of probate.

21.172 Similarly, the Western Australian provision is expressed to apply to 'a trustee',¹¹⁶⁶ which is defined to include a 'personal representative',¹¹⁶⁷ which is in turn defined to mean 'the executor, original or by representation, or an administrator for the time being of the estate of a deceased person'.¹¹⁶⁸ This definition also appears to be wide enough to include an executor who is administering an estate without a grant of probate.¹¹⁶⁹

Discussion Paper

21.173 In the Discussion Paper, the National Committee considered whether the provisions allowing advertising prior to distribution should be available to persons acting without a grant.¹¹⁷⁰ The National Committee recognised that it was arguably in the interests of all parties for a person administering an estate, whether informally or pursuant to a grant, to be able to 'draw out' claims against the estate prior to distribution, rather than for those claims to be made, after the distribution of the estate, against a person who might not be able to satisfy them.¹¹⁷¹

21.174 The National Committee did not reach a preliminary view on this matter. It therefore sought submissions on whether a person who is administering an estate without a grant should be able to advertise his or her intention to distribute the estate by a certain date and, by doing so, be protected from claims made by persons of whose claims the person administering the estate did not have notice at the time of distribution.

¹¹⁶⁴ *Trusts Act 1973* (Qld) s 67.

¹¹⁶⁵ *Trusts Act 1973* (Qld) s 5(1).

¹¹⁶⁶ *Trustees Act 1962* (WA) s 63.

¹¹⁶⁷ *Trustees Act 1962* (WA) s 6(1).

¹¹⁶⁸ *Trustees Act 1962* (WA) s 6(1).

¹¹⁶⁹ See Law Reform Commission of Western Australia, *The Administration Act 1903*, Report, Project No 88 (1990) [4.3] note 3.

¹¹⁷⁰ *Administration of Estates Discussion Paper* (1999) QLRC 153; NSWLRC [10.33]–[10.34].

¹¹⁷¹ *Ibid.*

Submissions

21.175 All the submissions that addressed this issue agreed that a person administering an estate without a grant should be able to advertise prior to distribution and have the same protection as if he or she were administering the estate formally.¹¹⁷² In addition, the submissions were also of the view that the available protection should not depend on whether the person administering the estate was appointed by will as the executor.¹¹⁷³

21.176 The Bar Association of Queensland stated:¹¹⁷⁴

There is no compelling reason why a person administering without a grant should not be able to advertise an intention to distribute, and have protection from claims as a consequence.

The availability of this protection need not depend on whether the person was appointed by a will ...

21.177 The Trustee Corporations Association of Australia expressed a similar view:¹¹⁷⁵

The Association is of the view that where a person advertises that they intend to distribute an estate, protection should be afforded to such person whether they are administering the estate with or without a grant.

21.178 The ACT Law Society also agreed, noting that allowing this practice was unlikely to have an impact on the number of people who administer estates informally:¹¹⁷⁶

A personal representative has to obtain a grant and then advertise to get this protection. In obtaining the grant, the personal representative also has to give notice. However, personal representatives do not obtain a grant with a view to maximising protection, but rather so they can deal with the assets which require a grant. So, giving persons without a grant protection if they advertise is not likely to encourage avoidance of grants.

21.179 The ACT Law Society went on to reject any distinction being made between executors named in a will and other persons who were administering an estate:¹¹⁷⁷

This would require an investigation of whether the will was valid, the last will, etc. How could this work without the court having to carry out some of the steps for a grant of probate?

1172 Submissions 1, 6, 8, 14, 15.

1173 Ibid.

1174 Submission 1.

1175 Submission 6.

1176 Submission 14.

1177 Ibid.

21.180 The New South Wales Law Society generally agreed with the principle of allowing informal administrators to gain protection by the advertising procedure, but qualified its submission by suggesting a longer time frame for notification of claims following advertising:¹¹⁷⁸

the danger that legitimate creditors or claimants against the estate of a deceased may be prejudiced by a swift disposition of assets or realization and distribution of proceeds could, it is suggested be countered by the qualification that protection to the 'unauthorised administrator' should require an extended period for notification of claims following advertisement, possibly 6 or 12 months.

21.181 One respondent generally supported the removal of the distinction between informal administrators and persons administering estates pursuant to a grant:¹¹⁷⁹

All estate administrators and third parties dealing with estate administrators should have the same statutory protections. The preferred treatment of official estate administrations as against informal estate administrations would disappear.

...

The level of protection should be that currently given to an executor with probate who gives notice to interested persons of an intention to distribute the estate, and that given to a third party holding estate property who pays or transfers the property to an executor with probate.

The National Committee's view

21.182 The protection afforded by the model provision should not be restricted to a person who is administering an estate under a grant, but should be expressed to apply to a personal representative who is administering an estate and who complies with the requirements of that provision. By referring to a 'personal representative', the provision will apply not only to a personal representative to whom a grant of probate or administration has been made, but also to an executor appointed by will who has not sought probate of the will, but who has assumed the duties of office.

21.183 The National Committee is also aware that in many cases, particularly where the estate has a relatively small value, it may be possible for a person who does not have a grant and who has not been named as executor in the deceased's will, if any, to administer the deceased's estate effectively. An example of this situation is where a bank is willing to pay the amount standing to the credit of a deceased person to a person who would be entitled to obtain letters of administration of the deceased's estate (perhaps on the provision of an indemnity by that person), but who is in fact administering the estate

¹¹⁷⁸ Submission 15.

¹¹⁷⁹ Submission 13A.

informally. In this type of situation, it is to the advantage of the informal administrator, the beneficiaries and any creditors if the informal administrator is able to take steps to ascertain, before he or she distributes the estate, any claims that may be made against the estate. For this reason, the National Committee is of the view that it should also be possible for an informal administrator to give a notice of intended distribution and, on complying with the requirements outlined earlier in the chapter, to be protected from claims of which he or she does not have notice at the time of distribution.

RELATIONSHIP WITH TRUSTEE LEGISLATION PROVISIONS

21.184 A final issue that arises is the relationship between the model administration provision recommended above and the provisions contained in every Australian jurisdiction's trustee legislation dealing with notice of intended distribution by a trustee or personal representative.

The National Committee's view

21.185 In the National Committee's view, the model provision dealing with notices of intended distribution should provide expressly that the provision does not limit any protection that may be available to the personal representative under any other law. This will have the effect that a personal representative will be protected from liability in respect of a claim of which he or she did not have notice at the time of distribution if he or she has complied with the requirements of either the model provision or the provision in the relevant trustee legislation.

21.186 The National Committee considered whether the model administration provision should be the sole source of a personal representative's protection, but rejected that option. The National Committee considered that, for the model provision to be the sole source of protection, it would be necessary to exclude a personal representative from the scope of the trustee provisions; otherwise, a personal representative could be misled by the apparent protection afforded by the trustee provisions. However, if a personal representative was appointed as the trustee of a testamentary trust or had simply become a trustee given the stage of administration, there would be a potential for disputes as to whether the trustee's protection was to be determined according to the trustee legislation provision or the model administration provision.

21.187 In the National Committee's view, the simpler and more certain approach is for the model provision to apply to both personal representatives and trustees and to enable a personal representative or trustee to be protected if he or she complies with either the model administration provision or the relevant trustee legislation provision. As a corollary, the model provision will need to apply not only to property that forms part of the estate of a deceased

person,¹¹⁸⁰ but also to property that is held on trust for a beneficiary of the deceased person's estate.¹¹⁸¹

21.188 The National Committee also recommends that the trustee provisions should be amended to be consistent with the proposals in this chapter about the model administration provision dealing with notices of intended distribution.

RECOMMENDATIONS

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):¹¹⁸²

- (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;¹¹⁸³**
- (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**

¹¹⁸⁰ That is, property that has not yet been distributed by the personal representative.

¹¹⁸¹ The Administration of Estates Bill 2009 cl 413 defines 'estate, of a deceased person' to include 'property held on trust for a person because of the person's beneficial interest in the deceased's estate'. This is intended to capture:

- (a) property that formed part of the deceased's estate, but that has since been distributed and is now held on trust for a beneficiary of the deceased's estate; and
- (b) property that did not form part of the deceased's estate, but that is held on trust for a beneficiary of the deceased's estate because of the nature of the beneficiary's interest in the deceased's estate — for example, property acquired out of the proceeds of sale of property that was left to the beneficiary or a bonus share issue that is made because certain shares were left to, and are held on trust for, the beneficiary.

¹¹⁸² See [21.54]–[21.57], [21.123]–[21.127], [21.148], [21.163] above.

¹¹⁸³ See [21.184]–[21.187] above.

- (B) on a dedicated, publicly searchable section of the website of the Supreme Court of the jurisdiction;¹¹⁸⁴ 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;¹¹⁸⁵
- (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;¹¹⁸⁶ 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.¹¹⁸⁷

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.¹¹⁸⁸

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 21-1.¹¹⁸⁹

¹¹⁸⁴ See [21.137]–[21.140] above.

¹¹⁸⁵ See [21.151] above.

¹¹⁸⁶ See [21.153] above.

¹¹⁸⁷ See [21.184]–[21.187] above.

¹¹⁸⁸ See [21.182]–[21.183] above.

¹¹⁸⁹ See [21.188] above.

- 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.¹¹⁹⁰
- 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.¹¹⁹¹

¹¹⁹⁰ See [21.116]–[21.119] above.

¹¹⁹¹ See [21.119] above.

Chapter 22

The right to follow assets and the barring of claims

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THE RIGHT TO FOLLOW ASSETS THAT HAVE BEEN WRONGFULLY DISTRIBUTED

Introduction

22.1 As explained in Chapter 21, all Australian jurisdictions have provisions that protect a trustee or personal representative who complies with the requirements for giving notice of intended distribution and who distributes the property after the expiry of the required period having regard to claims of which he or she has notice at the time of distribution.

22.2 The provisions dealing with distribution after notice are accompanied in all jurisdictions by a further provision that generally provides that the provision protecting a trustee or personal representative does not affect the right of a person who has a claim against the estate to follow the property into the hands of a person to whom it has been distributed.¹¹⁹²

22.3 These provisions, like the provisions dealing with distribution after notice, have their origins in section 29 of *Lord St Leonards' Act*,¹¹⁹³ the relevant part of which provided that:¹¹⁹⁴

nothing in the present Act contained shall prejudice the Right of any Creditor or Claimant to follow the Assets or any Part thereof into the Hands of the Person or Persons who may have received the same respectively.

Remedies of an unpaid or underpaid creditor or beneficiary against a person to whom estate property has been distributed

22.4 In *Re Diplock*,¹¹⁹⁵ the English Court of Appeal held that, where a personal representative has wrongfully distributed an estate, an unpaid or underpaid creditor or beneficiary has two remedies available against a person to whom property has been wrongfully distributed.

22.5 First, the creditor or beneficiary has a personal action in equity (described as a claim '*in personam*'¹¹⁹⁶) against the person to whom property has been wrongfully distributed, regardless of whether the distribution was made as a result of a mistake of fact or of law.¹¹⁹⁷ The Court of Appeal

¹¹⁹² Note, however, that the Queensland and Western Australian provisions make modifications to the general equitable principles that apply to the recovery of property from a person to whom property has been wrongfully distributed: see [22.25] and [22.36]–[22.39] below.

¹¹⁹³ 22 & 23 Vict c 35. Section 29 is set out at [21.7] above.

¹¹⁹⁴ In *Clegg v Rowland* (1866) LR 3 Eq 368, Malins VC observed (at 372) that this aspect of s 29 of *Lord St Leonards' Act* was consistent with the doctrine of the court which had 'always provided for creditors who had not been satisfied, and reserved to persons who had claims the existence of which was not known at the time, the right to resort to those persons to whom the assets had been handed'.

¹¹⁹⁵ [1948] Ch 465; aff'd *Ministry of Health v Simpson* [1951] AC 251.

¹¹⁹⁶ Ibid 476.

¹¹⁹⁷ Ibid 502.

considered that:¹¹⁹⁸

as regards the conscience of the defendant upon which ... equity is said to act, it is *prima facie* at least a sufficient circumstance that the defendant ... has received some share of the estate to which he was not entitled.

22.6 The Court of Appeal held, however, that the claim of the creditor or beneficiary is subject to the qualification that, since the wrong payment was attributable to the 'blunder' of the personal representative, the person's claim must, in the first instance, be against the personal representative. The direct action against a person to whom a distribution has been incorrectly made should be limited to the amount that cannot be recovered from the personal representative.¹¹⁹⁹

22.7 Secondly, an unpaid or underpaid creditor or beneficiary may have a right to trace the money (described as a claim '*in rem*'¹²⁰⁰), provided that it is possible to identify or disentangle the money where it has been mixed with assets of the recipients.¹²⁰¹ This second remedy is distinguished from the personal action described above because it presupposes 'the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund'.¹²⁰² The Court of Appeal observed that:¹²⁰³

If, on the facts of any individual case, such continued existence is not established, equity is as helpless as the common law itself. If the fund, mixed or unmixed, is spent upon a dinner, equity, which dealt only in specific relief and not in damages, could do nothing. ... It is, therefore, a necessary matter for consideration in each case where it is sought to trace money in equity, whether it has such a continued existence, actual or notional, as will enable equity to grant specific relief.

22.8 In *Hagan v Waterhouse*,¹²⁰⁴ Kearney J of the Supreme Court of New South Wales held that the requirement in *Re Diplock* to exhaust available remedies against the personal representative before proceeding against the wrongly paid recipient applied only to a claim *in personam* and did not apply to a tracing claim.¹²⁰⁵

1198 Ibid 503.

1199 Ibid 503.

1200 Ibid 476.

1201 Ibid 536–7. See also JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [2710].

1202 [1948] Ch 465, 521.

1203 Ibid.

1204 (1991) 34 NSWLR 308.

1205 Ibid 370.

Existing legislative provisions

ACT, New South Wales, Northern Territory, South Australia

22.9 The trustee legislation in the ACT, New South Wales, the Northern Territory and South Australia provides that the section that protects a trustee or personal representative who distributes after giving notice does not prejudice the right of a person to follow property into the hands of a person to whom it was distributed.¹²⁰⁶

22.10 Section 60(6) of the *Trustee Act 1925* (NSW), which is typical of the various sections, provides:

60 Distribution after notice

...

- (6) Nothing in this section shall prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person who may have received the same.

22.11 Similar provisions are also contained in the administration legislation in the ACT, New South Wales and the Northern Territory.¹²⁰⁷ These provisions confirm that nothing in the provisions dealing with distribution after notice, the barring of claims, or the distribution of the estate after appropriating part of it to meet certain future liabilities, prejudices the right of a relevant claimant to follow estate assets into the hands of the persons to whom the assets have been distributed.

22.12 Section 95 of the *Probate and Administration Act 1898* (NSW), which is similar to the provisions in the ACT and the Northern Territory, is in the following terms:

95 Right to follow assets

Nothing contained in section 92, 93 or 94 prejudices the right of any beneficiary, creditor or other person who has a claim in respect of the assets of the estate of a testator or an intestate or the right of a lessor or grantor under a lease, agreement for a lease, conveyance or agreement for a conveyance referred to in section 94, or any person claiming under any such lessor or grantor, to follow those assets or any part of those assets into the hands of the persons or any of the persons among whom those assets or that part may have been distributed or who may have received those assets or that part.

22.13 The various provisions do not confer on an unpaid creditor, beneficiary or other claimant any particular right to follow or trace property; the provisions simply confirm that any right to follow or trace property (the second type of

¹²⁰⁶ *Trustee Act 1925* (ACT) s 60(6); *Trustee Act 1925* (NSW) s 60(6); *Trustee Act* (NT) s 22(3); *Trustee Act 1936* (SA) s 29(3).

¹²⁰⁷ *Administration and Probate Act 1929* (ACT) s 67; *Probate and Administration Act 1898* (NSW) s 95; *Administration and Probate Act* (NT) s 99.

remedy referred to by the English Court of Appeal in *Re Diplock*¹²⁰⁸) is not affected by the protection afforded to a personal representative who complies with the requirements regarding distribution after giving notice of intention to distribute.

22.14 The right to trace property may, however, be affected by other equitable principles. For example, a ‘claimant cannot recover property from a bona fide purchaser for value without notice of the breach of trust’.¹²⁰⁹ The wrongly paid recipient of the moneys may also be able to raise other equitable defences, such as laches or acquiescence.¹²¹⁰

Queensland

22.15 In Queensland, section 67(4)(a) of the *Trusts Act 1973* (Qld) provides:

67 Protection of trustees by means of advertisements

...

(4) Nothing in this section—

- (a) prejudices the right of any person to enforce (subject to the provisions of section 109)¹²¹¹ any remedy in respect of the person’s claim against a person to whom a distribution of any trust property or estate has been made ... (note added)

22.16 Because this provision refers to ‘any remedy’ that a person may have against a person to whom any trust property or estate has been distributed, it is clear that it intends to preserve (subject to the operation of section 109(3) of the *Trusts Act 1973* (Qld)) not simply the right to follow assets into the hands of a distributee, but also the personal action in equity that the person may have against the distributee.

22.17 The reference in section 67(4)(a) of the *Trusts Act 1973* (Qld) to section 109 of that Act confirms that the defence of change of position found in section 109(3) is available to a distributee of property against whom a claim is brought.

¹²⁰⁸ [1948] Ch 465. See [22.7] above.

¹²⁰⁹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.3060] (at 23 February 2009).

¹²¹⁰ For a discussion of the equitable defences of laches and acquiescence see HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [18.3070]–[18.3090], [18.5010]–[18.5070] (at 23 February 2009).

¹²¹¹ The effect of s 109 of the *Trusts Act 1973* (Qld) is considered at [22.20]–[22.29] below. Note that when the *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) commences, s 109 of the *Trusts Act 1973* (Qld) will be renumbered as s 113, and the reference in s 67(4)(a) of the *Trusts Act 1973* (Qld) to s 109 will change to s 113.

22.18 Section 109 of the *Trusts Act 1973* (Qld) provides:¹²¹²

109 Remedies for wrongful distribution of trust property

- (1) In any case where a trustee has wrongfully distributed trust property any person who has suffered loss by that distribution may enforce the same remedies against the trustee and against any person to whom the distribution has been made as in the case where a personal representative has wrongfully distributed the estate of a deceased person.
- (2) Except by leave of the court, no person who has suffered loss by reason of the wrongful distribution of trust property or of the estate of a deceased person may enforce any remedy against any person to whom such property or estate has been wrongfully distributed until the person has first exhausted all remedies which may be available to the person against the trustee or personal representative.
- (3) Where any remedy is sought to be enforced against a person to whom a wrongful distribution of trust property or the estate of a deceased person has been made and that person has received the distribution in good faith and has so altered the person's position in reliance on the propriety of the distribution that, in the opinion of the court, it would be inequitable to enforce the remedy, the court may make such order as it considers to be just in all the circumstances.

22.19 A provision to the effect of section 109 was recommended by the Queensland Law Reform Commission in its 1971 Report that led to the enactment of the *Trusts Act 1973* (Qld).¹²¹³

22.20 Section 109(1) ensures that 'the remedies for the wrongful distribution of trust property are the same as in the case of the wrongful distribution of a deceased estate'.¹²¹⁴

22.21 Section 109(2) generally reiterates the requirement enunciated in *Re Diplock*¹²¹⁵ that a person must exhaust his or her remedies against the personal representative before pursuing the recipient of the property that has been wrongfully distributed.¹²¹⁶ Ford and Lee note that section 109(2) mitigates the harshness of that rule by enabling the court to give leave to a claimant to enforce his or her remedies against the recipient without first exhausting his or

¹²¹² Note that when the *Criminal Proceeds Confiscation and Other Acts Amendment Act 2009* (Qld) commences, s 109 of the *Trusts Act 1973* (Qld) will be renumbered as s 113.

¹²¹³ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 74, 141.

¹²¹⁴ Ibid. The Commission made this recommendation to remove any doubt raised by the speech of Lord Simonds in *Ministry of Health v Simpson* [1951] AC 251, 265–6 that the action *in personam* referred to in *Re Diplock* was available to a person if the distribution was made of property in a deceased estate, but was not necessarily available if the distribution was made of trust property generally: at 73–4.

¹²¹⁵ [1948] Ch 465, 503.

¹²¹⁶ See [22.6] above.

her remedies against the trustee or personal representative.¹²¹⁷ It has been suggested that a court would exercise its power to allow a beneficiary to pursue a recipient before pursuing the personal representative 'where the representative is bankrupt or where the recipient still has the legacy paid or transferred, or its traceable product'.¹²¹⁸

22.22 Although the Supreme Court of New South Wales held in *Hagan v Waterhouse*¹²¹⁹ that the requirement to exhaust all remedies against the trustee before proceeding against the wrongly paid recipient applied only to a person's claim *in personam* and not to a tracing claim, it is unclear whether this would also be the position under section 109(2) of the *Trusts Act 1973* (Qld) or whether, because section 109(2) refers to 'any remedy', the requirement also applies to a tracing claim, even though that claim cannot be brought against the trustee who has parted with the property.

22.23 In any event, if a trustee or personal representative distributed property after complying with the requirements of section 67 of the *Trusts Act 1973* (Qld), a person having a claim of which the trustee or personal representative did not have notice at the time of distribution would not have an action against the trustee or personal representative¹²²⁰ and would not, therefore, be required to bring proceedings against the trustee or personal representative before bringing proceedings against the wrongly paid recipient.

22.24 Ford and Lee have analysed the basis for the requirement in *Re Diplock* for a claimant to exhaust all available remedies against the personal representative before proceeding against the wrongly paid recipient. In light of developments in the law since *Re Diplock*, they have suggested that the law should now enable a claimant to pursue the personal representative and the wrongly paid recipient at the same time:¹²²¹

the reason given for it [the requirement to exhaust all remedies against the personal representative] by the court is illuminating. The court had mentioned that a personal representative could not recover at law moneys paid under a mistake of law (at 502–3). Their Lordships then said at 503–504:

In our judgment the absence or exhaustion of the beneficiary's right to go against the wrongdoing executor or administrator ought properly to be regarded as the justification for calling upon equity to come to the aid of the law by providing a remedy which would otherwise be denied to the party who has been deprived of that which is justly his.

¹²¹⁷ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.7010] (at 23 February 2009).

¹²¹⁸ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [10.200].

¹²¹⁹ (1991) 34 NSWLR 308. See [22.8] above.

¹²²⁰ This is because of the protection afforded to the trustee or personal representative by s 67(3) of the *Trusts Act 1973* (Qld).

¹²²¹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.5010] (at 23 February 2009).

That is, in an action brought in equity against recipients, equity would reject the defence that the moneys were paid by the trustee under a mistake of law; but the price for that was that the personal remedies against the trustees should first be exhausted. But since *Diplock* the defence of mistake of law has been rejected by the High Court of Australia in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; 66 ALJR 768 in an action for money had and received; and therefore a Diplock trustee can now recover directly from the recipient: one could hardly argue otherwise. In this context the rule applied in *Re Diplock* has been overtaken by an improved understanding of the law. It is therefore submitted that the law should now permit the beneficiaries to pursue both trustee and recipient at the same time ...

22.25 Section 109(3) of the *Trusts Act 1973* (Qld) creates a statutory defence of change of position where the recipient has received the property in good faith and has so altered his or her position in reliance on the propriety of the distribution that the court would consider it inequitable to enforce the remedy against the person. In those circumstances, the court may make such order as it considers to be just in all the circumstances. In *Ministry of Health v Simpson*,¹²²² the House of Lords, in the appeal from the Court of Appeal's decision in *Re Diplock* in relation to the claim *in personam*, effectively excluded any defence of change of position.¹²²³ The Queensland Law Reform Commission considered the denial of the defence of change of position to be 'regrettable', and recommended that the defence be available to an incorrectly paid recipient of property.¹²²⁴

22.26 Commentators on trusts law are divided in their opinion as to whether, in the absence of a statutory provision, change of position is now generally available as a defence to a claim against a person to whom trust property has been wrongfully distributed.

22.27 Ford and Lee consider that the decisions in *Re Diplock* and *Ministry of Health v Simpson*, in which the courts were reluctant to allow a recipient to plead change of position, 'belong to a time when certain issues of the law remained unresolved'.¹²²⁵ They suggest that the defence of change of position embodied in section 109(3) of the *Trusts Act 1973* (Qld) anticipated subsequent developments in the law, but that the section now reflects what is probably a narrower defence than has been recognised by the House of Lords in England:¹²²⁶

¹²²² [1951] AC 251.

¹²²³ Ibid 276 (Lord Simonds).

¹²²⁴ Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No 8 (1971) 74.

¹²²⁵ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.6010] (at 23 February 2009).

¹²²⁶ Ibid [17.7010] (at 23 February 2009).

The section is restricted to the case where there has been reliance, foreshadowing the justification referred to in *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ... ; but it is narrower than that now acknowledged in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 ...

22.28 In their view, section 109(3) of the *Trusts Act 1973* (Qld) answered difficulties that were believed to exist in the law at the time it was enacted. They suggest, however, that this provision may no longer be needed:¹²²⁷

the law of mistaken payments has moved on, as has the law concerning change of position, so that these provisions, while they may still be of procedural value, are no longer needed.

22.29 In contrast, the authors of *Jacobs' Law of Trusts in Australia* express a more cautious view about whether the defence of change of position is available to a party to whom trust property has been wrongfully distributed:¹²²⁸

It remains to be seen whether the principle, if there be one, be recognised in Australia, and, if so, what form that recognition will take.

Tasmania

22.30 In Tasmania, section 25A(7) of the *Trustee Act 1898* (Tas) provides:

25A Distribution of property or estate after notice by trustee or executor or administrator

...

- (7) Where a trustee distributes property subject to a trust or an executor or administrator distributes an estate as provided by this section, nothing in this section prejudices the right of any person to follow the property or estate or any part thereof into the hands of any other person other than a purchaser who has received it, or frees the trustee, executor, or administrator from any obligation to make searches similar to those which an intending purchaser would be advised to make.

22.31 Section 25A(7) provides that it does not preserve a person's right to follow property where the property has passed into the hands of a purchaser. This is similar to the equitable rule that property cannot be traced to a purchaser for value without notice,¹²²⁹ although the Tasmanian provision refers simply to a 'purchaser'.

22.32 Section 57 of the *Administration and Probate Act 1935* (Tas) also deals with the right to follow assets. It provides:

¹²²⁷ Ibid (at 23 February 2009).

¹²²⁸ JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (7th ed, 2006) [2712].

¹²²⁹ See [22.14] above.

57 Rights of claimants

Save as respects such release, nothing herein contained shall prevent any legatee, next-of-kin, or other person, having any claim against the estate, from taking such proceedings as he might have taken if this Act had not been passed; and nothing herein contained shall prevent an executor or administrator from declaring the estate in his hands insolvent.

Victoria

22.33 In Victoria, section 33(3)(a) of the *Trustee Act 1958* (Vic) provides, in part:

33 Protection by means of advertisements

- (3) ... but nothing in this section shall—
 - (a) prejudice the right of any person to follow the property, or any property representing the same, into the hands of any person, other than a purchaser, who has received it; ...

22.34 Section 43 of the *Administration and Probate Act 1958* (Vic), which also deals with the right to follow property, provides:

43 Right to follow property etc.

- (1) An assent or conveyance by a personal representative to a person other than a purchaser shall not prejudice the rights of any person to follow the property to which the assent or conveyance relates or any property representing the same into the hands of the person in whom it is vested by the assent or conveyance or of any other person (not being a purchaser) who may have received the same or in whom it may be vested.
- (2) Notwithstanding any such assent or conveyance the Court may on the application of any creditor or other person interested—
 - (a) order a sale exchange mortgage charge lease payment transfer or other transaction to be carried out which the court considers requisite for the purpose of giving effect to the rights of the persons interested;
 - (b) declare that the person not being a purchaser in whom the property is vested is a trustee for those purposes;
 - (c) give directions respecting the preparation and execution of any conveyance or other instrument or as to any other matter required for giving effect to the order;
 - (d) make any vesting order or appoint a person to convey in accordance with the provisions of the *Trustee Act 1958*.
- (3) This section shall not prejudice the rights of a purchaser or a person deriving title under him.

Western Australia

22.35 In Western Australia, section 63(2) of the *Trustees Act 1962* (WA) ensures that the protection afforded to a trustee or personal representative who distributes property after complying with the requirements of section 63 does not affect any remedy that a person may have against the wrongly paid recipient of the property. Section 63(2) provides:

63 Deceased estate, advertising for claims against, trustees' protection

...

- (2) Nothing in this section affects any remedy that a person may have under section 65 or any right or remedy available to him against any person other than the trustee, including any right that he may have to follow the property and any money or property into which it is converted.

22.36 However, section 65 of the *Trustees Act 1962* (WA) has the effect of modifying the remedies that may be enforced against a person to whom trust or estate property has been wrongfully distributed. Section 65 provides:

65 Deceased estate, claims made after distribution of, tracing, following assets

- (1) This section applies where a trustee has distributed any assets forming part of the estate of a deceased person or subject to a trust, and there is nothing in any Act to prevent the distribution from being disturbed.
- (2) Where this section applies, the Court may make an order on a claim, being—
- (a) an application under the *Inheritance (Family and Dependents Provision) Act 1972*;
 - (b) a claim to which section 63 applies; or
 - (c) a claim by a person to be a beneficiary under the will, or to be entitled on the intestacy, of the deceased person, or to be beneficially interested under the trust;

any of which application or claims are, hereinafter in this section, called “the claim”.

- (3) An order under subsection (2) may provide that—
- (a) any person to whom any assets, to which the section applies, were distributed, or his personal representative, shall pay to the person making the claim or to the trustee a sum not exceeding the value of those assets; or
 - (b) any person, who has received, otherwise than in good faith and for valuable consideration, any interest in any assets, to which this section applies, from the person to whom they were

distributed or his personal representative, shall pay to the person making the claim or to the trustee a sum not exceeding the value of that interest;

and for the purpose of giving effect to that order the Court may make such further order as it thinks fit.

- (4) The remedies given to any person by this section are in addition to all other rights and remedies (if any) available to that person, and nothing, other than the provisions of subsection (7) and (8), restricts those other rights and remedies.
- (5) Subject to the provisions of subsection (6), an order under this section shall not be made by the Court—
 - (a) where the claim is an application for an order under the *Inheritance (Family and Dependents Provision) Act 1972*, unless that application is made within the time permitted by that Act; or
 - (b) in the case of any other claim, unless the application for that order is made within the time within which the applicant could have enforced his claim in respect of the estate, without special leave of the Court, if the assets had not been distributed;

but, notwithstanding the foregoing provisions of this subsection, the order may be made, with the special leave of the Court, on application made within the time within which the applicant could have enforced his claim, in respect of the estate, with special leave of the Court, if the assets had not been distributed.

- (6) Notwithstanding anything to the contrary in subsection (5), where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust, and any person who is entitled to apply for an order under this section has, within the time specified in that subsection, applied to the Court for an order on the claim and that person was not aware of the distribution at the time when he made that application, the Court may hear an application by that person under this section after the expiration of the period prescribed by subsection (5), if it is made within 6 months after the date on which the person first became aware of the distribution, and may make an order accordingly.
- (7) Notwithstanding any rule of law to the contrary, where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust—
 - (a) a person may exercise the remedies (if any) given to him by this section and all other rights and remedies available to him (including all rights that he may have to follow assets and any money or property into which they have been converted) without first exercising the rights and remedies (if any) available to him against the trustee in consequence of the making of the distribution; and
 - (b) a person shall not exercise any remedy that may be available to him against the trustee in consequence of the making of the

distribution, until he has exhausted all other remedies available to him, whether under this section or in equity or otherwise.

- (8) Where a trustee has made a distribution of any assets forming part of the estate of a deceased person or subject to a trust, relief (whether under this section or in equity or otherwise) against any person other than the trustee or in respect of any interest of any such person in any assets so distributed and in any money or property into which they have been converted, shall be denied, wholly or in part, if the person from whom relief is sought received the assets or interest in good faith and has so altered his position in reliance on his having an indefeasible interest in the assets or interest, that, in the opinion of the Court, having regard to all possible implications in respect of the trustee and other persons, it is inequitable to grant relief or to grant relief in full.
- (9) Without prejudice to the provisions of subsection (8), an order under this section may provide that any payment directed to be made by that order shall be made by periodic payments or by instalments, and the Court may fix the amount or rate thereof in the order, and may from time to time vary, suspend or discharge the order for cause shown, as the Court thinks fit.

22.37 Section 65(1)–(6) enables the court to make an order that a person to whom assets have been distributed, or who has received any interest in assets, pay to the person making the claim a sum not exceeding the value of those assets or the value of that interest. Ford and Lee note that:¹²³⁰

The Western Australian provisions are not an attempt merely to modify the law on this subject. They confer a new, statutory right of action upon the claimant, additional to the claimant's remedies at common law and in equity.

22.38 Section 65(7) reverses the effect of *Re Diplock* concerning the order in which an unpaid claimant must pursue the relevant parties. A claimant is not obliged to exhaust all claims against the trustee or personal representative who made the distribution before enforcing a remedy against a recipient of the property. On the contrary, a claimant must not exercise any remedy that he or she may have against the trustee or personal representative in respect of the distribution until he or she has exhausted all other available remedies. This difference of approach has been said to stem 'from a perception that a recipient receives an unjustifiable windfall if the trustee is first pursued'.¹²³¹

22.39 Section 65(8), although worded differently from section 109(3) of the *Trusts Act 1973* (Qld), also creates a statutory defence of change of position. Where relief is sought against a person, other than the trustee or personal representative, in respect of assets that have been distributed, relief must be denied, wholly or in part, if the person from whom relief is sought received the assets or interest in good faith and has so altered his or her position in reliance

¹²³⁰ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [17.7030] (at 24 February 2009).

¹²³¹ *Ibid* (at 24 February 2009).

on having an indefeasible interest in the assets or interest that, in the opinion of the court, it would be inequitable to grant relief in full or in part.

Discussion Paper

22.40 In the Discussion Paper, the National Committee expressed the preliminary view that the provisions that are designed to protect a personal representative who distributes in accordance with the requirements of the legislation should not prevent a beneficiary or creditor who cannot claim against the personal representative from following the assets into the hands of persons who may have received them.¹²³² However, as the National Committee considered that section 95 of the *Probate and Administration Act 1898* (NSW) was simply declaratory of the law,¹²³³ it proposed that the model legislation should not include a provision to that effect.¹²³⁴

22.41 In addition, the National Committee sought submissions on whether:¹²³⁵

- the model legislation should include a provision to the effect of section 109 of the *Trusts Act 1973* (Qld); and
- a person should have to exhaust remedies against the trustee before proceeding against a person to whom a distribution had been made.

Submissions

22.42 The Queensland and ACT Law Societies agreed with the National Committee's proposal that a provision to the effect of section 95 of the *Probate and Administration Act 1898* (NSW) should not be included in the model legislation.¹²³⁶

22.43 However, the New South Wales Law Society was of a different view noting that:¹²³⁷

The inclusion of a provision to the effect of section 95 of the [*Probate and Administration Act 1898* (NSW)] is seen as a harmless but helpful statement of the law.

¹²³² *Administration of Estates Discussion Paper* (1999) QLRC 235; NSWLRC [16.10].

¹²³³ *Ibid*, QLRC 236; NSWLRC [16.10].

¹²³⁴ *Ibid*, QLRC 236; NSWLRC 336 (Proposal 81).

¹²³⁵ *Ibid*, QLRC 236; NSWLRC 336.

¹²³⁶ Submissions 8, 14. *Probate and Administration Act 1898* (NSW) s 95 is set out at [22.12] above.

¹²³⁷ Submission 15.

22.44 The Public Trustee of New South Wales also disagreed with the National Committee's proposal:¹²³⁸

As the model legislation should assist all parties interested in or affected by any estate activity, it seems sensible to incorporate this right to follow the assets.

22.45 The submissions that addressed the further issues of whether the model legislation should include a provision to the effect of section 109 of the *Trusts Act 1973* (Qld),¹²³⁹ and whether a person should be required to exhaust his or her remedies against the trustee or personal representative before proceeding against a person to whom the property was wrongfully distributed, expressed a range of views.

22.46 The Trustee Corporations Association of Australia supported a provision to the general effect of section 109, including section 109(2). It commented:¹²⁴⁰

The model legislation should contain a provision along the lines of section 109 of the *Trusts Act 1973* (Qld) which will set out the manner in which a person who suffers loss through the wrongful distribution of property by a trustee or personal representative, is to seek to recover compensation for that loss.

... The Association believes that action in the first instance should be against the trustee. However, the Association believes that the court should, in certain circumstances, have a discretion to allow action to be taken against beneficiaries prior to exhausting all remedies against the trustee. This in fact appears to be envisaged by section 109(2) of the *Trusts Act 1973* (Qld).

22.47 The Bar Association of Queensland agreed that a provision to the general effect of section 109 should be included, but disagreed with the requirement in section 109(2) that a claimant must ordinarily exhaust his or her rights against the trustee before proceeding against a wrongly paid recipient.¹²⁴¹

A provision to the effect of s 109 of the *Queensland Trusts Act 1973* should be considered for inclusion in the model legislation, if only to alert beneficiaries to tracing remedies which may arise in the course of administration of estates.

The provision of s 109(2), requiring a person to exhaust remedies against the trustee before following the beneficiaries, is not logical. If a person who has suffered loss through wrongful distribution knows the property or estate wrongfully distributed has passed from the trustee there is no good reason he/she should have to sue the trustee to exhaustion (eg, for damages — see *Queensland Succession Act 1981*, s 52(2)).

1238 Submission 11.

1239 *Trusts Act 1973* (Qld) s 109 is set out at [22.18] above.

1240 Submission 6.

1241 Submission 1.

22.48 The ACT Law Society also supported the inclusion of a provision to the general effect of section 109, but suggested that the requirement for a claimant to first exhaust remedies against the trustee was questionable and that it raised the cost of litigation:¹²⁴²

Our view is that it would be better to allow beneficiaries to be joined into the action.

22.49 The Queensland and New South Wales Law Societies did not support the inclusion of a provision to the effect of section 109 of the *Trusts Act 1973* (Qld); nor did they support a requirement that remedies must be exhausted against a trustee prior to any other action.¹²⁴³ The Queensland Law Society considered that the inclusion of such a provision was superfluous, 'as the common law provides a right of redress against a trustee who has wrongfully distributed estate property and against the persons to whom it has been wrongfully distributed'. It also considered that section 109(2) could not be supported in principle.¹²⁴⁴

22.50 An academic expert in succession law was of the view that it should be possible for a claimant to bring an action against both the trustee and the recipient at the same time, but considered that these were matters that should be addressed in trustee legislation, rather than in administration legislation:¹²⁴⁵

Re Diplock shows that persons to whom assets of a deceased estate have been distributed by mistake are accountable *in personam* for what they received. Their liability is personal and subject to limitation rules. If the assets distributed can be traced, then the claimant is in a better position as against other creditors of the recipient and is not subject to a limitation period. Although s 95 of the NSW *Wills, Probate and Administration Act* only refers to a right to trace assets it cannot be assumed that it excludes a right to bring a personal *Diplock* action.

The problem is that if the beneficiary brings action against the trustee for wrongful distribution the trustee must pay up and the recipient keeps the property wrongfully distributed. The trustee has no rights of recourse against the recipient. That seems to be hard on the trustee. On the other hand if the assets can be traced the beneficiary can recover them from the distributee and the defaulting trustee gets off scot free. Nowadays the distributee has the defence of change of position — *David Securities Pty Ltd v CBA* (1992) 175 CLR 353; ... and see *Ford & Lee Trusts* para [17350] — a defence inserted in the Queensland s 109(3) at a time when that defence was not clearly available. If the trustee cannot meet the personal claim then the beneficiary can pursue the recipient *in personam*. The situation is untidy. Queensland's s 109 allows the court to allow the beneficiary to pursue the recipient without first exhausting all remedies against the trustee. But this might be seen as an ad hoc provision. The Western Australian legislation ... provides the opposite.

1242 Submission 14.

1243 Submissions 8, 15.

1244 Submission 8.

1245 Submission 12.

A final *procedural* solution remains to be worked out. My view is that the beneficiary should be able to bring action against both trustee and recipient at the same time and the court should be able to make such order as it thinks fit, including one which apportions liability between trustee and recipient. It would have regard to such things as whether the assets are still traceable, whether it would be unfair to burden the trustee or the recipient with the entire liability, whether the recipient has changed position and whether either should be excused or partly excused etc.

However, one thing is clear and that is that this is no part of the law of administration of deceased estates. They belong in the law of trusts and lie outside the National Committee's remit.

The National Committee's view

Inclusion of a provision to preserve remedies against a person to whom property has been wrongfully distributed

22.51 In Chapter 21 of this Report, the National Committee has recommended that the model legislation should include a provision that protects a personal representative or trustee¹²⁴⁶ who gives certain notices before distributing an estate or trust property and who then distributes the estate or property having regard only to those claims of which he or she has notice at the time of distribution. Because the purpose of that provision, and the existing provisions that have a similar effect, is to facilitate the efficient administration of estates, the provisions only affect the rights of the claimant as against the personal representative or trustee.

22.52 The model legislation should therefore include a provision to the effect of section 67(4)(a) of the *Trusts Act 1973* (Qld), which confirms that the provisions dealing with distribution after notice do not affect the right of any person who has a claim against the estate to enforce 'any remedy' against a person to whom the trust property or estate has been distributed. The reference to 'any remedy' in that section ensures that a claimant's right to trace the money or property (the *in rem* claim) and the personal action in equity (the *in personam* claim) are both unaffected by the section. For this reason, the National Committee prefers section 67(4)(a) of the *Trusts Act 1973* (Qld) to section 95 of the *Probate and Administration Act 1898* (NSW), which refers to the narrower 'right to follow assets'.

22.53 The model provision should make it clear, however, that a person's right to enforce any remedy against the person to whom the wrongful distribution has been made is subject to:

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See [21.184]–[21.188] for a discussion of the application of the model provisions to trustees.

- the model provision, based on section 109(3) of the *Trusts Act 1973* (Qld),¹²⁴⁷ creating the defence of change of position;¹²⁴⁸ and
- any other defence that may be available, under an Act or at law or in equity, to the person to whom the wrongful distribution has been made.

Inclusion of provisions dealing generally with remedies for the wrongful distribution of property

22.54 The National Committee is of the view that the model legislation should include provisions dealing generally with a claimant's remedies where a personal representative or trustee wrongfully distributes the estate of a deceased person or property held on trust for the beneficiary of the estate of a deceased person.¹²⁴⁹ For the same reasons expressed in Chapter 20 of this Report, the model provisions should apply to both personal representatives and trustees.¹²⁵⁰

22.55 The model legislation should include a provision to the effect of section 109(1) of the *Trusts Act 1973* (Qld). As explained earlier in this chapter, that provision was recommended by the Queensland Law Reform Commission in its 1971 Report to remove any doubt raised by the speech of Lord Simonds in *Ministry of Health v Simpson*¹²⁵¹ that the *in personam* action referred to in *Re Diplock*¹²⁵² might not be available if the distribution related to trust property, rather than to the estate of a deceased person.¹²⁵³

22.56 Subject to the following modifications, the model legislation should also include provisions based on section 109(2) of the *Trusts Act 1973* (Qld).

22.57 First, section 109(2) of the *Trusts Act 1973* (Qld) currently provides that, except with the leave of the court, a claimant may not enforce a remedy against the person to whom the property has been wrongfully distributed until he or she has first exhausted all remedies that may be available against the trustee or personal representative. The National Committee considers that requirement to be an unnecessary restriction on a claimant's rights. It therefore recommends that the model legislation should instead provide that a person

¹²⁴⁷ As noted earlier, s 109(3) of the *Trusts Act 1973* (Qld) creates a statutory defence of change of position. Section 67(4)(a) of the *Trusts Act 1973* (Qld) is expressed to apply subject to the provisions of s 109 of that Act.

¹²⁴⁸ See [22.61] and Recommendation 22-5(a) below.

¹²⁴⁹ This provision will be relevant only if the personal representative or trustee has not complied with the requirements of the proposed provision for giving notice before distributing the estate or trust property. Note the definition of 'estate' in cl 423 of the Administration of Estates Bill and the explanation of that definition (in relation to cl 413 of the Bill) at note 1181 above.

¹²⁵⁰ See [20.84] above.

¹²⁵¹ [1951] AC 251, 265–6.

¹²⁵² [1948] Ch 465.

¹²⁵³ See [22.20] above.

who has suffered loss as a result of the wrongful distribution of an estate or of trust property may enforce any remedy against the personal representative or trustee or against the person to whom the property has been distributed, including at the same time, and is not required to exhaust all remedies against the personal representative or trustee before proceeding against the person to whom the property has been distributed.

22.58 However, if a proceeding is brought against a person to whom a wrongful distribution has been made, but is not also brought against the personal representative or trustee who made the distribution, the proceeding should require the court's leave.

22.59 Secondly, the model legislation should provide that, if a proceeding is brought against a person to whom a wrongful distribution has been made, the person:

- 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
- may join the personal representative or trustee as a party to the proceeding brought against him or her.

22.60 Thirdly, it is possible that a claimant's loss might exceed the amount of the wrongful distribution that has been made. Provided the person to whom the wrongful distribution has been made received the distribution in good faith, a judgment against the person should not exceed the amount of the wrongful distribution that was made to the person. Because of the possibility that a judgment may include an award of interest,¹²⁵⁴ the model legislation should make it clear that, 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.

22.61 Finally, the model legislation should also include a provision to the effect of section 109(3) of the *Trusts Act 1973* (Qld) creating a statutory defence of change of position. Given the developments in the law concerning the recovery of moneys paid under a mistake of law,¹²⁵⁵ the model legislation should make it clear that the provision that is based on section 109(3) of the *Trusts Act 1973* (Qld) does not limit any other defence that may be available, under an Act or at law or in equity, to the person to whom the wrongful distribution has been made. This will ensure that if, as a result of developments in the law, section 109(3) ultimately provides a narrower defence than is available under the general law, there can be no argument that a person to whom property has been wrongfully distributed is restricted to the statutory

¹²⁵⁴ See, for example, *Supreme Court Act 1995* (Qld) s 47.

¹²⁵⁵ See [22.24]–[22.29] above.

defence under the model provision that is based on section 109(3) of the *Trusts Act 1973* (Qld).

THE BARRING OF CLAIMS

22.62 Ordinarily, if a personal representative knows that there is a claim against the estate, he or she should 'set aside a sum sufficient to meet it and distribute only the balance'.¹²⁵⁶ However, the situation becomes more complicated if the claim is for an unliquidated sum or if the claim is speculative in nature.¹²⁵⁷

If a claim is for an unliquidated sum or is of a speculative nature or if the trustees find themselves having to decide whether they should compromise the claim, they may feel that their discretion to compromise is itself prejudiced by their duty to distribute.

22.63 All Australian jurisdictions have statutory provisions that seek to alleviate this problem by enabling a personal representative (and in some jurisdictions, a trustee) 'to take steps to force a person making a claim in respect of the assets of the estate to institute proceedings to enforce it'.¹²⁵⁸ These provisions do not have their origins in *Lord St Leonards' Act*, but were introduced to complement the provisions based on that legislation for giving notice of intended distribution. In introducing the Bill for the original Victorian provision, it was noted that the provision dealing with notice of intended distribution:¹²⁵⁹

worked very well, but now some creditors are resorting to a new method of avoiding a very reasonable section. They give notice of their claims, but will not prove them, in the hope that by that means the executor or the administrator will be induced to make some compromise with them. It almost amounts to a blackmailing proceeding. ... He will not take any steps to prove it, and the executors will have to wait for six years to pass for the claim to be barred. In the meantime the beneficiaries have to do without the property. What I propose is that the executor or administrator, upon receiving notice of a claim, shall give notice to the claimant to take proceedings to prove his claim within three months.

22.64 In the ACT, New South Wales and Victoria, the provisions are found in the administration legislation.¹²⁶⁰ In Queensland, South Australia, Tasmania

¹²⁵⁶ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16310] (at 24 February 2009).

¹²⁵⁷ Ibid (at 24 February 2009).

¹²⁵⁸ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1473.1] (at 20 February 2009).

¹²⁵⁹ *Ludwig v Public Trustee* (2006) 68 NSWLR 69, 77 (Campbell J), citing Victoria, *Parliamentary Debates*, Legislative Assembly, 19 October 1911, 2023 (Sir John Mackey).

¹²⁶⁰ See [22.65], [22.66], [22.72] below.

and Western Australia, the provisions are found in the trustee legislation.¹²⁶¹ In the Northern Territory, provisions are included in both the administration and trustee legislation.¹²⁶² It has been said of the policy underlying the Queensland provision that it:¹²⁶³

is the very sound one of permitting deceased estates to be administered expeditiously and that administrators should not be unduly delayed from completing the task of administration and distribution when creditors decline to act diligently.

The existing legislative provisions

Australian Capital Territory

22.65 Section 65 of the *Administration and Probate Act 1929* (ACT) provides:

65 Claims barred against executor or administrator in certain cases

- (1) If an executor or administrator has given notices under section 64¹²⁶⁴ and a claim against the estate is sent to him or her, the executor or administrator may serve a notice on the claimant calling the claimant to take proceedings to enforce the claim within a period of 6 months, and to duly prosecute the claim.
- (2) If, after that period of 6 months has ended, that person does not satisfy the Supreme Court that he or she is duly prosecuting the claim, the court may, on application by the executor or administrator, make an order barring the claim against the executor or administrator, subject to any conditions that appear just, or make any other order the court considers appropriate. (note added)

New South Wales

22.66 Section 93 of the *Probate and Administration Act 1898* (NSW) provides:¹²⁶⁵

93 Claims barred against executor or administrator in certain cases

- (1) When the executor or administrator of the estate of a testator or an intestate has published the notices referred to in section 92(1)¹²⁶⁶ and a claim in respect of the assets of that estate is submitted to the executor or administrator, the executor or administrator may, if the executor or administrator disputes the claim, serve on the person by whom or on whose behalf the claim was submitted a notice calling on the person to

¹²⁶¹ See [22.68], [22.70], [22.71], [22.73] below.

¹²⁶² See [22.68]–[22.69] below.

¹²⁶³ *Re Hanayama* (Unreported, Supreme Court of Queensland, White J, 11 November 1998) [25].

¹²⁶⁴ *Administration and Probate Act 1929* (ACT) s 64 is set out [21.18] above.

¹²⁶⁵ For an example of where this provision was used see *In the Will of Walker* (1943) 43 SR (NSW) 305.

¹²⁶⁶ *Probate and Administration Act 1898* (NSW) s 92 is set out at [21.26] above.

take proceedings to enforce the person's claim within a period of 3 months from the date of service of the notice and to prosecute the person's claim.

- (2) If, after a notice has been served on a person in accordance with subsection (1) and the period of 3 months referred to in the notice has expired, that person does not satisfy the Court that the person is prosecuting the person's claim, the Court may, on an application in that behalf made by the executor or administrator:
 - (a) make an order barring the claim of that person as against the executor or administrator, subject to such conditions (if any) as it thinks just and equitable, or
 - (b) make such other order in respect of the application as it thinks just and equitable, having regard to the circumstances of the case.
- (3) Where:
 - (a) in its capacity as executor or administrator, a trustee company:
 - (i) disputes any claim upon an estate (whether the claimant claims to be a creditor or to have a beneficial interest in the estate), and
 - (ii) has served on the claimant a notice in accordance with subsection (1), and
 - (b) the claimant has not, within the period of 3 months referred to in the notice served in accordance with subsection (1), commenced proceedings to enforce the claim,

the trustee company may serve a further notice on the claimant that unless, within the period of 2 months from the date of service of that further notice, the trustee company is duly served with process of court issued in proceedings to enforce the claim, the trustee company will distribute the estate without regard to the claim.
- (4) If, within the period of 2 months referred to in a notice served on a claimant in accordance with subsection (3), a trustee company has not been duly served with process as referred to in that subsection, the claimant's claim shall thereupon be barred and become irrecoverable as against the trustee company and the trustee company may proceed to distribute the estate without regard to the claim.
- (5) A trustee company may, if it thinks fit, waive any objection which it might, by virtue of subsection (4), take to proceedings commenced by a claimant after the expiration of the period of 2 months referred to in a notice served on the claimant in accordance with subsection (3).
- (6) The powers conferred on a trustee company by subsections (3) and (4) are in addition to the powers exercisable under subsection (2). (note added)

22.67 Section 93(3)–(6) applies only to trustee companies and is considered later in this chapter.¹²⁶⁷

Northern Territory, South Australia

22.68 Section 22(2) of the *Trustee Act* (NT) and section 29(2) of the *Trustee Act 1936* (SA) are in similar terms. The South Australian provision states:

29 Distribution of estate after notice by representative or trustee

...

- (2) Where a representative or trustee has received a claim or notice of claim against the estate of a deceased person or against a trust property, and he disputes the claim, that representative or trustee may give to the person making the claim, or giving the notice, a notice in writing that the claim is disputed, and requiring the claimant either to withdraw the claim or to institute proceedings to enforce it within six months of the service of the last-mentioned notice; and if the claim is not so withdrawn or prosecuted, the representative or trustee may apply by summons in chambers to any judge of the Supreme Court, on affidavit setting out the facts for an order that, as against such representative or trustee, the claim shall be absolutely barred, and any such judge may make such order as he deems just, and the order shall bind all persons whom it purports to affect.

22.69 The Northern Territory also includes a provision dealing with the barring of claims in its administration legislation. Section 97 of the *Administration and Probate Act* (NT) provides:

97 Claim barred against executor or administrator in certain cases

- (1) When an executor or administrator has given the notices mentioned in section 96,¹²⁶⁸ and a claim against the estate is sent in to him or her, the administrator or executor may, if he or she disputes the claim, serve upon the person, by whom or on whose behalf the claim was sent in, a notice calling upon that person to take proceedings to enforce his or her claim within a period of 6 months, and to duly prosecute the claim.
- (2) If, after that period of 6 months has expired, that person does not satisfy the Court that he or she is duly prosecuting his or her claim, the Court may, on application by the executor or administrator, make an order barring the claim against the executor or administrator, subject to such conditions as appear just, or make such other order as the Court thinks fit. (note added)

¹²⁶⁷ See [22.90], [22.102]–[22.103] below.

¹²⁶⁸ *Administration and Probate Act* (NT) s 96 is set out at [21.30] above.

Queensland

22.70 Section 68 of the *Trusts Act 1973* (Qld), which is one of the most detailed of the provisions dealing with the barring of claims, provides:¹²⁶⁹

68 Barring of claims

- (1) Where a trustee wishes to reject a claim (not being a claim in respect of which any insurance is on foot, being insurance required by any Act) which has been made, or which the trustee has reason to believe may be made—
 - (a) to or against the estate or property which the trustee is administering; or
 - (b) against the trustee personally, by reason of the trustee being under any liability in respect of which the trustee is entitled to reimburse himself or herself out of the estate or property which the trustee is administering;

the trustee may serve upon the claimant or the person who may become a claimant a notice calling upon the claimant, within a period of 6 months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.
- (2) At the expiration of the period stipulated in a notice served under subsection (1), the trustee may apply to the court for an order under subsection (3), and shall serve a copy of the application on the person concerned.
- (3) Where, on the hearing of an application made under subsection (2), the person concerned does not satisfy the court that the person has commenced proceedings and is prosecuting them with all due diligence, the court may make an order—
 - (a) extending the period, or barring the claim, or enabling the trust property to be dealt with without regard to the claim; and
 - (b) imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the court thinks fit.
- (4) Where a trustee has served any notices under this section in respect of claims on 2 or more persons, and the period specified in each of those notices has expired, the trustee may, if the trustee thinks fit, apply for an order in respect of the claims of those persons by a single application, and the court may, on that application, make an order accordingly.

¹²⁶⁹

For an example of where an order was made under s 68 of the *Trusts Act 1973* (Qld) extending the time period in which a claim could be prosecuted before the court would order barring of the claim, see *Re the Will of McNeill* (Unreported, Supreme Court of Queensland, Master Weld, 26 February 1982).

- (5) This section applies to every claim therein mentioned, whether the claim is or may be made as creditor or next of kin or beneficiary under the trust or otherwise; but it does not apply to any claim under the *Succession Act 1867*, part 5¹²⁷⁰ and no order made under this section shall affect any application for revocation of any grant of probate or of letters of administration, whether that application is made before or after the order.
- (6) Where any person beneficially entitled to the estate or property is not made a party to an application by a trustee under this section an order made by the court on the application shall not affect the right of that person to contest the claim of the trustee to be entitled to indemnify himself or herself out of the estate or property.
- (7) Any notice or application which is to be served in accordance with the provisions of this section may be served—
 - (a) by delivering it to the person for whom it is intended or by sending it by prepaid registered letter addressed to that person at the person's usual or last known place of abode or business; or
 - (b) in such other manner as may be directed by an order of the court.
- (8) Where a notice is sent by post as provided by this section, it shall be deemed to be served at the time at which the letter would have been delivered in the ordinary course of post. (note added)

Tasmania

22.71 In Tasmania, as in the Northern Territory and South Australia, the provisions dealing with the barring of claims form part of the provision dealing with distribution after giving notice. Section 25A(5) and (6) of the *Trustee Act 1898* (Tas) provides:

25A Distribution of property or estate after notice by trustee or executor or administrator

...

- (5) Where a trustee or an executor or administrator disputes a claim particulars of which he has received after giving notice in accordance with this section, the trustee, executor, or administrator may give to the person making the claim a notice in writing that the claim is disputed

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The *Succession Act 1867* (Qld) pt 5 dealt with applications for family provision. As a result of the enactment of the *Succession Act 1981* (Qld), pt 5 of the former Act applies only to an application for provision out of the estate of a person who died before 1 January 1982, being the date on which the *Succession Act 1981* (Qld) commenced. However, s 14H(1)(b) of the *Acts Interpretation Act 1954* (Qld) provides:

- (1) In an Act, a reference to a law (including the Act) includes a reference to the following—
 - ...
 - (b) if the law has been repealed and remade (with or without modification) since the reference was made—the law as remade, and as amended from time to time since it was remade;

and requiring the claimant to withdraw the claim or to institute proceedings to enforce it within 6 months of the service of the last-mentioned notice.

- (6) If a claim to which subsection (5) relates is not withdrawn or prosecuted as provided in that subsection, the trustee, executor, or administrator may apply by summons to a judge in chambers, on affidavit setting out the facts, for an order that, as against the trustee, executor, or administrator, the claim shall be absolutely barred, and the judge may make such order as he deems just, and the order binds every person whom it purports to affect.

Victoria

22.72 Section 30 of the *Administration and Probate Act 1958* (Vic) provides:

30 Executors or administrators may serve notice on claimant

- (1) A personal representative, having notice, whether under the provisions of section thirty-three of the *Trustee Act 1958*¹²⁷¹ or otherwise, that any claim has been or may be made against the estate of which he is the personal representative, may serve upon any person making or possibly entitled to make such claim a notice requiring such person to take within a period of three months from the date of receiving such notice all proceedings proper to enforce or to establish such claim and to duly prosecute the same.
- (2) After the expiration of the said period of three months such personal representative may apply to the Court for an order to some such effect as hereinafter in this section mentioned.
- (3) Upon the hearing of such application the Court, if not satisfied that such proceedings as aforesaid have been taken and are being duly prosecuted, may—
 - (a) order that the said period be extended; or
 - (b) order that the claim of any person so served with notice of the application be for all purposes barred; or
 - (c) make any further or other order enabling the estate to be distributed or dealt with without regard to the claim; and
 - (d) in any case impose such conditions and give such directions including a direction as to the payment of the costs of or incidental to the application as to the Court seems just. (note added)

¹²⁷¹

Trustee Act 1958 (Vic) s 33 is set out at [21.43] above.

Western Australia

22.73 Section 64 of the *Trustees Act 1962* (WA) provides:¹²⁷²

64 Claims etc., procedure for barring

- (1) Where a trustee wishes to reject a claim that has been made, or that he has reason to believe may be made—
 - (a) to or against the estate or property that he is administering; or
 - (b) against the trustee personally, by reason of his being under any liability in respect of which he is entitled to reimburse himself out of the estate or property that he is administering,

the trustee may serve upon the claimant or the person who may become a claimant a notice calling upon him, within a period of 3 months from the date of service of the notice, to take legal proceedings to enforce the claim and also to prosecute the proceedings with all due diligence.
- (2) At the expiration of the period stipulated in a notice served under subsection (1), the trustee may apply to the Court for an order under subsection (3), and shall serve a copy of the application on the person concerned.
- (3) Where, on the hearing of an application made under subsection (2), the person concerned does not satisfy the Court that he has commenced proceedings and is prosecuting them with all due diligence, the Court may make an order—
 - (a) extending the period, or barring the claim, or enabling the trust property to be dealt with without regard to the claim; and
 - (b) imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the Court thinks fit.
- (4) Where a trustee has served any notices under this section in respect of claims on 2 or more persons, and the period specified in each of those notices has expired, he may, if he thinks fit, apply for an order in respect of the claims of those persons by a single application, and the Court may, on that application, make an order accordingly.
- (5) This section applies to every claim therein mentioned, whether the claim is or may be made as creditor or next-of-kin or beneficiary under the trust or otherwise; but it does not apply to any claim under the *Inheritance (Family and Dependants Provision) Act 1972*, and no order made under this section shall affect any application for revocation of any grant of Probate or of Letters of Administration, whether that application is made before or after the order.

¹²⁷²

For an example of a case where this section was used, see *The Public Trustee v Cenen* (Unreported, Supreme Court of Western Australia, McKechnie J, 18 March 1999).

- (6) On an application by a trustee under this section, the persons beneficially entitled to the estate or property need not be made parties to the proceedings, and an order made by the Court on the application shall not affect their right to contest the claim of the trustee to be entitled to indemnify himself out of the estate or property that he is administering where they were not parties to the proceedings in which the order was made.

Features of the existing legislative provisions

Time limits

22.74 Generally, the provisions dealing with the barring of claims provide that the personal representative may serve a notice calling on the claimant to take proceedings to enforce his or her claim within a specified period of time.

22.75 In the ACT, the Northern Territory, Queensland, South Australia and Tasmania, a period of six months must be allowed for a claimant to institute proceedings.¹²⁷³ In New South Wales, Victoria and Western Australia, a period of three months is allowed.¹²⁷⁴

22.76 In Queensland, Victoria and Western Australia, the legislation provides that after the expiry of the relevant period, the court may, on hearing an application for the barring of a claim, order that the period of time allowed to a claimant to institute proceedings be extended.¹²⁷⁵

Claims that may be barred by this procedure

22.77 In the ACT,¹²⁷⁶ New South Wales,¹²⁷⁷ the Northern Territory¹²⁷⁸ and Tasmania,¹²⁷⁹ it appears that this procedure applies only to those claims that have been received following publication by the personal representative or trustee of a notice of intention to distribute. For example, the ACT provision applies '[i]f an executor or administrator has given notices under section 64 and a claim against the estate is sent to him or her'.

¹²⁷³ *Administration and Probate Act 1929* (ACT) s 65(1); *Trustee Act* (NT) s 22(2), *Administration and Probate Act* (NT) s 97(1); *Trusts Act 1973* (Qld) s 68(1); *Trustee Act 1936* (SA) s 29(2); *Trustee Act 1898* (Tas) s 25A(5).

¹²⁷⁴ *Probate and Administration Act 1898* (NSW) s 93(1); *Administration and Probate Act 1958* (Vic) s 30(1); *Trustees Act 1962* (WA) s 64(1).

¹²⁷⁵ *Trusts Act 1973* (Qld) s 68(3)(a); *Administration and Probate Act 1958* (Vic) s 30(3)(a); *Trustees Act 1962* (WA) s 64(3)(a). See *Re Barber* [1924] VLR 123 where Cussen ACJ extended the time for the claimant to institute proceedings by two months.

¹²⁷⁶ *Administration and Probate Act 1929* (ACT) s 65(1).

¹²⁷⁷ *Probate and Administration Act 1898* (NSW) s 93(1).

¹²⁷⁸ *Administration and Probate Act* (NT) s 97(1), although the *Trustee Act* (NT) s 22(2) does not include such a limitation.

¹²⁷⁹ *Trustee Act 1898* (Tas) s 25A(5).

22.78 In *Ludwig v Public Trustee*,¹²⁸⁰ Campbell J commented:¹²⁸¹

It is a precondition of the operation of s 93 that the person serving a s 93 notice has published notices under s 92.

22.79 In contrast, the Queensland and Western Australian provisions specifically provide that this procedure applies where a trustee wishes to reject a claim that has been made, or that the trustee has reason to believe may be made.¹²⁸² The Victorian provision has a similar effect. It applies where a personal representative has notice, whether under section 33 of the *Trustee Act 1958* (Vic) or otherwise, 'that any claim has been or may be made against the estate'.¹²⁸³

22.80 A personal representative may use this procedure in relation to the claims of creditors, beneficiaries and next of kin.¹²⁸⁴ However, it has been held that the provisions do not apply to a claim that the legal representative has no right to administer the relevant estate (for example, where the claimant gives notice that he or she intends to apply for the revocation of the grant).¹²⁸⁵

the only persons who are to be affected by the notices are those whose claims against the estate are to be met by the executor or administrator as the case may be in a due course of administration, and not persons whose claims are that the executor or administrator has no right to administer the estate at all.

22.81 The Queensland and Western Australian provisions give statutory effect to this exception. They provide that 'no order made under this section shall affect any application for revocation of any grant of probate or of letters of administration, whether that application is made before or after the order'.¹²⁸⁶

22.82 These two jurisdictions also provide that the barring provisions do not apply to a claim under their family provision legislation.¹²⁸⁷

22.83 The Queensland provision contains an additional exception, providing that the barring procedure does not apply to 'a claim in respect of which any

¹²⁸⁰ (2006) 68 NSWLR 69. The comment would seem to be equally applicable to the provisions in the ACT, the Northern Territory and Tasmania.

¹²⁸¹ (2006) 68 NSWLR 69, 82.

¹²⁸² *Trusts Act 1973* (Qld) s 68(1); *Trustees Act 1962* (WA) s 64(1).

¹²⁸³ *Administration and Probate Act 1958* (Vic) s 30(1).

¹²⁸⁴ *In the Will of Walker* (1943) 43 SR (NSW) 305; *Trusts Act 1973* (Qld) s 68(5); *Trustees Act 1962* (WA) s 64(5).

¹²⁸⁵ *Guardian Trust & Executors Co of New Zealand Ltd v Public Trustee of New Zealand* [1942] AC 115, 125 (PC). See also *Re Timm* [1912] VLR 460; *Bramston v Morris* (Unreported, Supreme Court of New South Wales, Powell J, 20 August 1993).

¹²⁸⁶ *Trusts Act 1973* (Qld) s 68(5); *Trustees Act 1962* (WA) s 64(5).

¹²⁸⁷ *Trusts Act 1973* (Qld) s 68(5); *Trustees Act 1962* (WA) s 64(5).

insurance is on foot, being insurance required by any Act'.¹²⁸⁸ Ford and Lee explain the rationale for this exception:¹²⁸⁹

This exception is intended for the case of motor accident claims of a kind required by law to be insured. Since such a claim would be fought out in reality between the claimant and the insurance company of the deceased person (whose death might have nothing to do with the incident giving rise to the insurance claim) it should not have any effect upon the distribution of the deceased's estate. It is accordingly not a suitable sort of claim to be the subject of this procedure.

The court's powers

22.84 The statutory provisions generally give the court wide powers to deal with an application to bar a claim. Most jurisdictions provide that the court may make an order barring the claim (subject to any conditions that appear 'just' or 'just and equitable') or such other order as the court considers appropriate or 'just and equitable' in the circumstances.¹²⁹⁰

22.85 The provisions in Queensland, Victoria and Western Australia are more specific. They provide that a court may make an order:¹²⁹¹

- extending the period of time in which the claimant may commence proceedings;¹²⁹²
- barring the claim;
- enabling the trust property or the estate to be dealt with without regard to the claim; or
- imposing such conditions and giving such directions, including a direction as to the payment of the costs of or incidental to the application, as the court thinks fit.

The extent of the barring

22.86 In most jurisdictions, the statutory provisions dealing with the barring of claims enable the court to make an order barring the claim against the executor

¹²⁸⁸ *Trusts Act 1973* (Qld) s 68(1).

¹²⁸⁹ HAJ Ford and WA Lee, *Principles of the Law of Trusts* (Thomson Reuters online service) [16340] (at 24 February 2009).

¹²⁹⁰ *Administration and Probate Act 1929* (ACT) s 65(2); *Probate and Administration Act 1898* (NSW) s 93(2); *Administration and Probate Act* (NT) s 97(2), *Trustee Act* (NT) s 22(2); *Trustee Act 1936* (SA) s 29(2); *Trustee Act 1898* (Tas) s 25A(6).

¹²⁹¹ *Trusts Act 1973* (Qld) s 68(3); *Administration and Probate Act 1958* (Vic) s 30(3); *Trustees Act 1962* (WA) s 64(3).

¹²⁹² See [22.76] above.

or administrator.¹²⁹³ This means that the executor or administrator may distribute the estate without regard to the claim. However, such an order would not prevent a claimant from bringing proceedings against a person to whom any part of the estate was distributed.¹²⁹⁴

22.87 As noted above, the legislation in Queensland, Victoria and Western Australia enables the court to make a variety of orders on an application for the barring of a claim.

22.88 The Queensland and Western Australian legislation enables the court to make an order 'barring the claim', as an alternative to an order enabling the trust property to be dealt with without regard to the claim.¹²⁹⁵ This would appear to enable the court to bar a claim not just against the personal representative, for which the latter order would be sufficient, but also against any persons to whom the property has been distributed.

22.89 The Victorian legislation provides expressly that the court may make an order that the claim of any person 'be for all purposes barred'.¹²⁹⁶

The barring of claims against the public trustee or a trustee company

22.90 Section 93(3)–(6) of the *Probate and Administration Act 1898* (NSW) creates a special procedure for trustee companies.¹²⁹⁷ Where a claimant does not commence proceedings within three months of being served, a trustee company may serve a further notice requiring the claimant to commence proceedings within two months. If the claimant fails to do so, the claim is automatically barred as against the trustee company, and the trustee company may proceed to distribute the estate without regard to the claim. This procedure avoids the need for the trustee company to apply to the court for an order barring the claim.

22.91 A number of other Australian jurisdictions have similar procedures for the public trustee and trustee companies, except that the provisions are contained, respectively, in the public trustee¹²⁹⁸ and trustee company¹²⁹⁹ legislation of those jurisdictions, rather than in the administration legislation.

¹²⁹³ See *Administration and Probate Act 1929* (ACT) s 65(2); *Probate and Administration Act 1898* (NSW) s 93(2)(a); *Administration and Probate Act* (NT) s 97(2), *Trustee Act* (NT) s 22(2); *Trustee Act 1936* (SA) s 29(2); *Trustee Act 1898* (Tas) s 25A(6).

¹²⁹⁴ See Chapter 26 of this Report, which addresses the extent to which an action that survives against the estate of a deceased person may be brought against a beneficiary to whom part of the estate has been distributed.

¹²⁹⁵ *Trusts Act 1973* (Qld) s 68(3)(a); *Trustees Act 1962* (WA) s 64(3)(a).

¹²⁹⁶ *Administration and Probate Act 1958* (Vic) s 30(3)(b).

¹²⁹⁷ *Probate and Administration Act 1898* (NSW) s 93 is set out at [22.66] above.

¹²⁹⁸ *Public Trustee Act 1985* (ACT) s 33; *Public Trustee Act 1913* (NSW) s 34B; *Public Trustee Act 1978* (Qld) s 131; *Public Trustee Act 1930* (Tas) s 58.

¹²⁹⁹ *Trustee Companies Act 1968* (Qld) s 32; *Trustee Companies Act 1953* (Tas) s 26; *Trustee Companies Act 1984* (Vic) s 43.

Discussion Paper

22.92 In the Discussion Paper, the National Committee did not come to a preliminary view about whether the model legislation should include a provision dealing with the barring of claims.¹³⁰⁰ Accordingly, it did not make a proposal about that issue, but instead sought submissions on whether the model legislation should include a provision to the effect of section 68 of the *Trusts Act 1973* (Qld) to deal with the barring of claims.¹³⁰¹

Submissions

22.93 The inclusion in the model legislation of a provision to the effect of section 68 of the *Trusts Act 1973* (Qld) was supported by the Bar Association of Queensland, the Trustee Corporations Association of Australia, the Queensland Council of the Trustee Corporations Association of Australia, and the Queensland, ACT and New South Wales Law Societies.¹³⁰²

22.94 However, an academic expert in succession law considered that the model legislation should not include a provision to the effect of section 68 of the *Trusts Act 1973* (Qld). In his view, the provision should appear in the trustee legislation, not in the model administration legislation.¹³⁰³

22.95 Although the National Committee did not address the issue of whether special barring provisions should be included for public trustees or trustee companies, the New South Wales Law Society suggested that the model legislation might also include a provision to the effect of section 93(3) of the *Probate and Administration Act 1898* (NSW).¹³⁰⁴ As explained above, section 93(3)–(6) of that Act creates a special procedure by which a trustee company can take steps to bar a claim without the need to apply to the court for such an order.¹³⁰⁵

The National Committee's view

Inclusion of a provision dealing with the barring of claims

22.96 A provision dealing with the barring of claims facilitates the efficient administration of estates. In the absence of such a provision, a personal representative or trustee who has notice that a claim might potentially be made against the estate or against trust property might consider it prudent to delay

¹³⁰⁰ *Administration of Estates Discussion Paper* (1999) QLRC 144; NSWLRC [9.59].

¹³⁰¹ *Ibid*, QLRC 145; NSWLRC 206.

¹³⁰² Submissions 1, 6, 7, 8, 14, 15.

¹³⁰³ Submission 12.

¹³⁰⁴ Submission 15.

¹³⁰⁵ See [22.90] above.

distributing at least part of the estate or trust property until after the expiry of the limitation period applicable to the particular claim. Accordingly, the model legislation should include provisions to create a procedure for the barring of claims.

22.97 For the same reasons expressed in Chapter 20 of this Report, the model provisions should apply to both personal representatives and trustees.¹³⁰⁶

22.98 The model provisions should generally be based on section 68 of the *Trusts Act 1973* (Qld). Section 68 has the advantage over the provisions that apply in some of the other jurisdictions¹³⁰⁷ of applying not only in respect of a claim that has been made in response to a notice published in accordance with section 67 of that Act, but also in respect of a claim that the trustee has reason to believe may be made. Further, section 68 does not apply to 'a claim in respect of which any insurance is on foot, being insurance required by any Act'.¹³⁰⁸ Because the model provisions apply to personal representatives and trustees, they should refer to a claim (other than a claim for which insurance is required to be, and is, maintained under an Act) that has been made, or that the personal representative or trustee has reason to believe may be made, to or against the estate of a deceased person or property that is held on trust for a beneficiary of the estate.¹³⁰⁹

22.99 However, the model provisions should make the following departures from section 68 of the *Trusts Act 1973* (Qld).

22.100 First, section 68(1) of the *Trusts Act 1973* (Qld) is expressed to apply where a trustee 'wishes to reject a claim'. In the National Committee's view, the model provision should instead be expressed to apply where a personal representative or trustee does not accept a claim. This will cover those situations where a personal representative or trustee has not actually rejected a claim, but does not have sufficient information to accept the claim.

22.101 Secondly, the National Committee is of the view that, on an application for the barring of a claim under the model provisions, one of the options open to the court should be to bar the claim for all purposes; the court should not be restricted to barring the claim against the personal representative or trustee, as is the case in some Australian jurisdictions. In the National Committee's view, the court's power under section 68(3)(a) of the *Trusts Act 1973* (Qld) to make an order 'barring the claim' would include an order barring the claim for all purposes. However, to avoid any doubt about the extent of the court's power, the model provision should provide expressly, in terms similar to section

¹³⁰⁶ See [20.84] above.

¹³⁰⁷ See [22.77]–[22.78] above.

¹³⁰⁸ *Trusts Act 1973* (Qld) s 68(1). See [22.83] above.

¹³⁰⁹ Note the definition of 'estate' in cl 417 of the Administration of Estates Bill and the explanation of that definition (in relation to cl 413 of the Bill) at note 1181 above.

30(3)(b) of the *Administration and Probate Act 1958* (Vic), that the court may make an order that the claim be barred for all purposes.

The barring of claims against the public trustee or a trustee company

22.102 Although it is desirable to encourage the efficient and expeditious administration of estates, the barring of a claim is a significant step. Even where a claim is barred only against the personal representative or trustee, that has the potential to significantly affect the claimant's rights. The beneficiary to whom the estate has been distributed may have dissipated the distribution and may not otherwise be able to meet any judgment in favour of the claimant. For that reason, the National Committee is strongly of the view that the barring of claims should occur only by court order.

22.103 Section 93(3)–(6) of the *Probate and Administration Act 1898* (NSW) and the corresponding provisions referred to above,¹³¹⁰ which enable claims against the public trustee or a trustee company to be barred simply by a failure to commence proceedings after being served with a notice, are anomalous and should therefore be repealed.

RECOMMENDATIONS

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

22-1 The model legislation should include:¹³¹¹

- (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:

¹³¹⁰ See [22.91] above.

¹³¹¹ See [22.51]–[22.53] above.

- (i) under the model provision that is based on section 109(3) of the *Trusts Act 1973* (Qld);¹³¹² 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;¹³¹³
- (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;¹³¹⁴ and
- (c) provide that a person who suffers loss because of the wrongful distribution:¹³¹⁵
 - (i) may bring a proceeding to enforce a remedy against either or both of the following:
 - (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

¹³¹² See Recommendation 22-5(a) below.

¹³¹³ See [22.54] above.

¹³¹⁴ See [22.55] above.

¹³¹⁵ See [22.56]–[22.58] above.

- (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:¹³¹⁶

- (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:¹³¹⁷

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

¹³¹⁶ See [22.59] above.

¹³¹⁷ See [22.60] above.

- (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:¹³¹⁸

- (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:¹³¹⁹

¹³¹⁸ See [22.61] above.

¹³¹⁹ See [22.96]–[22.98] above.

- (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;¹³²⁰
- (b) apply where a personal representative or trustee 'does not accept a claim';¹³²¹ and
- (c) provide that the court may make an order 'barring the claim for all purposes'.¹³²²

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.¹³²³

¹³²⁰ See [22.97]–[22.98] above.

¹³²¹ See [22.100] above.

¹³²² See [22.101] above.

¹³²³ See [22.102]–[22.103] above.

Chapter 23

Survivorship and presumptions of death

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INTRODUCTION

23.1 This chapter examines issues of survivorship that arise when two or more people die, or are presumed dead, and the order of their deaths is uncertain. The order in which their deaths occurred may be relevant in a number of situations, including:

- where one of the deceased persons is a beneficiary of the other person's estate (whether under the person's will or under the intestacy rules that govern the distribution of the person's estate);
- where each of the deceased persons is a beneficiary of the other person's estate;
- where the deceased persons owned property together as joint tenants; and
- where the deceased persons are both beneficiaries under the same will or instrument.

23.2 In these situations, the order in which the relevant persons died will affect the manner in which the property of the testator, intestate or joint tenants is distributed. In *Hickman v Peacey*,¹³²⁴ a case that arose out of the deaths of several people during an air-raid, Lord Macmillan commented:¹³²⁵

Rights of succession, alike testate and intestate, depend on the survivance of one person by another. The living succeed to the dead. In the ordinary case there is no difficulty in ascertaining which of two persons died first. But in the vicissitudes of human life there occur instances in which, owing to the absence of any positive evidence, it is not possible to arrive at a conclusion and the matter is left in uncertainty.

23.3 Before considering the common law in relation to survivorship and the legislative provisions that have been enacted to address the limitations of the common law, it is useful to have regard to four matters that affect the operation of the law in this area:

- the doctrine of lapse;
- the anti-lapse provisions in the wills legislation of the Australian jurisdictions;
- the common law presumption of death; and
- Benjamin orders.

¹³²⁴ [1945] AC 304.

¹³²⁵ Ibid 320.

The doctrine of lapse

23.4 At common law, if a person is a beneficiary under a will, but does not survive the testator, the disposition fails. This is known as the doctrine of lapse.¹³²⁶ The doctrine is said to be ‘founded on the view that a testator intends those who are named as beneficiaries under the will to take their benefits personally, so that if they predecease the testator their benefits pass back to the testator’s estate and are said to lapse’.¹³²⁷

23.5 In the ACT, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria, the doctrine of lapse has been extended so that, for a beneficiary to take under a will, it is not sufficient that the beneficiary has simply survived the testator; the beneficiary must have survived the testator for a period of 30 days, failing which the disposition takes effect as if the beneficiary died before the testator.¹³²⁸

23.6 Sometimes, a will may contain a substitutional disposition that is to take effect in the event of the lapse of another disposition. If the will does not contain a substitutional disposition, the property that is the subject of the failed disposition will fall into the residuary estate.

23.7 In Queensland, a 30 day survivorship requirement also applies in relation to entitlements under the intestacy rules.¹³²⁹ In New South Wales, a similar requirement is proposed by the Succession Amendment (Intestacy) Bill 2009 (NSW).¹³³⁰

23.8 In South Australia, the spouse of an intestate must survive the intestate by 28 days to take under the intestacy rules.¹³³¹

Anti-lapse provisions

23.9 All Australian jurisdictions include in their wills legislation a provision to counteract the effect of the doctrine of lapse in certain circumstances. These provisions create a statutory substitutional disposition that applies, subject to the expression of a contrary intention, where the beneficiary under a will is a

¹³²⁶ AA Preece, *Lee’s Manual of Queensland Succession Law* (6th ed, 2007) [10.270].

¹³²⁷ Ibid [10.280].

¹³²⁸ *Wills Act 1968* (ACT) s 31C; *Succession Act 2006* (NSW) s 35; *Wills Act* (NT) s 34; *Succession Act 1981* (Qld) s 33B; *Wills Act 2008* (Tas) s 49; *Wills Act 1997* (Vic) s 39. In its Wills Report, the National Committee recommended that a provision to this effect be included in the model wills legislation for the Australian States and Territories: see *Wills Report* (1997) QLRC 76; NSWLRC [6.47] and Draft Wills Bill 1997 cl 34.

¹³²⁹ *Succession Act 1981* (Qld) s 35(2). The National Committee has also proposed that a 30 day survivorship requirement should apply in relation to entitlements on intestacy: *Intestacy Report* (2007) 196 (Recommendation 40), Appendix A, Draft Intestacy Bill 2007 cl 4(2)(a).

¹³³⁰ Succession Amendment (Intestacy) Bill 2009 (NSW) sch 1 cl 4, which will insert a new section 107 into the *Succession Act 2006* (NSW).

¹³³¹ *Administration and Probate Act 1919* (SA) s 72E.

child or other issue of the testator.¹³³² The result of this statutory disposition is that, if the beneficiary dies before the testator, but leaves issue who survive the testator,¹³³³ the property that was the subject of the disposition in favour of the original beneficiary does not fall into the residuary estate. Instead, the property passes according to the terms of the relevant legislative provision. This principle is commonly referred to as the 'anti-lapse rule'.

23.10 Under the modern form of the anti-lapse rule, which applies in all jurisdictions except South Australia,¹³³⁴ the property that was the subject of the original disposition passes to the issue of the deceased issue who survive the testator.¹³³⁵ The rationale behind the anti-lapse rule is that:¹³³⁶

the anti-lapse rule corrects testaments that have failed to express the reasonably predictable intention of testators in the unforeseen event of their children predeceasing them and leaving issue surviving them. Parents ordinarily assume, even when making a will, and particularly if they make a will without legal advice, that their children will survive them. It is not improper for the law to consider what should be done if it appears that the testator has not contemplated the possibility that he or she is not survived by his or her children.

23.11 In its Wills Report, the National Committee recommended the inclusion in the model wills legislation of an anti-lapse provision in the modern form.¹³³⁷ Subsequently, in its Supplementary Wills Report, the National Committee substituted a modified clause 40 for the original anti-lapse provision that had been recommended in the earlier Report. The modified clause 40 of the Draft Wills Bill 1997 provided:¹³³⁸

¹³³² *Wills Act 1968* (ACT) s 31; *Succession Act 2006* (NSW) s 41; *Wills Act* (NT) s 40; *Succession Act 1981* (Qld) s 33N; *Wills Act 1936* (SA) s 36; *Wills Act 2008* (Tas) s 55; *Wills Act 1997* (Vic) s 45; *Wills Act 1970* (WA) s 27.

¹³³³ In the ACT, New South Wales, the Northern Territory, Queensland, Tasmania and Victoria, the issue of the deceased issue must survive the testator by 30 days: *Wills Act 1968* (ACT) s 31; *Succession Act 2006* (NSW) s 41; *Wills Act* (NT) s 40; *Succession Act 1981* (Qld) s 33N; *Wills Act 2008* (Tas) s 55; *Wills Act 1997* (Vic) s 45.

¹³³⁴ Under the original form of the anti-lapse rule, which has its origins in s 33 of the *Wills Act 1837* (UK), if a testator by will makes a disposition in favour of issue who predecease the testator, the property that is the subject of the disposition does not necessarily pass to the issue of the deceased issue. Instead, the disposition takes effect as if the deceased issue died immediately *after* the testator. As a result, the property will pass according to the terms of the deceased issue's will (if he or she left one) or according to the relevant intestacy rules: see *Wills Act 1936* (SA) s 36. Section 33 of the *Wills Act 1837* (UK) was substituted in 1982 (see *Administration of Justice Act 1982* (UK) s 19) and now provides that a devise or bequest to issue who do not survive the testator takes effect as a devise or bequest to the issue of the deceased issue who are living at the testator's death.

¹³³⁵ *Wills Act 1968* (ACT) s 31; *Succession Act 2006* (NSW) s 41; *Wills Act* (NT) s 40; *Succession Act 1981* (Qld) s 33N; *Wills Act 2008* (Tas) s 55; *Wills Act 1997* (Vic) s 45; *Wills Act 1970* (WA) s 27.

¹³³⁶ *Wills Report* (1997) QLRC 84; NSWLRC [6.69].

¹³³⁷ See *Wills Report* (1997) QLRC 83–90; NSWLRC 139–49 and Draft Wills Bill 1997 cl 40.

¹³³⁸ See *Supplementary Wills Report* (2006) 10.

40 Dispositions not to fail because issue have died before testator

- (1) This section applies if—
- (a) a testator makes a disposition¹³³⁹ of property to a person, whether as an individual or as a member of a class, who is issue of the testator (an **original beneficiary**); and
 - (b) under the will, the interest of the original beneficiary in the property does not come to an end at or before the original beneficiary's death; and
 - (c) the disposition is not a disposition of property to the testator's issue, without limitation as to remoteness; and
 - (d) the original beneficiary does not survive the testator for 30 days.
- (2) The issue of the original beneficiary who survive the testator for 30 days take the original beneficiary's share of the property in place of the original beneficiary as if the original beneficiary had died intestate leaving only issue surviving.
- (3) Subsection (2) does not apply if—
- (a) the original beneficiary did not fulfil a condition imposed on the original beneficiary in the will; or
 - (b) a contrary intention appears in the will.
- (4) A general requirement or condition that issue survive the testator or reach a specified age does not show a contrary intention for subsection (3)(b).
- (5) A disposition of property to issue as joint tenants does not, of itself, show a contrary intention for subsection (3)(b). (note added)

The common law presumption of death

23.12 Usually, the death of a person will be proved by the production of a death certificate. However, where a person has simply gone missing, it will not be possible for the person's death to be proved in that way. In certain circumstances, a person's death may be presumed at common law.

¹³³⁹

The term 'disposition' was defined in cl 4 of the Draft Wills Bill 1997 to include:

- (a) any gift, devise or bequest of property under a will, and
- (b) the creation by will of a power of appointment affecting property, and
- (c) the exercise by will of a power of appointment affecting property.

23.13 The High Court has described the presumption of death in the following terms:¹³⁴⁰

If, at the time when the issue whether a man is alive or dead must be judicially determined, at least seven years have elapsed since he was last seen or heard of by those who in the circumstances of the case would according to the common course of affairs be likely to have received communications from him or to have learned of his whereabouts, were he living, then, in the absence of evidence to the contrary, it should be found that he is dead.

23.14 However, there is no presumption that the person died at or before a given date.¹³⁴¹ In particular, the person is not presumed to have died at the conclusion of the seven year period.¹³⁴² The presumption operates merely 'to prove the fact of death at the time of the institution of the legal proceedings where the fact giving rise to the presumption is proved'.¹³⁴³ The burden of proving that a person died at any particular time rests on the person who makes that assertion.¹³⁴⁴

23.15 In some situations, it may not be necessary to resort to the presumption of death to establish that a person has died. Depending on the nature of the evidence, it may be possible for the court, at an earlier time than seven years from when a person was last known to be alive, to infer that the person has died, as well as the date on or about which the person died.¹³⁴⁵ This will be the case where there is evidence about the circumstances in which the person appears to have died, for example, where a person is known to have been a passenger on a ship that was wrecked or lost at sea.¹³⁴⁶

Benjamin orders

23.16 Where the person who has gone missing is a beneficiary under the will of a deceased person, or under the intestacy rules that govern the distribution of a deceased person's estate, the court may be called upon to presume the death of the missing person and to determine how the estate of the testator, or intestate, should be distributed.

¹³⁴⁰ *Axon v Axon* (1937) 59 CLR 395, 405 (Dixon J). In that case, the appellant's first husband disappeared at a time when she was attempting to serve him with a maintenance order. Although her husband had been absent for more than seven years, the Court refused to presume his death, as it considered that he had every reason to conceal his whereabouts from his wife: see at 402 (Latham CJ), 406 (Dixon J).

The Northern Territory now has a statutory provision that, to a large extent, reflects the common law presumption: see *Law of Property Act* (NT) s 215, which is set out at [23.300] below.

¹³⁴¹ *Axon v Axon* (1937) 59 CLR 395, 405 (Dixon J).

¹³⁴² *Ibid* 401 (Latham CJ), 406 (Dixon J).

¹³⁴³ *Ibid* 412 (Evatt J).

¹³⁴⁴ *Ibid*.

¹³⁴⁵ See *Re Main* (1858) 1 Sw & Tr 11; 164 ER 606; *Re Horn* (1930) 36 ALR 280; *Mackay v Mackay* (1901) 18 WN (NSW) 266; *Re Bennett* [2006] QSC 250.

¹³⁴⁶ See *Re Main* (1858) 1 Sw & Tr 11; 164 ER 606; *Mackay v Mackay* (1901) 18 WN (NSW) 266; *Re Bennett* [2006] QSC 250.

23.17 In these circumstances, the court may make what is known as a Benjamin order — so called after the decision in *Re Benjamin*.¹³⁴⁷ In that case, the testator died in June 1893. Under the terms of his will, he left a legacy to one of his sons, Philip, who had been missing since September 1892. In 1900, some eight years after Philip had disappeared, the trustees of the testator's estate applied to the court for a determination of the manner in which Philip's share was to be dealt with or disposed of by them. In the meantime, letters of administration to Philip's estate had been granted to one of his brothers.¹³⁴⁸

23.18 The Court considered that Philip Benjamin must be presumed to be dead, but observed that the relevant question was as to when he died. It held that the onus of proof was on the administrator of Philip's estate and on those claiming under Philip to prove that he had survived the testator. As the administrator had failed to prove this, the Court held that the trustees were at liberty to distribute the testator's estate. However, the Court refrained from declaring Philip to be dead:¹³⁴⁹

I am anxious ... not to do anything which would prevent his [Philip's] representative from making any claim if evidence of his death at any other time should be subsequently forthcoming. I shall not, therefore, declare that he is dead, ...

23.19 Instead, the Court made an order — in terms now referred to as a Benjamin order — that, in the absence of any evidence that Philip Benjamin survived the testator, the trustees be at liberty to divide the share of the testator's estate bequeathed to Philip Benjamin on the footing that he was unmarried and did not survive the testator.¹³⁵⁰

23.20 An order in this form protects a personal representative from liability in respect of the distribution made, in the event that the missing beneficiary returns and claims his or her entitlement or that evidence becomes available that establishes that the missing beneficiary died after the testator or the intestate.¹³⁵¹

1347 [1902] 1 Ch 723.

1348 See Chapter 24 of this Report for a discussion of the court's jurisdiction to make a grant on the presumption of death.

1349 [1902] 1 Ch 723, 726 (Joyce J).

1350 Ibid. See also *Re Green's Will Trusts* [1985] 3 All ER 455, where the Court observed (at 463) that, in recent years, the practice of the Court has been to make a Benjamin order, rather than to declare the missing beneficiary dead. In Western Australia, these principles are now incorporated in s 66 of the *Trustees Act 1962* (WA): see [21.78]–[21.86] above.

1351 *Re Green's Will Trusts* [1985] 3 All ER 455, 460 (Nourse J).

SURVIVORSHIP: THE COMMON LAW

23.21 At common law, where two people die in a common calamity,¹³⁵² there is no presumption about which of the persons survived the other. In particular, there is no presumption of survivorship based on the age or sex of the persons dying in the same incident;¹³⁵³ nor is there any presumption that they died at the same time.¹³⁵⁴ The issue of survivorship is a question of fact to be decided on the evidence, and the onus of proof rests on those who claim to take under the deceased's will or, where the deceased died intestate, on intestacy.¹³⁵⁵

23.22 Problems can arise where the evidence is insufficient to establish that either person survived the other. This is illustrated by the related decisions of *Underwood v Wing*¹³⁵⁶ and *Wing v Angrave*.¹³⁵⁷ Mr and Mrs Underwood and their children were swept overboard from the ship on which they were travelling to Australia, and were never seen again. Prior to their voyage, Mr and Mrs Underwood had both made wills. Mr Underwood, in his will, left all his property on trust for his wife, but provided that, if she died in his lifetime, the property was to be held by the trustee upon certain trusts (which failed on the death of his children); subject to those trusts, he bequeathed his property to one William Wing. Mrs Underwood, who had a power of appointment with respect to certain property under the will of her late father,¹³⁵⁸ made a will in which she appointed the property to her husband, but provided that, if he died in her lifetime, the property was to pass to Wing.

23.23 In *Underwood v Wing*,¹³⁵⁹ which concerned Wing's entitlement under Mr Underwood's will, the Court held that Wing bore the onus of proving that Mr Underwood had survived his wife. As Wing was unable to prove the condition on which the disposition in his favour depended — namely that Mrs Underwood died before her husband — Mr Underwood's estate passed instead to his next of kin, as on intestacy.¹³⁶⁰

23.24 In *Wing v Angrave*,¹³⁶¹ the Court considered the question of Wing's entitlement under Mrs Underwood's will. The Court held that the persons entitled in default of appointment under the will of Mrs Underwood's father were

¹³⁵² People who died in a common disaster were traditionally referred to as 'commorientes'.

¹³⁵³ *Underwood v Wing* (1855) 4 DeG M & G 633; 43 ER 655, 664 (Wightman J).

¹³⁵⁴ *Wing v Angrave* (1860) 8 HLC 183; 11 ER 397, 403 (Lord Campbell LC).

¹³⁵⁵ *Hickman v Peacey* [1945] AC 304, 321 (Lord Macmillan), 332 (Lord Porter); *Re Trenaman* [1962] SASR 95, 98 (Napier CJ).

¹³⁵⁶ (1854) 19 Beav 459; 52 ER 428, aff'd on appeal, *Underwood v Wing* (1855) 4 DeG M & G 633; 43 ER 655.

¹³⁵⁷ (1860) 8 HLC 183; 11 ER 397.

¹³⁵⁸ See the explanation of powers of appointment at [10.148] in vol 1 of this Report.

¹³⁵⁹ (1854) 19 Beav 459; 52 ER 428, aff'd on appeal, *Underwood v Wing* (1855) 4 DeG M & G 633; 43 ER 655.

¹³⁶⁰ *Underwood v Wing* (1855) 4 DeG M & G 633; 43 ER 655, 666 (Lord Cranworth LC).

¹³⁶¹ (1860) 8 HLC 183; 11 ER 397.

not to be dispossessed unless someone else established a superior claim.¹³⁶² As Wing was unable to prove that Mr Underwood died before Mrs Underwood, the property in respect of which Mrs Underwood held a power of appointment passed instead to those persons entitled under the gift over in default of appointment contained in her father's will.

23.25 The same principle applies where a person's death has been presumed on the basis that he or she has not been heard of for seven years or more. As explained earlier in this chapter, the law does not presume that the person died at any particular time.¹³⁶³ Consequently, if the date of the person's death is relevant to establish that he or she survived another person under whose will he or she was named as a beneficiary, the onus rests on those claiming through the deceased beneficiary to prove that the deceased beneficiary survived the testator.¹³⁶⁴

EXISTING LEGISLATIVE PROVISIONS

23.26 Obviously it is desirable for the law to provide a solution to the problem that arises in relation to succession to property when the evidence does not establish which of two or more relevant persons survived the other or others. All Australian jurisdictions have legislative provisions that, to varying degrees, address this issue.

Jurisdictions where the seniority rule applies

New South Wales, Queensland, Tasmania, Victoria

23.27 Legislation in New South Wales, Queensland, Tasmania and Victoria deals with the situation where the order in which two or more people have died is uncertain. It provides that the deaths are deemed to have occurred in the order of seniority — that is, the younger is deemed to have survived the elder.¹³⁶⁵ This means of resolving the issue of survivorship is commonly referred to as the seniority rule.

23.28 The provisions are in similar terms, except that, whereas the provisions in New South Wales, Tasmania and Victoria simply provide that the younger is deemed to have survived the elder, the Queensland provision provides that the younger is deemed to have survived the elder for a period of one day.

¹³⁶² Ibid 408 (Lord Cranworth LC, with whom Lord Brougham agreed).

¹³⁶³ See [23.14] above.

¹³⁶⁴ *Re Phené's Trusts* (1870) LR 5 Ch 139, 152 (Sir GM Giffard LJ). This principle also applies to the distribution of an intestate estate. Those persons who claim through an intestacy beneficiary must prove that the beneficiary survived the intestate: see *Re Albert* [1967] VR 875, 880 (Lush J).

¹³⁶⁵ *Conveyancing Act 1919* (NSW) s 35; *Succession Act 1981* (Qld) s 65; *Presumption of Survivorship Act 1921* (Tas) s 2; *Property Law Act 1958* (Vic) s 184.

23.29 Section 65 of the *Succession Act 1981* (Qld) provides:

65 Presumption of survivorship

Subject to this Act, where 2 or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court),¹³⁶⁶ for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder for a period of 1 day. (note added)

23.30 The relevant provisions do not apply where there is evidence on which the court can come to a conclusion about the order in which the persons died.¹³⁶⁷

23.31 The provisions embodying the seniority rule apply even where the persons did not die as a result of a common calamity, but died in unconnected circumstances.¹³⁶⁸ It has also been held that the provisions apply regardless of whether the uncertainty as to who was the survivor of the relevant persons arises because the persons died consecutively, but the sequence is unknown, or because the persons are thought to have died simultaneously.¹³⁶⁹

23.32 However, there has been a division of judicial opinion about whether these provisions apply if one of the deaths is presumed under the common law.

23.33 In *In the Estate of Dixon*,¹³⁷⁰ the Court held that the New South Wales provision applied even though one of the deaths was presumed at common law. However, in that case, the Court was considering the application of the provision to the question of entitlement to a grant, and did not therefore need to consider the effect that the application of the seniority rule would have on the

¹³⁶⁶ The words '(subject to any order of the court)' appear only in the Queensland and Victorian provisions and in the equivalent English provision (*Law of Property Act 1925* (UK) s 184). It has been held that these words do not confer on the court a power to depart from the tenor of the provision on the grounds of fairness or justice: *Re Lindop* [1942] Ch 377, 382 (Bennett J). In *Re Brush* [1962] VR 596 Adam J expressed the view (at 601) that the words added nothing to the section and could be omitted. See also *Hickman v Peacey* [1945] AC 304 where Lord Simonds commented (at 346–7) that he had 'tried in vain to give any reasonable meaning and effect' to these words.

¹³⁶⁷ *Re Plaister* (1934) 34 SR (NSW) 547; *Re Comfort* [1947] VLR 237; *Re Zappullo* [1966] VR 390. The differing views as to the degree of certainty that is required to render the provisions inapplicable is considered at [23.266]–[23.278] below.

¹³⁶⁸ *Hickman v Peacey* [1945] AC 304, 314–15 (Viscount Simon LC); *Re Albert* [1967] VR 875, 880 (Lush J); *In the Estate of Dixon* (1969) 90 WN (Pt 1) (NSW) 469; *Halbert v Mynar* [1981] 2 NSWLR 659, 666 (Waddell J).

¹³⁶⁹ *Hickman v Peacey* [1945] AC 304, 324 (Lord Macmillan), 337 (Lord Porter), 345 (Lord Simonds). A minority of the House of Lords held that it was possible for two or more persons to die at the same time and that, where they did, s 184 of the *Law of Property Act 1925* (UK) had no application to the issue of survivorship: see at 319 (Viscount Simon LC), 329 (Lord Wright).

¹³⁷⁰ (1969) 90 WN (Pt 1) (NSW) 469.

distribution of property where one of the deaths was presumed.¹³⁷¹ In a second case, *Re Watkinson*,¹³⁷² where the death of a beneficiary was presumed at common law, it seems that the Court would have decided the issue of survivorship on the basis of the Victorian provision, except that it was not satisfied that the death of the beneficiary whose death was presumed had occurred after the commencement of that provision.

23.34 These decisions have not been followed in their respective jurisdictions, and the better view would now appear to be that the relevant provisions do not apply where the death of one or more of the parties is merely presumed.¹³⁷³

23.35 In *Re Albert*,¹³⁷⁴ the issue was whether a nephew, whose family had not heard from him since 1928, had survived his aunt, who died intestate in 1958, or whether the aunt's estate should be distributed on the basis that the nephew had predeceased her. The Court held that section 184 of the *Property Law Act 1958* (Vic) did not apply where one of the deaths is merely presumed.

23.36 In coming to this view, the Court observed that the application of the provision in this situation would produce anomalous results:¹³⁷⁵

If s 184 can be used to determine which of two persons survived the other when the death of one of them is proved only by the use of the seven-year presumption, consequences follow which may be regarded as surprising. The section will always lead to the result that the younger survived the older so that in a case in which the precise date of death of the older is known, the younger will be presumed to survive even if he has not been heard of for 50 years before the date of the death of the older.

1371

In *In the Estate of Dixon* (1969) 90 WN (Pt 1) (NSW) 469, the applicant applied under s 40A of the *Probate and Administration Act 1898* (NSW) for a grant of letters of administration of the estate of his brother to be made on the presumption of death. The brother had last been seen on 27 October 1961. The application was made on the basis that the applicant was one of his brother's next of kin, and was therefore directly entitled to a grant. The applicant's siblings consented to the making of the grant. The Court was satisfied that the brother could be presumed to be dead. However, as the siblings' father had died in November 1964, a question arose as to whether the brother had survived his father or had died before him. Helsham J observed (at 471) that, if the deceased died before his father, the father was his next of kin, and the court could not make a grant directly to the deceased's brother. It would be necessary for the applicant first to take out letters of administration of his father's estate, and then to apply for a grant of his brother's estate on the basis of being the legal personal representative of his brother's next of kin. It was in this context that Helsham J held that the application of the Victorian provision meant that the deceased was deemed to have survived his father, with the result that a grant could be made directly to the deceased's brother.

See the criticism of this decision in *Halbert v Mynar* [1981] 2 NSWLR 659, 667, where Waddell J observed that the application in *In the Estate of Dixon* was made ex parte with the result that the Court did not have the advantage of argument on both sides and, further, that the case of *Re Albert* [1967] VR 875 was not cited to, or considered by, the Court.

1372

[1952] VLR 123.

1373

Re Albert [1967] VR 875; *Halbert v Mynar* [1981] 2 NSWLR 659.

1374

[1967] VR 875.

1375

Ibid 879 (Lush J).

23.37 The Court referred to another situation:¹³⁷⁶

Further, one can imagine a family of three brothers the second of whom in age has been missing in circumstances from which his death can be presumed. If the youngest brother dies, the presumption under s 184 will be that the second brother predeceased the youngest brother. Upon the death of the oldest brother at a later date the second brother will, upon the application of s 184, be presumed to have survived the eldest brother although he was treated as having predeceased the youngest brother at some previous time. Or, if the oldest and youngest brothers die together in a common calamity, the second brother will be treated as having survived one but predeceased the other.

23.38 The Court held that the words ‘in circumstances rendering’, which appear in the section, ‘supply the key to the present problem’:¹³⁷⁷

They indicate that the section applies where two or more persons have died, where the circumstances of the death of each is known and where those circumstances render it uncertain which of them survived the other or others. ... [In the present case], nothing is known of the circumstances of the death of one of the persons concerned, and the uncertainty which exists is, therefore, not one which arises from the circumstances in which that party died but from the fact that none of the circumstances of death — time, place or cause — of one of the relevant persons is known at all. The condition of the operation of the section is that the circumstances of the two deaths, whether occurring together or separately, produces the uncertainty. The condition is not satisfied if the circumstances of one death are unknown.

23.39 As a result, the Court held that the section had no application to the case under consideration and that, as those claiming through the nephew were unable to prove that he survived his aunt, her estate was to be distributed on the footing that the nephew had predeceased her.

23.40 This decision was followed in *Halbert v Mynar*,¹³⁷⁸ where the Court suggested that:¹³⁷⁹

It is unlikely that the legislature intended the section to determine arbitrarily the order of death of persons whose deaths may have been separated by many years.

23.41 As noted previously, in New South Wales, Queensland, Tasmania and Victoria, the doctrine of lapse has been extended.¹³⁸⁰ In those jurisdictions, unless a contrary intention appears by the will, if a disposition is made to a

¹³⁷⁶ Ibid 879–80.

¹³⁷⁷ Ibid 880.

¹³⁷⁸ [1981] 2 NSWLR 659. Probate of the deceased's will had been granted on the presumption of death only (see s 40A of the *Probate and Administration Act 1898* (NSW), which is set out at [24.17] below). Section 40B of the *Probate and Administration Act 1898* (NSW) provides that, when a grant is made under s 40A, the estate may not be distributed without the leave of the court. This decision arose out of the executor's application to the court for directions as to which of the provisions of the testator's will were applicable, and for leave to distribute in accordance with those directions.

¹³⁷⁹ [1981] 2 NSWLR 659, 668 (Waddell J).

¹³⁸⁰ See [23.5] above.

person who does not survive the testator for a period of 30 days, the disposition is treated as if the beneficiary died before the testator and therefore lapses.¹³⁸¹

23.42 As a result of these provisions, if a beneficiary under a will is younger than the testator, and the beneficiary and the testator die in circumstances where the order of their deaths is uncertain, the presumption that the younger of the persons survived the elder (in Queensland, by one day) will not overcome the hurdle of satisfying the 30 day survivorship requirement that applies in those jurisdictions. In the absence of evidence that the beneficiary survived the testator by 30 days, the disposition will be treated as if the beneficiary died before the testator, with the result that the disposition will lapse.¹³⁸²

23.43 In Queensland, a 30 day survivorship requirement also applies to distributions on intestacy.¹³⁸³ As a result, if a person who is entitled under the intestacy rules is younger than the intestate and the person and the intestate die in circumstances where the order of their deaths is uncertain, the rule that the younger is taken to have survived the elder by one day will not overcome the requirement to establish that the person survived the intestate by 30 days.

23.44 However, in New South Wales, Tasmania and Victoria, where there is not a similar survivorship requirement, the person will be taken to have survived the intestate and will therefore take under the intestacy rules.¹³⁸⁴

23.45 Where the deceased persons held property as joint tenants, the application of the seniority rule produces the same result in New South Wales, Queensland, Tasmania and Victoria. Because the property of one joint tenant accrues to a surviving joint tenant automatically, and is not subject to a 30 day survivorship requirement, mere survivorship is sufficient for the property to accrue to the estate of the younger of the joint tenants.

23.46 It has been suggested that, although the seniority rule is clear and easy to administer:¹³⁸⁵

it [is] arbitrary and could produce capricious, if not harsh, results. The rule would disinherit the living relatives or beneficiaries of the more senior of the commorientes ...

23.47 The seniority rule has also be criticised on the basis that, where its application has the effect that a younger beneficiary is presumed to have

1381 *Succession Act 2006* (NSW) s 35; *Succession Act 1981* (Qld) s 33B; *Wills Act 2008* (Tas) s 49; *Wills Act 1997* (Vic) s 39.

1382 Accordingly, the anomalies to which the Court referred in *Re Albert* [1967] VR 875 (see [23.36]–[23.37] above) would not occur in New South Wales, Queensland, Tasmania or Victoria.

1383 *Succession Act 1981* (Qld) s 35(2). See also note 1329 above.

1384 But see [23.7] above in relation to the Succession Amendment (Intestacy) Bill 2009 (NSW).

1385 Ontario Law Reform Commission, *Administration of Estates of Deceased Persons*, Report (1991) 129.

survived an older testator, it does not reflect the probable wishes of the testator.¹³⁸⁶

Why should a gift ... intended for a beneficiary who will never enjoy it, go to that beneficiary's heirs and not back into the testator's estate for distribution among his next-of-kin?

Jurisdictions that have adopted a different approach

23.48 In the ACT, the Northern Territory, and Western Australia, quite a different approach has been adopted. The underlying policy of the principal provisions is, to use the terminology of the ACT legislation, that the beneficiary is taken to have predeceased the benefactor.¹³⁸⁷ As a result, where a testator and beneficiary die in circumstances where the order of their deaths is uncertain, a disposition contained in the will lapses,¹³⁸⁸ and the property that was the subject of the disposition does not flow to, and is not distributed as part of, the deceased beneficiary's estate. Instead, the property is distributed according to any substitutional disposition contained in the testator's will or, if the will does not contain such a provision, it falls into the residuary estate and is distributed to the residuary beneficiary (if the will provides for one) or to the testator's next of kin on intestacy. Similarly, the property of an intestate will devolve as if the intestate died after the intestacy beneficiary.

23.49 It has been suggested that this approach is more likely to accord with a testator's wishes:¹³⁸⁹

Presuming that a testator survives his beneficiary permits the testator's estate to devolve subject to contingent provisions in his will or pursuant to intestate succession. In either case, the result is more likely to satisfy the testator's intention than permitting the gift to be shared by the deceased beneficiaries' successors. If a testator intends to benefit the estate of the beneficiary he is at liberty to make that provision expressly in his will.

23.50 The survivorship provisions that apply in the ACT, the Northern Territory, and Western Australia address a range of situations where the order of deaths of the persons would affect the distribution of property. These provisions are intended to avoid the arbitrary results that can occur when questions of survivorship are resolved primarily by the application of the seniority rule.

¹³⁸⁶ Law Reform Commission of British Columbia, *Presumptions of Survivorship*, Report No 56 (1982) 1.

¹³⁸⁷ See *Administration and Probate Act 1929* (ACT) s 49(P), which is set out at [23.54] below.

¹³⁸⁸ See the discussion of the doctrine of lapse at [23.4]–[23.6] above.

¹³⁸⁹ Law Reform Commission of British Columbia, *Presumptions of Survivorship*, Report No 56 (1982) 17. A similar view has been expressed by the Manitoba Law Reform Commission: see Manitoba Law Reform Commission, *The Survivorship Act*, Report No 51 (1982) 6.

Australian Capital Territory

23.51 In the ACT, three provisions are relevant.

23.52 Section 213 of the *Civil Law (Property) Act 2006* (ACT) applies where two or more people die at the same time or in an order that is uncertain. For purposes affecting title to land, it provides that the deaths are taken to have occurred in the order of seniority — that is, that the younger (or, where more than two people have died, the youngest) is taken to have survived the elder (or, where more than two people have died, the eldest). Section 213 provides:¹³⁹⁰

213 Presumption of survivorship

- (1) If 2 people die at the same time or in an order that is uncertain, the deaths are, for purposes affecting title to land, taken to have happened in order of seniority, and the younger is taken to have survived the elder.
- (2) If more than 2 people die at the same time or in an order that is uncertain, the deaths are, for purposes affecting title to land, taken to have happened in order of seniority, and the youngest is taken to have survived the eldest.
- (3) This section is subject to the *Administration and Probate Act 1929*, part 3B (Simultaneous deaths).

23.53 Although this provision incorporates the seniority rule, the application of that rule is limited by the operation of section 213(3), which provides that section 213 is subject to the provisions of part 3B of the *Administration and Probate Act 1929* (ACT).

23.54 Part 3B of the *Administration and Probate Act 1929* (ACT) consists of two provisions, sections 49P and 49Q, which provide:

49P Simultaneous deaths—devolution of property generally

- (1) This section applies if—
 - (a) a person who has died (the **beneficiary**) would, if the person had not died, have been entitled, under a will or on an intestacy, to an interest in the estate of someone else who has died (the **benefactor**); and
 - (b) the beneficiary and the benefactor died at the same time or in an order that is uncertain.
- (2) The property of the benefactor devolves as if the benefactor had survived the beneficiary and had died immediately after the beneficiary.

¹³⁹⁰

Section 213 of the *Civil Law (Property) Act 2006* (ACT) replaced s 119 of the *Conveyancing and Law of Property Act 1898* (ACT).

49Q Simultaneous deaths—devolution of jointly owned property

- (1) This section applies to property—
 - (a) that was owned jointly and exclusively by 2 or more people who died at the same time or in an order that is uncertain; and
 - (b) that was not held by them as trustees.
- (2) The property devolves as if the joint owners had, at the time of their deaths, held the property as tenants in common in equal shares.

23.55 Accordingly, the seniority rule found in section 213 of the *Civil Law (Property) Act 2006* (ACT) applies only to those situations that are not governed by either section 49P or section 49Q of the *Administration and Probate Act 1929* (ACT). Because section 49Q of the *Administration and Probate Act 1929* (ACT) deals with the devolution of jointly owned property, the seniority rule in section 213 of the *Civil Law (Property) Act 2006* (ACT) does not apply to that situation.

Northern Territory

23.56 In 2000, legislation was enacted in the Northern Territory to deal with the manner in which property is to devolve when two or more persons die in circumstances where there are reasonable doubts as to the order in which the deaths occurred.¹³⁹¹ The legislation is to a large extent based on section 120 of the *Property Law Act 1969* (WA).¹³⁹² However, the Northern Territory legislation differs from the Western Australian legislation in that it applies not only where two or more persons die in circumstances that give rise to reasonable doubts as to which of those persons survived the other or others, but also where one or more of the persons is presumed to have died in those circumstances.

23.57 Sections 216 and 217 of the *Law of Property Act* (NT) provide:

216 Devolution of property in cases where order of death uncertain

- (1) This section applies subject to the appearance of a contrary intention in a will, trust, settlement, disposition, appointment or any other instrument.
- (2) If 2 or more persons die or are presumed dead or 1 or more persons die and one or more persons are presumed dead in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them—

1391

Law of Property Act (NT) ss 214–218. In addition, s 64 of the *Administration and Probate Act* (NT) provides that, where an intestate and his or her spouse or de facto partner have died in circumstances rendering it uncertain which of them survived the other, the provisions of the Act that deal with distribution on intestacy apply as if the spouse or the de facto partner had not survived the intestate.

1392

Section 120 of the *Property Law Act 1969* (WA) is set out at [23.65] below.

- (a) subject to this section — the property of each of those persons is to devolve as if he or she had survived the other or others of them and had died immediately afterwards;
- (b) a donatio mortis causa¹³⁹³ made by any of those persons to another of those persons is void and of no effect;
- (c) in any case where any of those persons life is insured under a policy of life or accident insurance and another or others of them would, on surviving the insured person, be entitled (other than under a will or on the intestacy of a person) to the proceeds or a part of the proceeds payable under the policy, the proceeds are to be distributed as if the insured person had survived the other or each of the others and had died immediately afterwards;
- (d) any property that is owned jointly and exclusively by any 2 or more of those persons is to devolve as if it were owned by them as tenants in common in equal shares when they died;
- (e) subject to subsection (3) — in any case where under a will or trust or other disposition property would have passed (whether as the consequence of the operation of section 40 of the *Wills Act* or otherwise) to any of 2 or more possible beneficiaries (who are from amongst those 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, the devise or bequest or disposition takes effect as if the property were given to the possible beneficiaries as tenants in common in equal shares, and the property is to devolve accordingly;
- (f) subject to subsection (4) — in any case of a power of appointment which could have been exercised in respect of any property by any 2 or more of those persons who die or are presumed dead if any of them could be shown to have survived the other or others of them, the power may be exercised as if an equal share of that property had been set apart for appointment by each of those persons and as if each of those persons had the power of appointment in respect of the share of that property set apart for appointment by him or her, and that share is to devolve in default of appointment by him or her in the manner in which the property would have devolved in default of appointment by him or her if he or she had survived the other or others;
- (g) in any case where—
 - (i) property is devised or bequeathed or appointed by will or other testamentary instrument to the survivor of 2 or more of the testator's children or other issue; and
 - (ii) all or the last survivors of those children or other issue are from amongst those persons who die or are presumed dead,

1393See [23.113]–[23.116] below for an explanation of *donationes mortis causa*.

that provision applies as if the devise or bequest or appointment were in equal shares to those survivors who leave a child or children who survives or survive the testator; and

- (h) in any case where those persons who die or are presumed dead include a testator and one or more of his or her issue (however remote) and section 40 of the *Wills Act* applies, the testator is to be taken to have survived all of his or her issue who die or are presumed dead and to have died immediately afterwards and, accordingly, a devise or bequest by the testator to any of his or her issue who die or are presumed dead or who had already died during the testator's lifetime—
 - (i) lapses unless any of the donee's issue, other than those persons who die or are presumed dead, survives the testator; or
 - (ii) if any of the issue referred to in subparagraph (i) survives the testator — takes effect in accordance with that provision.

- (3) Subsection (2)(e) does not apply in any case to which subsection (2)(c) or (f) applies.
- (4) Subsection (2)(f) does not apply in any case to which subsection (2)(c) applies. (note added)

217 Presumption of survivorship

In any other case affecting the title to property or the appointment of trustees not referred to in this Part—

- (a) if—
 - (i) 2 or more persons die;
 - (ii) 2 or more persons are presumed dead; or
 - (iii) one or more persons die and one or more persons are presumed dead; and
- (b) the circumstances of those person's deaths or presumed deaths gives rise to reasonable doubts as to which of those persons survived the other or others,

the deaths or presumed deaths or deaths and presumed deaths are presumed to have occurred in order of seniority and, accordingly, the younger is presumed to have survived the elder.

23.58 Although the Northern Territory provisions are more detailed than the ACT provisions discussed above,¹³⁹⁴ they share a number of similarities with those provisions:

¹³⁹⁴

See [23.51]–[23.55] above.

- the underlying policy is that, generally, the estate of each person is to be distributed as if he or she survived the other person who has died in the relevant circumstances;
- property that is owned jointly and exclusively by the deceased persons as joint tenants is to be distributed as if they held the property as tenants in common in equal shares;
- in a situation not specifically provided for by section 216, the deaths or presumed deaths are presumed to have occurred in order of seniority.

23.59 However, the devolution of property in accordance with the various paragraphs of section 216(2) is subject 'to the appearance of a contrary intention in a will, trust, settlement, disposition, appointment or any other instrument'.¹³⁹⁵

South Australia

23.60 In South Australia, there is no general statutory presumption of survivorship where two or more persons have died, and the order of their deaths is uncertain. As a result, the common law principles outlined earlier in this chapter still apply.¹³⁹⁶

23.61 However, section 72E of the *Administration and Probate Act 1919* (SA) deals with the specific situation where an intestate and the intestate's spouse die within 28 days of each other. Section 72E provides:

72E Presumption of survivorship not to apply

Where an intestate and the intestate's spouse die within twenty-eight days of each other this Part applies as if the spouse had not survived the intestate.

23.62 This provision, although limited in its operation, reflects the approach found in section 49P(1) of the *Administration and Probate Act 1929* (ACT) and section 216(2)(a) of the *Law of Property Act* (NT), in that the estate of the intestate is to be distributed on the basis that the spouse, as the intestacy beneficiary, predeceased the intestate.

23.63 In 1985, the Law Reform Committee of South Australia observed that, because section 72E of the *Administration and Probate Act 1919* (SA) is confined to the deaths of spouses, '[p]roblems still remain where the

¹³⁹⁵ *Law of Property Act* (NT) s 216(1). This issue is discussed further at [23.248]–[23.265] below.

¹³⁹⁶ *Re Treneman* [1962] SASR 95, 98 (Napier CJ). See also DM Haines, *Succession Law in South Australia* (2003) [29.40]–[29.41].

contemporaneous deaths are those of parents and children, brothers and sisters, other relatives, and so on'.¹³⁹⁷

23.64 The Law Reform Committee of South Australia came to the view that 'some form of statutory reform is desirable to ensure that the situation in *Underwood v Wing* and *Wing v Angrave* will not be repeated'.¹³⁹⁸ Although the Committee was of the view that the seniority rule should not be enacted in South Australia,¹³⁹⁹ it could not agree on what model the reform should take.¹⁴⁰⁰

Western Australia

23.65 The Western Australian legislation contains a comprehensive provision that deals with the devolution of property in a range of circumstances.

23.66 Section 120 of the *Property Law Act 1969* (WA) provides:¹⁴⁰¹

120 Devolution of property in cases of simultaneous deaths

Where, after 6 December 1962, 2 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—

- (a) the property of each person so dying shall devolve and if he left a will it shall take effect, unless a contrary intention is shown by the will, as if he had survived the other person or persons so dying and had died immediately afterwards;
- (b) every *donatio mortis causa*¹⁴⁰² made by a person so dying to another person so dying is void and of no effect;
- (c) if the life of a person so dying is insured under any policy of life or accident insurance, and any other person or persons so dying would be entitled (otherwise than under a will or on the intestacy of any person) to the proceeds payable under the policy or any part of the proceeds if he or they survived the person so insured, the proceeds shall, unless a contrary intention is shown by the instrument governing the distribution of the proceeds, be distributed as if the person so insured had survived every other person so dying and had died immediately afterwards;

¹³⁹⁷ Law Reform Committee of South Australia, *Eighty-eighth Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Problems of Proof of Survivorship as between Two or More Persons Dying at about the Same Time in One Accident* (1985) 23.

¹³⁹⁸ Ibid 16. These decisions are discussed at [23.22]–[23.24] above.

¹³⁹⁹ Ibid 16.

¹⁴⁰⁰ Ibid 27–8. Some of the options considered by the Law Reform Committee of South Australia are discussed at [23.86]–[23.102] below.

¹⁴⁰¹ This provision was originally enacted as s 4 of the *Simultaneous Deaths Act 1960* (WA).

¹⁴⁰² See [23.113]–[23.116] below for an explanation of *donationes mortis causa*.

- (d) any property owned jointly and exclusively by 2 or more of the persons so dying, other than property so owned by them as trustees, shall devolve as if it were owned by them when they died as tenants in common in equal shares;
- (e) where, under any will or trust or other disposition, any property would have passed, whether in consequence of section 33 of the *Wills Act 1837* of the United Kingdom Parliament¹⁴⁰³ or otherwise to any of 2 or more possible beneficiaries (being persons who have so died) if any of them could be shown to have survived the other or others of them, then, unless a contrary intention is shown by the will, trust or disposition, it takes effect as if the property were given to those possible beneficiaries as tenants in common in equal shares, and the property devolves accordingly, but this paragraph does not apply in any case to which paragraph (c) or paragraph (f) applies;
- (f) where a power of appointment could have been exercised in respect of any property by any of 2 or more persons so dying if any of them could be shown to have survived the other or others of them, unless a contrary intention is shown by the instrument creating the power, the power may be exercised as if an equal share of that property had been set apart for appointment by each of those persons, and as if each of those persons had the power of appointment in respect of the share of the property so set apart for appointment by him, and that share shall devolve in default of appointment by him in the manner in which the property would have devolved in default of appointment by him if he had been the survivor of those persons, but this paragraph does not apply in any case to which paragraph (c) applies;
- (g) where, by any will or other testamentary disposition, any property is devised or bequeathed or appointed to the survivor of 2 or more of the testator's children or other issue within the meaning of section 117 and all or the last survivors of those children or issue are persons so dying that section (where it applies) takes effect as if the devise or bequest or appointment were in equal shares to those of them who so die and leave a child or children living at the death of the testator;
- (h) where the persons so dying include a testator and one or more of his issue, however remote, then for the purpose of section 33 of the *Wills Act 1837* of the United Kingdom Parliament where that section applies, the testator shall be deemed to have survived all his issue so dying and to have died immediately afterwards, and accordingly, unless a contrary intention is shown by the will, a devise or bequest by the testator to any of his issue who so dies or has already died in the testator's lifetime—
 - (i) lapses unless any of the donee's issue, other than the persons so dying, is living at the time of the death of the testator;
 - (ii) takes effect in accordance with the provisions of section 33 of the *Wills Act 1837* of the United Kingdom Parliament if any such other issue of the donee is living at that time;

1403

See note 1532 below.

- (i) for all other purposes affecting the title to property or the appointment of trustees, the deaths of the persons so dying shall be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder. (note added)

23.67 In most respects, the devolution of property under section 120 of the *Property Law Act 1969* (WA) is very similar to the devolution of property under sections 216 and 217 of the *Law of Property Act* (NT). However, unlike the Northern Territory provisions, section 120 of the Western Australian legislation is not expressed to apply where the deaths are presumed. Further, the Western Australian provision is not expressed in general terms to be subject to the expression of a contrary intention.¹⁴⁰⁴ Instead, the issue of the expression of a contrary intention, including the type of instrument in which such an intention may be expressed, is addressed on a case by case basis in the individual paragraphs of section 120.¹⁴⁰⁵

ISSUES FOR CONSIDERATION

23.68 The following issues arise from the preceding examination of the law concerning the distribution of property when the order in which the relevant persons died is uncertain:¹⁴⁰⁶

- how the property of each person who dies in these circumstances should devolve;
- how the model survivorship provisions should deal with substitutional dispositions;
- how a *donatio mortis causa* should be treated when the donor and donee die in these circumstances;
- how the proceeds payable under a policy of life or accident insurance should be paid when the insured and a nominated beneficiary die in these circumstances;
- how property that is owned exclusively by joint tenants who die in these circumstances should devolve;
- how property that is left to the survivor of two or more persons should devolve when the last of those persons die in these circumstances;

¹⁴⁰⁴ See s 216(1) of the *Law of Property Act* (NT), which is set out at [23.57] above.

¹⁴⁰⁵ This issue is discussed further at [23.248]–[23.265] below.

¹⁴⁰⁶ The National Committee is here using the term 'uncertain' in a broad sense. The specific issue of the degree of uncertainty that is required for the model provisions to apply is considered later in this chapter: see [23.266]–[23.282] below.

- how property that may be appointed by the survivor of two or more persons is to devolve when the last of those persons die in these circumstances;
- how property should devolve when the persons who die in these circumstances include the testator and one or more of the testator's issue;
- whether, in any situation not covered by a specific provision, property should devolve according to the presumption that the younger of the deceased persons survived the older;
- whether the model survivorship provisions should be subject to the expression of a contrary intention and, if so, where such an intention may be expressed;
- the circumstances in which the model survivorship provisions should apply — in particular, whether the model provisions should be expressed to apply where the deaths occurred in circumstances rendering it 'uncertain' which of two or more persons survived the others, or in circumstances that give rise to 'reasonable doubts' as to which of those persons survived the other or others;
- whether the model survivorship provisions should apply where one or more of the deaths is established at common law following an unexplained absence of at least seven years;
- whether the common law presumption of death should be modified by the model survivorship provisions;
- whether the model survivorship provisions should include a provision that gives statutory effect to the court's power to make a Benjamin order or should extend the court's power to make such an order;
- the application of the model survivorship provisions (including the relevant transitional provisions); and
- whether the model survivorship provisions should be located in the model administration legislation or in the property law legislation of the relevant jurisdiction.

The general rule

23.69 The primary question to be resolved is the general rule that is to govern the devolution of property where two people die in circumstances in which the order of their deaths is uncertain, and one is a beneficiary of the other's estate (whether under the person's will or under the relevant intestacy rules), or both are beneficiaries of each other's estates.

23.70 In New South Wales, Queensland, Tasmania and Victoria, the general rule is that the younger is deemed to have survived the older.¹⁴⁰⁷ However, as explained previously, at least in relation to dispositions made by will, the seniority rule has a more limited operation in these jurisdictions by virtue of the extension of the doctrine of lapse.¹⁴⁰⁸ Consequently, if A leaves his estate to B and B leaves her estate to A, B being the younger of the two, if there is no evidence that either person survived the other for a period of 30 days, the estates of each person will be distributed as if each had survived the other.

23.71 In the ACT, the Northern Territory and Western Australia, the legislation provides expressly that, in this situation, the property of each of the deceased persons is to devolve as if he or she had survived the other or others and had died immediately afterwards.¹⁴⁰⁹ As a result, any disposition made by one person to the other will lapse. Similarly, any power of appointment that the testator's will purported to confer on a person who died in the specified circumstances of uncertainty will fail.¹⁴¹⁰

23.72 It has been suggested that provisions to this effect 'retain the traditional and desirable common law position that for a beneficiary (and the persons claiming through the beneficiary) to take, it must be shown that such beneficiary survived the testator'.¹⁴¹¹

Discussion Paper

23.73 In the Discussion Paper, the National Committee expressed the view that a provision to the effect of section 120(a) of the *Property Law Act 1969* (WA) was not necessary, as the same result could be achieved by a 30 day survivorship rule — which had already been recommended by the National Committee in its Wills Report¹⁴¹² — and a statutory enactment of the rule in *Re Benjamin*.¹⁴¹³ Consequently, it did not propose that a provision to the effect of section 120(a) of the *Property Law Act 1969* (WA) be included in the model survivorship provisions.

¹⁴⁰⁷ See [23.27]–[23.29] above.

¹⁴⁰⁸ See [23.41]–[23.42] above. In Queensland, the 30 day survivorship rule applies to dispositions made by will and to distributions on intestacy. In New South Wales, Tasmania and Victoria, the rule applies only to dispositions made by will.

¹⁴⁰⁹ *Administration and Probate Act 1929* (ACT) s 49P; *Law of Property Act* (NT) s 216(2)(a); *Property Law Act 1969* (WA) s 120(a).

¹⁴¹⁰ Where a testator, by will, creates a power of appointment that is to be exercised by the will of the donee, the power is not exercised by the donee's will unless the donee survives the donor of the power: *Jones v Southall* (No 2) (1862) 32 Beav 31; 55 ER 12, 15–16 (Sir John Romilly MR).

¹⁴¹¹ Law Reform Committee of South Australia, *Eighty-eighth Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Problems of Proof of Survivorship as between Two or More Persons Dying at about the Same Time in One Accident* (1985) 17.

¹⁴¹² See note 1328 above.

¹⁴¹³ *Administration of Estates Discussion Paper* (1999) QLRC 253; NSWLRC [17.55].

Submissions

23.74 None of the submissions that addressed the issue of survivorship commented on whether the model survivorship provisions should include a provision to the effect of section 120(a) of the *Property Law Act 1969* (WA).¹⁴¹⁴

The National Committee's view

23.75 The National Committee has given consideration to which approach should be adopted as the primary rule for the devolution of property where a testator or an intestate and a person who is a beneficiary of the estate of the testator or intestate have died in circumstances where there is uncertainty as to the order of their deaths. As the National Committee observed in the Discussion Paper, in this situation, the application of the 30 day survivorship rule produces a similar result to section 120(a) of the *Property Law Act 1969* (WA). The effect of the 30 day survivorship rule is that, if a person claiming through a deceased beneficiary cannot establish that the beneficiary survived the testator or intestate by a period of 30 days, the disposition takes effect as if the beneficiary died before the testator, in which case the disposition is deemed to have lapsed. Under section 120(a) of the *Property Law Act 1969* (WA), where there is a reasonable doubt as to the order of deaths, the property of the testator or intestate also devolves as if he or she survived the beneficiary.

23.76 Although the two approaches produce similar results, the National Committee is of the view that it would be undesirable simply to rely on the operation of the 30 day survivorship rule to resolve the issue of survivorship. Although the National Committee recommended in its Wills Report that, unless a contrary intention is made by will, a beneficiary must survive a testator by 30 days in order to take a disposition under a will, two jurisdictions (South Australia and Western Australia) do not have a legislative provision to that effect. Further, only one jurisdiction — Queensland — currently has a similar requirement in relation to distributions made on intestacy.¹⁴¹⁵ Consequently, there is a significant risk that reliance on the operation of the 30 day survivorship rule, at least in the short term, will not produce the desired outcome.

23.77 Moreover, even if all jurisdictions ultimately enact legislation to give effect to the 30 day survivorship rule in relation to dispositions under wills and distributions made on intestacy, the National Committee considers it desirable to have the various provisions dealing with uncertainty as to survivorship collected together. There is otherwise a possibility that the effect of the 30 day rule in a particular situation may be overlooked.

¹⁴¹⁴ Several submissions addressed the possible statutory enactment of the rule in *Re Benjamin*. Those submissions are discussed at [23.317]–[23.318] below.

¹⁴¹⁵ See [23.7] above in relation to the Succession Amendment (Intestacy) Bill 2009 (NSW). See also note 1329 above in relation to the National Committee's proposal in the *Intestacy Report* (2007).

23.78 The National Committee is therefore of the view that 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). The extent to which the model provision should be able to be displaced by the expression of a contrary intention is considered below.¹⁴¹⁶

23.79 In this chapter, the principle embodied in the proposed provision is referred to as the ‘general rule’.

Property appointed under the will of the donee of a power of appointment

Background

23.80 The situation may arise where the persons who die in the specified circumstances of uncertainty include the donee of a power of appointment (the appointor) and the person in whose favour the appointor’s will has exercised the power of appointment (the appointee).

23.81 The general rule proposed above provides that ‘the property of each person so dying’ is to devolve as if he or she survived the other persons so dying. However, property in respect of which a person is entitled to exercise a power of appointment is not the property of the donee.¹⁴¹⁷ Consequently, it would appear that the general rule, which is based on section 216(2)(a) of the *Law of Property Act* (NT) and section 120(a) of the *Property Law Act 1969* (WA), would not resolve the issue of survivorship as between the donee of a power of appointment and the appointee.

23.82 This issue was not raised in the Discussion Paper and none of the submissions addressed it.

The National Committee’s view

23.83 In the National Committee’s view, the principle that underlies the general rule proposed above should also apply to the devolution of property that is the subject of a power of appointment. Where it is uncertain whether the appointee survived the donee/appointor, the property should devolve as if the donee/appointor survived the appointee.

¹⁴¹⁶ See [23.248]–[23.265] below.

¹⁴¹⁷ *O’Grady v Wilmot* [1916] 2 AC 231, 248 (Lord Buckmaster LC).

23.84 This result can be achieved by defining 'property', for the purposes of the general rule, to include property in respect of which a person holds a power of appointment.¹⁴¹⁸

Substitutional dispositions

Background

23.85 It is not uncommon for a will to include a substitutional disposition that is to take effect in the event of the lapse of a specific disposition contained in the will.¹⁴¹⁹ In *Underwood v Wing*¹⁴²⁰ and *Wing v Angrave*,¹⁴²¹ discussed earlier in this chapter,¹⁴²² William Wing was the beneficiary under a substitutional disposition contained in the wills of both Mr and Mrs Underwood.

23.86 When the Law Reform Committee of South Australia reviewed the law in relation to survivorship, it was of the view that a provision to the effect of section 120(a) of the *Property Law Act 1969* (WA) — which forms the basis of the National Committee's general rule for resolving issues of survivorship¹⁴²³ — would effect a positive change to the common law in relation to the operation of substitutional dispositions. It expressed the view that, where a will contains a substitutional disposition that is to take effect if the principal beneficiary predeceases the testator, and the testator and principal beneficiary die in circumstances where the order of their deaths is uncertain, a provision in these terms 'will effectively wipe off the slate all persons who die at the same time as the testator (by presuming that they predeceased him) and thereby ensure that another beneficiary ... can take'.¹⁴²⁴

23.87 However, the Law Reform Committee of South Australia observed that the principle embodied in what has been proposed above as the general rule will not be of assistance where the person whose property is being disposed of

¹⁴¹⁸ In Chapter 10, the National Committee has recommended 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: see Recommendation 10-18. That provision applies where the deceased has *exercised* the general power of appointment. The general rule proposed here, in conjunction with the proposed definition of 'property', has the effect that the donee/appointor is taken to have died after the potential appointee, which means that there is not an effective exercise of the general power of appointment in favour of the potential appointee.

¹⁴¹⁹ See [23.6] above.

¹⁴²⁰ (1854) 19 Beav 459; 52 ER 428, *aff'd* on appeal, *Underwood v Wing* (1855) 4 De G M & G 633; 43 ER 655.

¹⁴²¹ (1860) 8 HLC 183; 11 ER 397.

¹⁴²² See [23.22]–[23.24] above.

¹⁴²³ See [23.75]–[23.79] above.

¹⁴²⁴ Law Reform Committee of South Australia, *Eighty-eighth Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Problems of Proof of Survivorship as between Two or More Persons Dying at about the Same Time in One Accident* (1985) 17.

is not one of the persons who died in the circumstances of uncertainty.¹⁴²⁵ The Committee gave the following example:¹⁴²⁶

a testator or donor could leave a life estate to A, with remainder to B if B should survive A, otherwise to C. If A and B should die in a common accident or in circumstances rendering it uncertain which one of them survived, then it becomes unclear whether C will take. Common sense would seem to indicate that, since C can show that he (C) survived A and since the representatives of B are unable to show that B survived A, that C should therefore take. However, if *Underwood v Wing* were to be applied, then for C to take he (C) must prove that B predeceased the life tenant A — which C could not do.

23.88 The Committee explained the limitations of the principle that is embodied in section 120(a) of the *Property Law Act 1969* (WA) and its counterparts:¹⁴²⁷

It does not help to say that the property of A and B shall be disposed of as if each survived the other, because the assumptions (that A survived B and B survived A) will not help C, since neither A nor B were actually capable of *disposing* of the property; rather, it was the testator who had (perhaps decades earlier) disposed of the property by specifying in his will or a deed the events upon which the disposal of his property depended.

23.89 The legislation in a number of Canadian provinces includes a provision that is intended to address this situation.¹⁴²⁸ The British Columbia provision is in the following terms:¹⁴²⁹

2 General presumptions

...

(3) Subject to a contrary intention appearing by the instrument, if

- (a) an instrument contains a provision for the disposition of property operative in any one or more of the following cases, namely, if a person designated in the instrument
 - (i) dies before another person,
 - (ii) dies at the same time as another person, or
 - (iii) dies in circumstances that make it uncertain which of them survived the other, and

¹⁴²⁵ Ibid.

¹⁴²⁶ Ibid.

¹⁴²⁷ Ibid 17–18.

¹⁴²⁸ *Survivorship Act*, RSA 2000, c S–28, s 2; *Survivorship and Presumption of Death Act*, RSBC 1996, c 444, s 2(3); *The Survivorship Act*, CCSM, c S250, s 2(1); *Survivorship Act*, SNB 1991, c S–20, s 2(1); *Survivorship Act*, RSNL 1990, c S–33, s 2(2); *Survivorship Act*, RSNWT 1988, c S–16, s 1(2); *The Survivorship Act*, SS 1993, c S–67.1, s 6.

¹⁴²⁹ *Survivorship and Presumption of Death Act*, RSBC 1996, c 444, s 2(3).

- (b) the designated person dies at the same time as the other person or in circumstances that make it uncertain which of them survived the other,

then, for the purpose of that disposition, the case for which the instrument provides is deemed to have occurred.

...

23.90 When the Law Reform Commissions of British Columbia and Manitoba reviewed their respective survivorship legislation, both Commissions acknowledged that a provision to the effect of the general rule proposed above would not be of assistance where the issue of survivorship arose as between two or more possible donees or beneficiaries.¹⁴³⁰ As a result, both Commissions recommended the retention of their respective provisions¹⁴³¹ to supplement the general rule in relation to survivorship.¹⁴³²

23.91 Although the Law Reform Committee of South Australia accepted that a provision was required to address the difficulty posed by substitutional dispositions where the issue of survivorship concerned two or more beneficiaries, it did not consider the Canadian provisions to be entirely satisfactory.¹⁴³³

23.92 First, the Committee was concerned that, if it recommended a general rule that each person's estate is to devolve as if he or she survived the other persons who died in the relevant circumstances, there would be an 'overlap' between that general rule and the special provision in relation to substitutional dispositions.¹⁴³⁴

The general provision above would ensure that the *Underwood v Wing* problem did not arise again with the exception of instances where there is a life estate with a series of gift over. But, the special rule (adopted to deal with the specific deficiency in the general rule) can overlap with the general rule since it may also be utilised to prevent the recurrence of an *Underwood v Wing* situation in the special case where the testator is *one of the commorientes*. (emphasis in original)

¹⁴³⁰ Law Reform Commission of British Columbia, *Presumptions of Survivorship*, Report No 56 (1982) 15–16, 17–19; Manitoba Law Reform Commission, *The Survivorship Act*, Report No 51 (1982) 19–21.

¹⁴³¹ For the provisions then in force, see *Survivorship and Presumption of Death Act*, RSBC 1979, c 398, s 2(3) in Law Reform Commission of British Columbia, *Presumptions of Survivorship*, Report No 56 (1982) Appendix C and *The Survivorship Act*, CCSM, c S250, s 2(2) in Manitoba Law Reform Commission, *The Survivorship Act*, Report No 51 (1982) Appendix C. See now *Survivorship and Presumption of Death Act*, RSBC 1996, c 444, s 2(3) and *The Survivorship Act*, CCSM, c S250, s 2(1). The original provisions that were the subject of these recommendations were in similar terms to the current provisions in these two provinces.

¹⁴³² Law Reform Commission of British Columbia, *Presumptions of Survivorship*, Report No 56 (1982) 15–16, 18–19; Manitoba Law Reform Commission, *The Survivorship Act*, Report No 51 (1982) 19–21.

¹⁴³³ Law Reform Committee of South Australia, *Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Problems of Proof of Survivorship as between Two or More Persons Dying at about the Same Time in One Accident*, Report No 88 (1985) 18.

¹⁴³⁴ *Ibid.*

23.93 The South Australian Committee considered, however, that this overlap could be avoided by providing that the provision in relation to substitutional dispositions applies only where the general rule does not cover the situation.¹⁴³⁵

23.94 One member of the Law Reform Committee of South Australia was concerned 'that the special rule [about substitutional dispositions] could operate so as to reverse the common law rule that a claimant, in order to succeed, must prove his own survivorship'.¹⁴³⁶ His concern was illustrated by the following example:¹⁴³⁷

X makes a will in which he gives his whole estate to his wife for life with remainder to his son A if he is living at her death; or remainder to his son B if son A predeceases her and B is living at her death; or remainder to his son C if sons A and B predecease her and C is living at her death; finally, remainder to son D if sons A, B and C all predecease her and D is living at her death. Let it be assumed that the wife and sons A, B and C die together or in circumstances where the order of deaths is uncertain, but, in any event, some years after the death of the testator.

23.95 It was suggested that the Canadian provisions could be subject to the following interpretation:¹⁴³⁸

the representatives of A could come to court and argue that the first 'case' or 'condition' upon which the disposition is dependent is that A be living at the death of his [the testator's] wife, that is to say, that the wife predeceased A. Since, pursuant to the section, this condition is deemed to have occurred, A would be entitled to take notwithstanding the fact that he is not shown to have survived the wife.

23.96 The Law Reform Committee of South Australia also had concerns about the expression of the Canadian provisions. It considered that the reference to a 'designated person' was ambiguous, and thought that the word 'condition' would be preferable to the word 'case'.¹⁴³⁹

23.97 In an attempt to deal with these difficulties, the Law Reform Committee of South Australia considered several possible options.

23.98 One option that was considered was the adoption, in addition to the general rule in relation to survivorship, of a provision that made several changes to the Canadian provisions dealing with substitutional dispositions. This proposal was as follows:¹⁴⁴⁰

1435 Ibid.

1436 Ibid.

1437 Ibid.

1438 Ibid 19.

1439 Ibid 18.

1440 Ibid 19–20 (Option 2).

Effect of commorientes on life estates with gifts over etc

- (1) This section shall only apply to gifts over not coming within the terms of the previous section, and is not intended to affect the common law requirement of proof by a claimant of his own survivorship.
- (2) Unless a contrary intention appears, where an *instrument* contains a provision for the disposition of property dependent upon any one or more of the following *conditions*; namely a person *named in the disposition*—
 - (a) dying before another person;
 - (b) dying at the same time as another person; or
 - (c) dying in circumstances rendering it uncertain which of them survived the other,

and that *named person* dies at the same time as another person mentioned in paragraphs (a)–(c) or in circumstances rendering it uncertain which of them survived the other, then for the purposes of that disposition, the condition upon which the disposition is dependent is deemed to be satisfied. (emphasis in original)

23.99 Another option that was considered expressed the relevant conditions slightly differently, including a reference to a condition that a beneficiary survive a person by a stipulated time:¹⁴⁴¹

Subject to any express direction in the instrument to the contrary, where under any instrument there is a disposition conditional upon—

- (a) a person surviving another person or persons; or
- (b) a person surviving by a stipulated period of time another person or persons; or
- (c) a person surviving other persons dying in a given temporal order of succession,

AND that disposition has failed due to lack of proof of the survivorship required by conditions (a) (b) or (c) THEN a gift over conditional upon there being a failure of the aforesaid survivorship shall be deemed to be a gift over conditional upon there being a failure of proof of the aforesaid survivorship.

23.100 Yet another option was considered by the South Australian Committee. This option was similar to the one set out immediately above, except that its effect was to deem the original condition to be satisfied:¹⁴⁴²

¹⁴⁴¹ Ibid 21 (Option 6). This option was a combination of two other options considered by the Law Reform Committee of South Australia.

¹⁴⁴² Ibid 21–2 (Option 7).

Subject to any express direction in the instrument to the contrary, where under any instrument there is a disposition conditional upon—

- (a) a person surviving another person or persons; or
- (b) a person surviving by a stipulated period of time another person or persons; or
- (c) a person surviving other persons dying in a given temporal order of succession,

AND that disposition has failed due to lack of proof of the survivorship required by conditions (a) (b) or (c) THEN, where there is a gift over conditional upon there being failure of the aforesaid survivorship, that condition shall be deemed to have been satisfied.

23.101 Finally, three members of the South Australian Committee favoured a further, more succinct, option. They were of the view that:¹⁴⁴³

where under an instrument a disposition of property depending upon a person surviving another fails for lack of proof that that person survived the other and there is a gift over conditional on that person not surviving the other, that condition of the gift over should be deemed to be satisfied. In other words the gift over will operate as a substituted gift.

Some elaboration of the wording of the proposal might be required ... it might be thought appropriate to make it clear that the qualification applies where a gift over is expressly dependent upon survival for a period of time (such as 30 days).

23.102 Ultimately, the Law Reform Committee of South Australia did not reach agreement in relation to any of these options, and therefore made no firm recommendation about either the general rule for dealing with issues of survivorship or the nature of a supplementary provision for dealing with substitutional dispositions.¹⁴⁴⁴

23.103 This issue was not considered in the Discussion Paper and the National Committee did not receive any submissions that referred to it.

The National Committee's view

23.104 Where a substitutional disposition is to take effect in the event that one beneficiary does not survive another beneficiary, but the two beneficiaries die in circumstances where the order of their deaths cannot be established, the beneficiary under the substitutional disposition will not be able to establish the facts on which his or her entitlement depends. As explained above, the beneficiary under this type of substitutional disposition will not be assisted by

¹⁴⁴³ Ibid 22 (Option 8).

¹⁴⁴⁴ Ibid 22.

the general rule that has been proposed earlier in this chapter.¹⁴⁴⁵ The National Committee is therefore of the view that the model survivorship provisions should include a provision to give effect to a substitutional disposition of this kind.

23.105 The National Committee generally favours a provision that incorporates the principles contained in the final option considered by the Law Reform Committee of South Australia, which is set out at paragraph [23.101] of this Report.

23.106 The model provision should be expressed to apply if:

- 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
- 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
- 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.

23.107 The model provision should provide that, for the purposes of the further disposition to the substitute beneficiary, the possible beneficiary is taken not to have survived the specified person. Because the model provision takes effect for this limited purpose only, it avoids the possibility that both the general rule and the model provision might be capable of applying to the same situation.

23.108 A provision in these terms will give effect to the substitutional disposition in the following scenario:

Scenario 1

T by will leaves:

1. A life estate in property to B, and the remainder to A if A survives B.
2. But, if A does not survive B, the remainder is to go to C if C survives B.

A and B die in circumstances where the order of their deaths is uncertain.

¹⁴⁴⁵

The general rule is discussed at [23.75]–[23.79] above. The limitations of the general rule are discussed at [23.86]–[23.88] above.

23.109 If A and B died in circumstances where the order of their deaths was uncertain, the effect of the provision would be that A would be taken not to have survived B, so that C could establish his or her entitlement under the substitutional disposition.

23.110 The National Committee realises that some substitutional dispositions may depend, for their efficacy, on proof of the failure of more than one preceding disposition (including another substitutional disposition), for example:

Scenario 2

T by will leaves:

1. A life estate in property to B, and the remainder to A if A survives B.
2. But, if A does not survive B, the remainder is to go to C if C survives B.
3. But, if C does not survive B, the remainder is to go to D if D survives B.

A, B and C die in circumstances where the order of their deaths is uncertain.

23.111 The model provision will also ensure that, by its re-application, D is able to take under the third disposition in Scenario 2.

23.112 The extent to which this provision should be able to be displaced by the expression of a contrary intention is considered separately in this chapter.¹⁴⁴⁶

Property the subject of a *donatio mortis causa*

23.113 A *donatio mortis causa* is a gift made in anticipation of the donor's death.¹⁴⁴⁷ It has 'some of the characteristics of a gift and some of the characteristics of a legacy', but 'does not have to be executed in the manner prescribed for wills'.¹⁴⁴⁸

23.114 There are three essential requirements for a valid *donatio mortis causa*:¹⁴⁴⁹

- (1) the gift must be made in contemplation of the donor's death, although not necessarily in expectation of death;
- (2) there must be delivery of the subject matter of the gift to the donee or a transfer of the means or part of the means of getting at the property, or, as has been said, the essential indicia of title; and

¹⁴⁴⁶ See [23.248]–[23.265] below.

¹⁴⁴⁷ The extent to which a *donatio mortis causa* may be applied towards the discharge of a deceased person's debts and liabilities is considered at [17.91]–[17.103] above.

¹⁴⁴⁸ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [2.160].

¹⁴⁴⁹ *Public Trustee v Bussell* (1993) 30 NSWLR 111, 115 (Cohen J).

- (3) the gift must be conditional upon it taking effect on the death of the donor, being revocable until that event occurs.

23.115 On the death of the donor, the legal title to a chattel the subject of a *donatio mortis causa* does not vest in the personal representative of the deceased person, but passes directly to the donee,¹⁴⁵⁰ who will usually already have possession of the chattel.

23.116 Because a *donatio mortis causa* is conditional on the death of the donor, it is implicit that the donee must survive the donor in order to become entitled to the property the subject of the *donatio*.¹⁴⁵¹

23.117 The legislation in the Northern Territory and Western Australia deals specifically with the devolution of property the subject of a *donatio mortis causa* where the order in which the donor and donee died is uncertain (or additionally, in Western Australia, where the donor and donee died at the same time). The legislation provides that, in these circumstances, a *donatio mortis causa* made by any of the persons to another is void and of no effect.¹⁴⁵² These provisions deal with the devolution of property the subject of a *donatio* as if the gift were one by will.

Discussion Paper

23.118 In the Discussion Paper, the National Committee did not make any proposal about how property the subject of a *donatio mortis causa* should devolve. Instead, the National Committee sought submissions on whether the model survivorship provisions should include a provision to the effect of section 120(b) of the *Property Law Act 1969* (WA).¹⁴⁵³

Submissions

23.119 Three submissions addressed this issue.

23.120 The Queensland and New South Wales Law Societies both supported the inclusion of a provision to the effect of section 120(b) of the *Property Law Act 1969* (WA).¹⁴⁵⁴

¹⁴⁵⁰ *Re Korvine's Trust* [1921] 1 Ch 343 where Eve J commented (at 348) that, if the donor of a *donatio mortis causa* dies without revoking the gift, 'the donee's title is derived from the act of the donor in his lifetime and relates back to the date of that act'.

¹⁴⁵¹ *Delgoffe v Fader* [1939] 1 Ch 922, 927 (Luxmoore LJ).

¹⁴⁵² *Law of Property Act* (NT) s 216(2)(b); *Property Law Act 1969* (WA) s 120(b).

¹⁴⁵³ *Administration of Estates Discussion Paper* (1999) QLRC 256; NSWLRC 365. Although s 216(2)(b) of the *Law of Property Act* (NT) is expressed in similar terms to s 120(b) of the *Property Law Act 1969* (WA), the *Law of Property Act* (NT) had not been enacted when the Discussion Paper was published. Consequently, submissions were sought only in respect of the Western Australian provision.

¹⁴⁵⁴ Submissions 8, 15.

23.121 However, the inclusion of such a provision was opposed by an academic expert in succession law. In his view, having regard to the nature of such a gift, the proposed provision was ‘an unwarranted extension of the doctrine of lapse’.¹⁴⁵⁵

I have difficulties with this. It is new law. I have supported the proposition that *donationes mortis causa* should be recovered to pay *creditors* of the deceased. And I suppose one must accept an argument that a *donatio mortis causa* should be recoverable under a family provision order. But I doubt whether we should extend that to the case where the order of deaths of donor donee is uncertain or where the donee fails to survive the donor by 30 days. Possession has been transferred. The intention to give is less equivocal than in the case of a legacy. It would necessitate an action in which the personal representative would have to show that the gift was made as a conditional gift. ... I see it as an unwarranted extension of the doctrine of lapse. (emphasis in original)

The National Committee’s view

The general provision

23.122 It is in the very nature of a *donatio mortis causa* that it is conditional on the death of the donor. If the donee does not survive the donor, the donee does not become entitled to the relevant property.

23.123 It is consistent with the nature of a *donatio mortis causa* that, if it is uncertain whether or not the donee survived the donor, the *donatio* should be void and of no effect. The National Committee is therefore of the view that 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). The extent to which the model provision should be able to be displaced by the expression of a contrary intention is considered separately in this chapter.¹⁴⁵⁶

Thirty day survivorship requirement

23.124 The National Committee has considered the further issue of whether the model provision should be extended to include a 30 day survivorship requirement. If the model provision were extended in this way, it would apply not only where the order in which the donor and donee died was uncertain, but also where it could not be established that the donee had survived the donor by a period of 30 days.

23.125 In the National Committee’s view, it should continue to be the law that a donee’s title to property that is the subject of a *donatio mortis causa* is complete on the death of the donor. The National Committee is concerned that the introduction of a requirement that a donee must survive a donor by 30 days would complicate the law in relation to the vesting of property and could cast

¹⁴⁵⁵ Submission 12.

¹⁴⁵⁶ See [23.248]–[23.265] below.

doubt on the nature of a donee's interest in the property during the 30 day interval following the donor's death.

23.126 Unlike property comprising a deceased person's estate, which vests on death in the deceased person's personal representative, property that is the subject of a *donatio mortis causa* vests in the donee as soon as the donor dies. If the law were to be changed by introducing a 30 day survivorship requirement, it would be necessary to consider how the property should vest during the 30 day interval following the donor's death. Even if it were decided that the property should continue to vest in the donee on the donor's death, but be liable to being divested if the donee died within 30 days of the donor, a further question would arise as to the extent to which a donee should be able to deal with the property during the 30 day period.

23.127 In light of these considerations, the National Committee is of the view that the model provision should not require a donee to survive a donor by 30 days in order to be entitled to property that was the subject of a *donatio mortis causa*.

The proceeds of a life insurance or accident insurance policy

23.128 The legislation in the Northern Territory and Western Australia deals specifically with the payment of the proceeds of a life insurance policy or accident insurance policy where two or more persons die and the order of their deaths is uncertain (or additionally, in Western Australia, where two or more persons die at the same time). Where the life of any of those persons is insured under a relevant policy and another or others of them would, on surviving the insured person, be entitled (other than under a will or on the intestacy of the person) to the proceeds or part of the proceeds payable under the policy, the proceeds are to be distributed as if the insured person had survived the other person or persons and had died immediately afterwards.¹⁴⁵⁷

Discussion Paper

23.129 In the Discussion Paper, the National Committee did not propose that the model survivorship provisions should include a provision to the effect of section 120(c) of the *Property Law Act 1969* (WA), but instead sought submissions on that issue.¹⁴⁵⁸

Submissions

23.130 All the respondents who addressed this issue — the Bar Association of Queensland, the Public Trustee of South Australia, the Queensland Law

¹⁴⁵⁷ *Law of Property Act* (NT) s 216(2)(c); *Property Law Act 1969* (WA) s 120(c).

¹⁴⁵⁸ *Administration of Estates Discussion Paper* (1999) QLRC 256; NSWLRC 365. Although s 216(2)(c) of the *Law of Property Act* (NT) is expressed in similar terms to s 120(c) of the *Property Law Act 1969* (WA), the *Law of Property Act* (NT) had not been enacted when the Discussion Paper was published. Consequently, submissions were sought only in respect of the Western Australian provision.

Society, an academic expert in succession law and the New South Wales Law Society — agreed that the model survivorship provisions should include a provision to the effect of section 120(c) of the *Property Law Act 1969* (WA).¹⁴⁵⁹

23.131 The academic expert in succession law commented:¹⁴⁶⁰

Section 120(c) of the *Property Law Act 1969* (WA) adopts a view that moneys payable under a life insurance policy should be treated as part of the testator's estate and the nomination of a beneficiary under the policy should be treated like a legacy contained in a will. I think that is correct but perhaps the life insurance industry should be asked whether it would prefer to pay the proceeds of life policies to the personal representatives of the policy holder rather than to the person nominated as beneficiary in the policy. To that question I think there would be a resounding answer in the affirmative. In fact I suggest that the law should provide for the proceeds of life policies to be regarded as forming part of the estate of the deceased and should be paid to the personal representatives; and that a nominated beneficiary should be considered to be a legatee of the proceeds of the policy. A specific provision in a will later than the date of nomination of the beneficiary should be allowed to revoke the nomination. It is not unfair for a nominated beneficiary to have to suffer the possibility of adverse (eg family provision) claims being made against the estate as beneficiaries of the estate all must ...

23.132 This respondent also suggested that the model provision should be extended to incorporate the 30 day survivorship rule:¹⁴⁶¹

I would extend the provision to the case where the beneficiary has died within 30 days of the death of the insured, again for the reason that it can save expensive issues of proof.

The National Committee's view

The general provision

23.133 Where a person would be entitled to the proceeds of a policy of life or accident insurance if he or she survived the insured, but the person and the insured died in circumstances where it is uncertain which of them survived the other, the person can never benefit personally from the payment of the proceeds of the policy. For this reason, the National Committee considers it appropriate for the proceeds of the policy to be paid as if the insured had survived the other person.

23.134 The National Committee is therefore of the view that 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). The extent to which the model provision should

¹⁴⁵⁹ Submissions 1, 4, 8, 12, 15.

¹⁴⁶⁰ Submission 12.

¹⁴⁶¹ Ibid.

be able to be displaced by the expression of a contrary intention is considered separately in this chapter.¹⁴⁶²

Thirty day survivorship requirement

23.135 The National Committee has considered the further issue of whether the model provision should be extended to include a 30 day survivorship requirement. If the model provision were extended in this way, it would apply not only where the order in which the insured and the nominated beneficiary died was uncertain, but also where it could not be established that the nominated beneficiary had survived the insured by a period of 30 days.

23.136 The National Committee considers that a person who is the nominated beneficiary under a policy of life or accident insurance should not be required to survive the insured by 30 days in order to become entitled to the proceeds of the policy. The imposition of such a requirement could have the effect that the nominated beneficiary is deprived of the proceeds at the very time that his or her need is the greatest. In certain circumstances, the *Life Insurance Act 1995* (Cth) facilitates the payment of the proceeds of a life insurance policy without the production of a grant of probate or letters of administration.¹⁴⁶³ In the view of the National Committee, it would be undesirable to impose a requirement that would delay a nominated beneficiary's access to the proceeds of a policy.

Property owned exclusively by the deceased persons as joint tenants

23.137 A joint tenancy is one of the main forms of co-ownership of property. An important feature of a joint tenancy is that, on the death of a joint tenant, the interest of that joint tenant passes by operation of the right of survivorship (the *jus accrescendi*) to the remaining joint tenant or joint tenants.¹⁴⁶⁴ A joint tenant cannot dispose of his or her interest in jointly owned property by will, although a joint tenant may, during his or her lifetime, sever his or her interest.¹⁴⁶⁵ This has the result of converting the joint tenant's interest into an interest as tenant in common with the other co-owners.¹⁴⁶⁶

23.138 In contrast, there is no right of survivorship among tenants in common. A person's interest in property as a tenant in common vests, on the person's death, in his or her personal representative, and forms part of the person's estate. As a result, the person's interest in the property is distributed in accordance with the person's will, if there is one, or in accordance with the relevant intestacy rules.

¹⁴⁶² See [23.248]–[23.265] below.

¹⁴⁶³ *Life Insurance Act 1995* (Cth) ss 211, 212.

¹⁴⁶⁴ Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (6th ed, 2000) [9–003].

¹⁴⁶⁵ For a discussion of how a joint tenancy in respect of Torrens land may be severed, see A Bradbrook, S MacCallum and AP Moore, *Australian Real Property Law* (3rd ed, 2002) [10.43], [10.54].

¹⁴⁶⁶ Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (6th ed, 2000) [9–003].

23.139 The legislation in the ACT,¹⁴⁶⁷ the Northern Territory¹⁴⁶⁸ and Western Australia¹⁴⁶⁹ provides that, where property is owned exclusively by two or more persons as joint tenants, and those persons die in circumstances where the order of their deaths is uncertain (or, additionally, in the ACT and Western Australia, where those persons die at the same time), the property is to devolve as if it had been held by the deceased persons as tenants in common in equal shares.¹⁴⁷⁰

23.140 The effect of these provisions is that the estate of the younger joint tenant does not receive the windfall that results in those jurisdictions where the issue of survivorship is resolved by the presumption that the younger of the deceased persons is deemed to have survived the older.

23.141 When the Law Reform Committee of South Australia reviewed the issue of survivorship, it was of the view that it was generally desirable for a provision to the effect of section 3(1)(d) of the *Simultaneous Deaths Act 1958* (NZ) — which was in the same terms as section 120(d) of the *Property Law Act 1969* (WA) — to be enacted in South Australia.¹⁴⁷¹ It suggested however, that the provision should be expressed to apply to persons who hold legal or equitable title to property, to make it ‘absolutely certain that the subsection applied to a joint tenancy arising in equity’.¹⁴⁷²

23.142 The Law Reform Committee of South Australia also referred to the further situation where the joint tenants are, in equity, tenants in common in unequal shares. The Committee did not suggest an additional provision, but was of the view that the property of the joint tenants ‘should be distributed in

¹⁴⁶⁷ *Administration and Probate Act 1929* (ACT) s 49Q.

¹⁴⁶⁸ *Law of Property Act* (NT) s 216(2)(d).

¹⁴⁶⁹ *Property Law Act 1969* (WA) s 120(d).

¹⁴⁷⁰ Obviously, where the property is not held exclusively by the deceased persons, but is held jointly with another person or persons, the various provisions will not apply and the property will be held by the surviving joint tenant or tenants. Consequently, where A, B and C hold property as joint tenants and B and C die in circumstances in which the order of their deaths is uncertain, the provisions will not apply. Instead, A, as the surviving joint tenant, will take by operation of the right of survivorship.

However, the various provisions will still apply where an interest in property, rather than the whole property, is held jointly and exclusively by persons who die in the specified circumstances of uncertainty: see *Law of Property Act* (NT) s 4 (definition of ‘property’); *Property Law Act 1969* (WA) s 7 (definition of ‘property’). Consequently, where A holds a one third share in a property with B and C, who hold their two thirds share as joint tenants, and B and C die in the specified circumstances of uncertainty, their two thirds share will devolve as if it had been held by them as tenants in common in equal shares, rather than as joint tenants.

¹⁴⁷¹ Law Reform Committee of South Australia, *Eighty-eighth Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Problems of Proof of Survivorship as between Two or More Persons Dying at about the Same Time in One Accident* (1985) 23, 28. Similar provisions have also been recommended by the law reform agencies of several Canadian provinces: see Law Reform Commission of British Columbia, *Presumptions of Survivorship*, Report No 56 (1982) 20, Manitoba Law Reform Commission, *The Survivorship Act*, Report No 51 (1982) 15–16; Alberta Institute of Law Research and Reform, *Survivorship*, Report No 47 (1986) 42–3 (also incorporating a five day survivorship requirement).

¹⁴⁷² Law Reform Committee of South Australia, *Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Problems of Proof of Survivorship as between Two or More Persons Dying at about the Same Time in One Accident*, Report No 88 (1985) 23. The Law Reform Committee of South Australia noted (at 23) that a recommendation to this effect had been made by the Manitoba Law Reform Commission. See Manitoba Law Reform Commission, *The Survivorship Act*, Report No 51 (1982) 16.

those same unequal proportions even though the legal title will flow equally' in accordance with the recommended provision.¹⁴⁷³

Discussion Paper

23.143 In the Discussion Paper, the National Committee expressed the view that the devolution of property held jointly by the deceased persons as if it were held by them as tenants in common would produce a fairer result than the application of the presumption that the younger of the joint tenants had survived the older.¹⁴⁷⁴ The National Committee therefore proposed that the model survivorship provisions should include a provision to the effect of section 120(d) of the *Property Law Act 1969* (WA) and provide that, where two or more persons who owned property as joint tenants died in circumstances where it was uncertain as to which of them survived the other or others, the property held by them as joint tenants should devolve as if they had owned it as tenants in common in equal shares.¹⁴⁷⁵

23.144 The National Committee sought submissions on the further issue of whether, if such a provision were to be included, the model provision should be extended to include a 30 day survivorship requirement.¹⁴⁷⁶ If the model provision were extended in this way, it would apply not only where the order in which the joint tenants died was uncertain, but also where it could not be established that any joint tenant survived the other or others for a period of 30 days.

Submissions

23.145 Almost all the submissions that addressed this issue agreed that, where the order in which joint tenants died was uncertain, the property should devolve as if the joint tenants had owned it in equal shares as tenants in common. This was the view of the Bar Association of Queensland, the Public Trustees of South Australia and Queensland, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁴⁷⁷

¹⁴⁷³ Law Reform Committee of South Australia, *Report of the Law Reform Committee of South Australia to the Attorney-General: Relating to Problems of Proof of Survivorship as between Two or More Persons Dying at about the Same Time in One Accident*, Report No 88 (1985) 23.

¹⁴⁷⁴ *Administration of Estates Discussion Paper* (1999) QLRC 254; NSWLRC [17.60].

¹⁴⁷⁵ Ibid, QLRC 255; NSWLRC 363 (Proposal 85). Although s 216(2)(d) of the *Law of Property Act* (NT) is expressed in similar terms to s 120(d) of the *Property Law Act 1969* (WA), the *Law of Property Act* (NT) had not been enacted when the Discussion Paper was published. Consequently, the National Committee's proposal was expressed only in terms of the Western Australian provision.

¹⁴⁷⁶ Ibid, QLRC 256; NSWLRC 365.

¹⁴⁷⁷ Submissions 1, 4, 5, 8, 12, 14, 15.

23.146 The Public Trustee of Queensland commented that the Western Australian provision produced a fair result:¹⁴⁷⁸

Abolition of the presumption of survivorship by the younger co-owner in these circumstances will avoid the 'windfall' which might otherwise seem to apply. Significant inequities in relation to the ultimate disposition of jointly owned property can result where the co-owners die in circumstances where it is uncertain who survived the other. It is submitted that s 120(d) of the *Property Law Act 1969* (WA) produces a fair result.

23.147 The Queensland Law Society also expressed the view that the Western Australian provision produced a fairer result:¹⁴⁷⁹

Strongly endorse the proposal. Significant inequities in relation to the ultimate disposition of jointly owned property can result where two joint owners (typically husband and wife) die in circumstances where it is uncertain who survived the other. If the couple is childless, and if they are either intestate or their wills do not contain a provision to counter the unfair effect, the relative ages of the husband and wife will determine which of the two original families (parents, siblings, etc.) will inherit the whole of the jointly owned assets. Section 120(d) of the *Property Law Act 1969* (WA) produces a fairer result.

23.148 An academic expert in succession law who supported the National Committee's proposal commented:¹⁴⁸⁰

We should reject any formula that the younger is deemed to survive the elder. It is arbitrary and indeed discriminatory and probably embodies attitudes dating from the era of primogeniture. The Western Australian draft is appropriate in this regard.

23.149 He queried, however, whether the interests as tenants in common should necessarily devolve in equal shares:¹⁴⁸¹

Should the statute specifically provide that the tenancies in common which result from the statutory severance be in equal shares? Suppose that the joint tenants have agreed that their shares, eg of income from the joint account, should be one third and two thirds, to reflect the capital input from the parties. In that case should the tenancy in common resulting from statutory severance be in those shares? I suggest that the provision as to equal shares should be subject to evidence of a contrary intention.

23.150 Although the Public Trustee of Queensland supported the National Committee's proposal, he suggested that the proposed provision might result in the 'double administration' of property that was ultimately distributed through two estates to the same beneficiaries:¹⁴⁸²

1478 Submission 5.

1479 Submission 8.

1480 Submission 12.

1481 Ibid.

1482 Submission 5.

On the other hand this scenario will result in 'double' administration of the same property in that the personal representative will need to deal with the separate interests therein. Given that spouses are the most common instances of joint tenancy, more often than not the separate administration will ultimately result in a transfer of the whole property to the same beneficiaries.

23.151 The Public Trustee of New South Wales was the only respondent who did not support the National Committee's proposal, commenting that:¹⁴⁸³

The present survivorship concepts would be changed and may adversely affect planning and wills based on those concepts.

23.152 Three respondents commented on whether the provision in relation to the devolution of jointly owned property should be expanded to incorporate a 30 day survivorship rule.¹⁴⁸⁴

23.153 An academic expert in succession law was strongly of the view that the model provision in relation to jointly held property should incorporate the 30 day survivorship rule.¹⁴⁸⁵

It would be more practical and consonant with the rest of our decisions about lapse to provide that where joint tenants die *within 30 days of each other* the joint tenancy is severed. The great advantage of this is that the underlying principle of the lapse rule is not offended if one joint tenant survives the other by a very short space of time, or if evidence of who survived whom by perhaps a few minutes could be expensive to establish. (emphasis in original)

23.154 Although the Queensland Law Society expressed some reservations about the basis for the 30 day survivorship rule generally, it acknowledged that the rule 'seems to have generated a swell of support which presumably can now not be stopped'.¹⁴⁸⁶ On that basis, it suggested that the incorporation of the 30 day survivorship rule into the model provision dealing with the devolution of jointly owned property could be justified.¹⁴⁸⁷

23.155 The New South Wales Law Society also supported the incorporation of the 30 day survivorship rule, although it noted that some practitioners consider the 30 day rule generally to be long, and instead adopt a 21 day survivorship requirement in testamentary instruments.¹⁴⁸⁸

23.156 The submission from an academic expert in succession law raised a further issue in relation to the operation of the model survivorship provision dealing with property the subject of a joint tenancy. He queried whether, if the

1483 Submission 11.

1484 Submissions 8, 12, 15.

1485 Submission 12.

1486 Submission 8.

1487 Ibid.

1488 Submission 15.

model survivorship provisions were to incorporate a provision to the effect of section 120(d) of the *Property Law Act 1969* (WA) in relation to property that was held under a joint tenancy, as has been proposed above, they should include an additional provision so that, where one of the joint tenants was the issue of the other, the proposed rule — that the property is to devolve as if the joint tenants held it as tenants in common in equal shares — would not apply:¹⁴⁸⁹

In succession law lapse rules are accompanied by anti-lapse rules where the beneficiary is issue of the deceased who are survived by issue. Then the issue take *per stirpes*. Should an anti lapse rule be introduced in the case of joint tenancies where the joint tenants die at about the same time? Such a rule would not often have effect in the case of joint tenants because one joint tenant would have to be the parent of the other. But if the joint tenants were parent and child and they die within 30 days of each other, the child leaving issue, should provision be made to ensure that the subject matter of the joint tenancy pass to the issue of the deceased child *per stirpes*? My answer to this question is in the negative for a couple of reasons. One is that such joint tenancies are rarely found and so there is no point in legislating for it. The other is that there would be special reasons for such a joint tenancy, not necessarily connected with a will substitute intention, so an anti-lapse provision might not really be at all relevant. I would therefore pass by this question.

The National Committee's view

The general provision

23.157 The National Committee is of the view that a provision to the effect of section 216(2)(d) of the *Law of Property Act* (NT) and section 120(d) of the *Property Law Act 1969* (WA) provides a more equitable basis for the distribution of property than the seniority rule, under which the beneficiaries of the younger of the joint tenants take the entire property to the exclusion of the beneficiaries of the older of the joint tenants.

23.158 The model survivorship provisions should therefore 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). The extent to which the model provision should be able to be displaced by the expression of a contrary intention is considered separately in this chapter.¹⁴⁹⁰

Equitable interests in property

23.159 Although the Law Reform Committee of South Australia was of the view that the provision should refer expressly to persons who hold the legal or equitable title to property,¹⁴⁹¹ the National Committee does not consider such a reference to be desirable. If the model provision that is based on section

¹⁴⁸⁹ Submission 12.

¹⁴⁹⁰ See [23.248]–[23.265] below.

¹⁴⁹¹ See [23.141] above.

216(2)(d) of the *Law of Property Act* (NT) and section 120(d) of the *Property Law Act 1969* (WA) were the only one of the survivorship provisions to refer expressly to equitable interests in property, it could create uncertainty in relation to the meaning of 'property' when used in the other survivorship provisions. Instead, the model survivorship provisions should define 'property' to include:

- real and personal property and any estate or interest in the property; and
- any thing in action and any other right.

23.160 This will make it clear that all references to 'property' include both legal and equitable interests in that property.

Tenants in common in unequal shares.

23.161 In the National Committee's view, it is not necessary to include a separate provision to deal with the situation where the deceased persons held the legal title to property as joint tenants, but in equity were tenants in common in unequal shares. It will be necessary for a person claiming through one of the joint tenants who asserts that the property was, in equity, held by the deceased persons as tenants in common in unequal shares to establish that claim. If the person is successful in obtaining a declaration that the property is held on a constructive trust for the estates of the deceased persons in the shares asserted, the model provision in relation to property that is held by persons as joint tenants will affect only the legal title to the property, as the equitable title to the property will not be held as joint tenants.

Thirty day survivorship requirement

23.162 In the National Committee's view, the model provision should not be extended so that it applies where the joint tenants die within 30 days of each other. As explained above, on the death of a joint tenant, that person's interest in the property does not vest in his or her personal representative. Instead, it accrues immediately to the surviving joint tenant or tenants. Because of this, the National Committee considers that the imposition of a 30 day survivorship requirement would unnecessarily complicate the law in relation to joint tenancies.

23.163 Such a proposal would cast doubt on a surviving joint tenant's entitlement to deal with the property during the 30 day period following the death of his or her co-tenant. Where the subject matter of the joint tenancy was a bank account, this could cause particular hardship.

Incorporation of an anti-lapse concept

23.164 The National Committee notes that one respondent queried whether the general rule that has been proposed in relation to joint tenancies should be subject to a kind of anti-lapse provision that would apply where one of the joint tenants was the issue of the other joint tenant. The suggestion that was raised

for consideration was whether, if the deceased issue is survived by issue, the property that was the subject of the joint tenancy should pass to the surviving issue of the deceased issue.¹⁴⁹²

23.165 As explained earlier in this chapter, the rationale underlying the anti-lapse rule is that a testator who has made a disposition in favour of his or her issue would wish, if that issue predeceased him or her, to benefit the issue of the predeceased issue. In the situation under consideration, however, a joint tenant who is, say, the parent of the other joint tenant,¹⁴⁹³ may not have made any disposition in his or her will in favour of the child who is the other joint tenant. Consequently, the introduction of a form of anti-lapse provision in this situation would not necessarily be consistent with the rationale underlying the anti-lapse rule, but could, depending on the circumstances, have quite the opposite effect — namely, benefiting the issue of a deceased child in circumstances where the deceased child was never an intended beneficiary under the parent's will.

23.166 However, under the rule that has been proposed generally in relation to jointly held property, where, for example, a parent and a child were joint tenants of a parcel of real property, a half interest in the property would form part of the parent's estate and a half interest would form part of the estate of the deceased child. If the parent's will included a disposition under which the deceased child would have been entitled to the property, or a share in it, if he or she had survived the parent,¹⁴⁹⁴ the operation of the anti-lapse rule in respect of that disposition would have the effect that the children of the deceased child would take their parent's share. Similarly, depending on the terms of the will of the deceased child, the issue of the deceased child may be entitled to an interest in the half share of the property that forms part of their parent's estate.

23.167 In light of these matters, the National Committee is of the view that the general rule proposed in relation to the devolution of jointly held property should not be subject to an exception where one of the joint tenants is the issue of the other joint tenant. The exception that has been raised for consideration would represent a significant modification to the anti-lapse rule, and would not be consistent with the rationale underlying that rule.

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

23.168 The legislation in the Northern Territory and Western Australia deals specifically with the situation where, under a will, trust or other disposition, property would have passed to any of two or more possible beneficiaries if any

¹⁴⁹² See [23.156] above.

¹⁴⁹³ Note that the model anti-lapse provision applies to a disposition made in a testator's will to any issue of the testator, and is not restricted to a disposition in favour of a child of the testator.

¹⁴⁹⁴ This would arise where the parent's will made a disposition of 'all my estate' or 'all my real estate' to his or her children, or where the deceased child was a beneficiary of the parent's residuary estate, and the particular parcel of real estate, in the circumstances, forms part of the parent's residuary estate.

of them could be shown to have survived the other or others. In those circumstances, if the order in which the possible beneficiaries die is uncertain (or, additionally, in Western Australia, if those persons die at the same time) the disposition takes effect as if the property were given to the possible beneficiaries as tenants in common in equal shares, and the property is to devolve accordingly.

23.169 Sections 216(2)(e) and (3) of the *Law of Property Act* (NT) provides:

216 Devolution of property in cases where order of death uncertain

(1) ...

(2) If 2 or more persons die or are presumed dead or 1 or more persons die and one or more persons are presumed dead in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them—

...

(e) subject to subsection (3) — in any case where under a will or trust or other disposition property would have passed (whether as the consequence of the operation of section 40 of the *Wills Act* or otherwise) to any of 2 or more possible beneficiaries (who are from amongst those 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, the devise or bequest or disposition takes effect as if the property were given to the possible beneficiaries as tenants in common in equal shares, and the property is to devolve accordingly;

...

(3) Subsection (2)(e) does not apply in any case to which subsection (2)(c) or (f) applies.¹⁴⁹⁵ (note added)

23.170 Section 120(e) of the *Property Law Act 1969* (WA), which is in similar terms, provides:

120 Devolution of property in cases of simultaneous deaths

Where, after 6 December 1962, 2 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—

...

(e) where, under any will or trust or other disposition, any property would have passed, whether in consequence of section 33 of the *Wills Act 1837* of the United Kingdom Parliament¹⁴⁹⁶ or otherwise to any of 2 or

¹⁴⁹⁵ *Law of Property Act* (NT) s 216(2)(c) and (f) deal respectively with the distribution of life insurance proceeds and with the conferral of a power or appointment on the survivor of two or more persons.

¹⁴⁹⁶ See note 1532 below.

more possible beneficiaries (being persons who have so died) if any of them could be shown to have survived the other or others of them, then, unless a contrary intention is shown by the will, trust or disposition, it takes effect as if the property were given to those possible beneficiaries as tenants in common in equal shares, and the property devolves accordingly, but this paragraph does not apply in any case to which paragraph (c) or paragraph (f) applies;¹⁴⁹⁷ (note added)

23.171 These provisions would apply to the situation where a testator left a sum of money on trust to pay the income to A, B and C during their joint lives in equal shares as tenants in common, and the capital to whoever is the survivor of them. If A, B and C survive the testator (in the Northern Territory, by 30 days), but die in circumstances where it is uncertain as to who was the ultimate survivor of them, the estates of A, B and C will take the capital in equal shares.

23.172 The provisions do not apply if the specific survivorship provision dealing with the distribution of life insurance proceeds or with the conferral of a power of appointment on the survivor of two or more persons applies to the situation.

Discussion Paper

23.173 In the Discussion Paper, the National Committee proposed that the model survivorship provisions should include a provision to the effect of section 120(e) of the *Property Law Act 1969* (WA).¹⁴⁹⁸

23.174 The National Committee sought submissions on the further issue of whether, if such a provision were to be included, the model provision should be subject to the 30 day survivorship rule.¹⁴⁹⁹ If the model provision were extended in this way, it would apply not only where the order in which the deceased persons died was uncertain, but also where it could not be established that any of them survived the other or others of them by 30 days.

Submissions

23.175 Almost all the submissions that addressed this issue agreed that the model survivorship provisions should include a provision to the effect of section 120(e) of the *Property Law Act 1969* (WA), so that, where the order in which the possible beneficiaries died was uncertain, the property would devolve as if it were given to them as tenants in common in equal shares. This was the view of the Bar Association of Queensland, the Public Trustee of South Australia, the

¹⁴⁹⁷ *Property Law Act 1969* (WA) s 120(c) and (f) deal respectively with the distribution of life insurance proceeds and with the conferral of a power of appointment on the survivor of two or more persons.

¹⁴⁹⁸ *Administration of Estates Discussion Paper* (1999) QLRC 255; NSWLRC 364. Although s 216(2)(e) of the *Law of Property Act* (NT) is expressed in similar terms to s 120(e) of the *Property Law Act 1969* (WA), the *Law of Property Act* (NT) had not been enacted when the Discussion Paper was published. Consequently, the National Committee's proposal was expressed only in terms of the Western Australian provision.

¹⁴⁹⁹ *Administration of Estates Discussion Paper* (1999), QLRC 256; NSWLRC 365.

Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁵⁰⁰

23.176 The support of the New South Wales Law Society was expressed to be subject to the ‘availability of specific evidence as to the order of death’.¹⁵⁰¹

23.177 The Public Trustee of New South Wales was the only respondent who did not support the National Committee’s proposal, commenting that:¹⁵⁰²

The proposals could have different results for different estates and may need to be more fully considered. The present survivorship concepts would be changed and may adversely affect planning and wills based on those concepts.

23.178 Three respondents commented on whether the model provision in relation to gifts to the survivor of two or more persons should be extended to incorporate a 30 day survivorship rule.

23.179 An academic expert in succession law supported the incorporation of a 30 day survivorship rule, commenting:¹⁵⁰³

Here we are talking about a gift to the surviving members of a class, usually upon the dropping of a life interest, where the order of deaths of the surviving members is uncertain. Again I would advocate a 30 day rule to save difficulties of proof. If all the surviving members of a beneficiary class die within 30 days of each other, their respective estates should take in equal shares.

23.180 The Queensland Law Society, on the basis that the 30 day survivorship rule was now widely supported, suggested that the incorporation of the 30 day survivorship rule into the model provision dealing with the gifts to the survivor of two or more persons could be justified.¹⁵⁰⁴

23.181 The New South Wales Law Society expressed only qualified support for the National Committee’s proposal, commenting that the provision should take effect subject to the New South Wales anti-lapse provision:¹⁵⁰⁵

This is supported, only to the extent that a provision similar to that contained in section 29 of the [*Wills, Probate and Administration Act 1898* (NSW)] is applied, subject to a contrary intention expressed in the deceased’s will or other testamentary instrument.¹⁵⁰⁶ (note added)

1500 Submissions 1, 4, 8, 12, 14, 15.

1501 Submission 15.

1502 Submission 11.

1503 Submission 12.

1504 Submission 8.

1505 Submission 15.

1506 *Wills, Probate and Administration Act 1898* (NSW) s 29, which was an ‘old form’ anti-lapse provision, has since been repealed and replaced by s 41 of the *Succession Act 2006* (NSW). The various anti-lapse provisions are discussed at [23.9]–[23.11] above.

The National Committee's view

The general provision

23.182 The National Committee has considered how property should devolve when a disposition is made in favour of the survivor of two or more persons, and those persons die in circumstances where the order of their deaths is uncertain. In the National Committee's view, a provision that has the effect that the disposition is taken to have been made to all the persons so dying as tenants in common in equal shares produces a more equitable result than the application of the seniority rule.

23.183 The National Committee is therefore of the view that 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). The extent to which the model provision should be able to be displaced by the expression of a contrary intention is considered separately in this chapter.¹⁵⁰⁷

Thirty day survivorship requirement

23.184 In the context of a disposition made by will, the application of the 30 day survivorship rule is quite simple to apply. A beneficiary must survive the testator by 30 days in order to be entitled to the property that is the subject of the disposition. However, it is not entirely clear how the introduction of a 30 day survivorship rule would operate in the context of a disposition made in favour of the survivor of two or more persons, as the possible survivors must necessarily have survived the testator (if relevant, by the required period), otherwise the gift would have lapsed.

23.185 One option would be to provide that, if none of the possible beneficiaries survives the other or others by 30 days, the disposition takes effect as if it had been made to the possible beneficiaries as tenants in common in equal shares. However, it may also be necessary to address how property is to pass where only some of the possible beneficiaries die within 30 days of each other — that is, where the survivor of the possible beneficiaries survives one or more, but not all, of the other possible beneficiaries by 30 days.

23.186 For example, suppose that a disposition is made to the survivor of A, B and C. A is the first to die, B dies twenty days after A, and C dies twenty days after B. In this situation, C has survived A by 30 days, but has not survived B by 30 days. In order to deal with this situation, it would be necessary for the model provision to provide that, where the survivor of the possible beneficiaries does not survive the other possible beneficiaries by 30 days, the disposition is to be treated as if it had been made, as tenants in common in equal shares, to the survivor of the possible beneficiaries and to such of the possible

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See [23.248]–[23.265] below.

beneficiaries who died within 30 days of the survivor. Under such a provision, because C died within 30 days of B, B and C would take in equal shares.

23.187 In the National Committee's view, a provision in these terms would make the survivorship provisions unnecessarily complex. Further, given that the provision proposed in relation to dispositions made to the survivor of two or more possible beneficiaries will apply only where the possible beneficiaries have survived the testator by 30 days,¹⁵⁰⁸ the National Committee is of the view that the model provision should not incorporate a 30 day survivorship requirement as between the possible beneficiaries. Where a disposition is made to the survivor of two or more persons and there is no uncertainty about the order in which these persons have died, the person who survives the others, by whatever period of time, should continue to take in accordance with the terms of the disposition.

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

23.188 The legislation in the Northern Territory and Western Australia deals specifically with the situation where a power of appointment is conferred on any of two or more persons if any of them could be shown to have survived the other or others. Where the persons who could potentially have been the donee of the power of appointment die in circumstances where the order of their deaths is uncertain (or additionally, in Western Australia, where those persons die at the same time), the power of appointment may be exercised as if:

- an equal share of the property that is the subject of the power had been set apart for appointment by each of the persons so dying; and
- each of persons so dying had the power of appointment in respect of that share of the property set apart for appointment by him or her.

23.189 If any of the persons so dying fails to exercise the power of appointment,¹⁵⁰⁹ the share of the property set apart for appointment by that person is to devolve in the manner in which the property would have devolved in default of appointment by the person if he or she had survived the other or others.

¹⁵⁰⁸ Where a disposition is made to the survivor of two or more beneficiaries, and none of the possible beneficiaries survives the testator by 30 days, the disposition lapses unless the possible beneficiaries were issue of the testator who leave issue who survive the testator by 30 days. In that case, the model provision that is based on s 216(2)(g) of the *Law of Property Act* (NT) and s 120(g) of the *Property Law Act 1969* (WA) will apply: see [23.205]–[23.219] below.

¹⁵⁰⁹ Where a power of appointment is exercisable by will, a person will have failed to exercise the power if he or she dies intestate. Even if a person leaves a will, he or she will have failed to exercise the power if the will does not contain:

- an express appointment of the property the subject of the power; or
- a disposition that, under the relevant wills legislation, operates as an implied exercise of the power.

As to the latter, see *Wills Report* (1997) QLRC 76–8; NSWLRC [6.49]–[6.52] and Draft Wills Bill 1997 cl 35.

23.190 Section 216(2)(f) and (4) of the *Law of Property Act* (NT) provides:

216 Devolution of property in cases where order of death uncertain

(1) ...

(2) If 2 or more persons die or are presumed dead or 1 or more persons die and one or more persons are presumed dead in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them—

...

(f) subject to subsection (4) — in any case of a power of appointment which could have been exercised in respect of any property by any 2 or more of those persons who die or are presumed dead if any of them could be shown to have survived the other or others of them, the power may be exercised as if an equal share of that property had been set apart for appointment by each of those persons and as if each of those persons had the power of appointment in respect of the share of that property set apart for appointment by him or her, and that share is to devolve in default of appointment by him or her in the manner in which the property would have devolved in default of appointment by him or her if he or she had survived the other or others;

...

(4) Subsection (2)(f) does not apply in any case to which subsection (2)(c) applies.¹⁵¹⁰ (note added)

23.191 Section 120(f) of the *Property Law Act 1969* (WA), which is in similar terms, provides:

120 Devolution of property in cases of simultaneous deaths

Where, after 6 December 1962, 2 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—

...

(f) where a power of appointment could have been exercised in respect of any property by any of 2 or more persons so dying if any of them could be shown to have survived the other or others of them, unless a contrary intention is shown by the instrument creating the power, the power may be exercised as if an equal share of that property had been set apart for appointment by each of those persons, and as if each of those persons had the power of appointment in respect of the share of the property so set apart for appointment by him, and that share shall devolve in default of appointment by him in the manner in which the property would have devolved in default of appointment by him if he

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Law of Property Act (NT) s 216(2)(c) deals with the distribution of life insurance proceeds.

had been the survivor of those persons, but this paragraph does not apply in any case to which paragraph (c) applies;¹⁵¹¹ (note added)

23.192 These provisions would apply to the situation where a testator left a life estate in property to A, B and C during their joint lives, and conferred on the last of them to survive a power of appointment in relation to the property. If A, B and C survive the testator (in the Northern Territory, by 30 days), but die in circumstances where it is uncertain as to who was the ultimate survivor of them, the testator's will takes effect as if each of A, B and C were the donee of a power of appointment with respect to a one third interest in the property.

23.193 The provisions do not apply if the specific survivorship provision dealing with the distribution of life insurance proceeds applies to the situation.

Discussion Paper

23.194 In the Discussion Paper, the National Committee proposed that the model survivorship provisions should include a provision to the effect of section 120(f) of the *Property Law Act 1969* (WA).¹⁵¹²

23.195 The National Committee sought submissions on the further issue of whether, if a provision to the effect of section 120(f) of the *Property Law Act 1969* (WA) were to be included, the model provision should be subject to the 30 day survivorship rule.¹⁵¹³

Submissions

23.196 Almost all the submissions that addressed this issue agreed that the model survivorship provisions should include a provision to the effect of section 120(f) of the *Property Law Act 1969* (WA), so that, where the order in which the potential donees of a power of appointment died was uncertain, each would be treated as having a power of appointment over an equal share of the property that was the subject of the power. This was the view of the Bar Association of Queensland, the Public Trustee of South Australia, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁵¹⁴

23.197 The Public Trustee of New South Wales was the only respondent who did not support the National Committee's proposal, commenting that:¹⁵¹⁵

¹⁵¹¹ *Property Law Act 1969* (WA) s 120(c) deals with the distribution of life insurance proceeds.

¹⁵¹² *Administration of Estates Discussion Paper* (1999) QLRC 255; NSWLRC 364. Although s 216(2)(f) of the *Law of Property Act* (NT) is expressed in similar terms to s 120(f) of the *Property Law Act 1969* (WA), the *Law of Property Act* (NT) had not been enacted when the Discussion Paper was published. Consequently, the National Committee's proposal was expressed only in terms of the Western Australian provision.

¹⁵¹³ Ibid, QLRC 256; NSWLRC 365.

¹⁵¹⁴ Submissions 1, 4, 8, 12, 14, 15.

¹⁵¹⁵ Submission 11.

The proposals could have different results for different estates and may need to be more fully considered. The present survivorship concepts would be changed and may adversely affect planning and wills based on those concepts.

23.198 Three respondents commented on whether, if the model survivorship provisions were to include a provision to the effect of section 120(f) of the *Property Law Act 1969* (WA), the model provision should be extended to incorporate a 30 day survivorship rule. The Queensland Law Society and the Law Societies of the ACT and New South Wales all agreed that the model provision should incorporate a 30 day survivorship rule.¹⁵¹⁶

23.199 The ACT Law Society commented:¹⁵¹⁷

The 30 day rule, having been decided by the National Committee to be less likely to lead to unsatisfactory outcomes, should be incorporated.

The National Committee's view

The general provision

23.200 The National Committee has considered how property should devolve when a power of appointment is conferred on the person who is the survivor of two or more persons, and those persons die in circumstances where the order of their deaths is uncertain. A provision that treats each of those persons as having had a power of appointment with respect to an equal share of the property resolves the question of survivorship as between the potential donees and produces a fair result.

23.201 The National Committee is therefore of the view that 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). The extent to which the model provision should be able to be displaced by the expression of a contrary intention is considered separately in this chapter.¹⁵¹⁸

23.202 However, the model provision should provide, as section 216(2)(e) of the *Law of Property Act* (NT) and section 120(e) of the *Property Law Act 1969* (WA) do, that the provision applies 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*.¹⁵¹⁹ The model anti-lapse provision recommended by the National Committee¹⁵²⁰ applies where a testator makes a

¹⁵¹⁶ Submissions 8, 14, 15.

¹⁵¹⁷ Submission 14.

¹⁵¹⁸ See [23.248]–[23.265] below.

¹⁵¹⁹ *Law of Property Act* (NT) s 216(2)(f) and *Property Law Act 1969* (WA) s 120(f), unlike *Law of Property Act* (NT) s 216(2)(e) and *Property Law Act 1969* (WA) s 120(e), do not make any reference to the operation of the anti-lapse provisions in those jurisdictions.

¹⁵²⁰ See [23.11] above.

‘disposition’ to a person who is issue of the testator. ‘Disposition’ was defined in the Draft Wills Bill 1997 to include ‘the exercise by will of a power of appointment affecting property’.¹⁵²¹ It is therefore important that the model provision is framed in terms to make it clear that it will apply whether the person who would be entitled to exercise the power if he or she were the survivor is directly identified as a potential donee of a power of appointment or whether the person is a potential donee as a result of the operation of the relevant anti-lapse provision.

Thirty day survivorship requirement

23.203 In the National Committee’s view, the model provision should not be extended so that it also applies where some or all of the potential donees of the power die within 30 days of each other. For the same reasons that have been expressed above in relation to the provision dealing with dispositions made to the survivor of two or more persons,¹⁵²² the National Committee considers that a provision in these terms would make the survivorship provisions unnecessarily complex.

23.204 Consequently, where a power of appointment may be exercised by the survivor of two or more persons, but there is no uncertainty about the order in which those persons have died, the person who survives the others, by whatever period of time, should continue to be entitled to exercise the power in accordance with the terms of the power of appointment.

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

Background

23.205 As explained previously in this chapter, where a testator has made a disposition in a will ‘to my child A’, but A predeceases the testator, the anti-lapse provision of the relevant jurisdiction will apply if A leaves issue who survive the testator or who survive the testator by 30 days (depending on the form of the anti-lapse provision in the relevant jurisdiction). Under most provisions, A’s issue will take the property that was bequeathed to A.¹⁵²³

23.206 However, the application of the anti-lapse provision is a more complicated matter where a testator has made a disposition in a will ‘to the survivor of my children A, B and C’, all of whom predecease the testator (or fail to survive the testator by the required period), and die in circumstances where the order of their deaths is uncertain.

¹⁵²¹ See note 1339 above.

¹⁵²² See [23.184]–[23.187] below.

¹⁵²³ See [23.9]–[23.10] above.

23.207 In those Australian jurisdictions where the seniority rule applies, such a disposition would take effect as if the younger had survived the elder (or, in Queensland, had survived the elder for one day).¹⁵²⁴ If the younger of the issue left issue who survived the testator, the anti-lapse provision of the particular jurisdiction would then apply. However, if the younger of those issue did not leave issue who survived the testator, the disposition would simply lapse. It would be irrelevant to the question of lapse that the other siblings who died in these circumstances may have left issue who survived the testator.

23.208 The legislation in the Northern Territory and Western Australia reflects quite a different approach. Instead of providing that the younger of the testator's issue is taken to have survived the elder, the legislative provisions in these jurisdictions have the effect that, for the purpose of the relevant anti-lapse provision, the disposition is treated as having been made in equal shares to those issue who leave children who survive the testator.

23.209 Section 216(2)(g) of the *Law of Property Act* (NT) provides:

216 Devolution of property in cases where order of death uncertain

...

- (2) If 2 or more persons die or are presumed dead or 1 or more persons die and one or more persons are presumed dead in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them—

...

- (g) in any case where—

- (i) property is devised or bequeathed or appointed by will or other testamentary instrument to the survivor of 2 or more of the testator's children or other issue; and
- (ii) all or the last survivors of those children or other issue are from amongst those persons who die or are presumed dead,

that provision¹⁵²⁵ applies as if the devise or bequest or appointment were in equal shares to those survivors who leave a child or children who survives or survive the testator; ...
(note added)

23.210 Section 120(g) of the *Property Law Act 1969* (WA) is expressed in fairly similar terms:

¹⁵²⁴ See [23.27]–[23.29] above.

¹⁵²⁵ It is assumed that the reference to 'that provision' is intended to be a reference to s 40 of the *Wills Act* (NT), which is the Northern Territory anti-lapse provision.

120 Devolution of property in cases of simultaneous deaths

Where, after 6 December 1962, 2 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—

...

- (g) where, by any will or other testamentary disposition, any property is devised or bequeathed or appointed to the survivor of 2 or more of the testator's children or other issue within the meaning of section 117¹⁵²⁶ and all or the last survivors of those children or issue are persons so dying that section (where it applies) takes effect as if the devise or bequest or appointment were in equal shares to those of them who so die and leave a child or children living at the death of the testator; ...
(note added)

23.211 These provisions would apply, for example, to the situation where a testator left a sum of money on trust to pay the income to 'my children A, B, C and D during their joint lives in equal shares, and the capital to such of my children A, B, C and D as survives the others'. A dies some years before the testator and before B, C and D. B, C and D predecease the testator in circumstances where the order of their deaths is uncertain. B did not have any children, but C and D both have children (C1 and D1 and D2) who survive the testator by 30 days.

23.212 In this situation, the Northern Territory and Western Australian provisions have the effect that, for the purpose of the anti-lapse provision in that jurisdiction, the disposition of the capital (which is a disposition to the survivor of two or more of the testator's issue) is treated as if it were a disposition in equal shares to the survivors who leave a child or children who survive the testator — that is, as a disposition in equal shares to C and D. However, because C and D predeceased the testator, their estates do not take those shares. Instead, the anti-lapse provisions operate so that C1 takes the half share of the capital to which C would otherwise have been entitled and D1 and D2 share between them the other half share of the capital to which D would otherwise have been entitled.

23.213 In this situation, if the provisions had the effect that the disposition was to take effect as if it were made in equal shares to all the possible survivors, B's one third share would simply lapse anyway, because B predeceased the testator without leaving issue.

23.214 The Northern Territory and Western Australian provisions are not in themselves anti-lapse provisions, as they do not have the direct effect of providing that the children of the deceased issue (in the above example, the

¹⁵²⁶

Section 117 of the *Property Law Act 1969* (WA) was repealed by the *Wills Act 1970* (WA). It was the predecessor of s 27 of the *Wills Act 1970* (WA), which is the current Western Australian anti-lapse provision. Curiously, s 120(h) of the *Property Law Act 1969* (WA) does not refer to s 117 of the *Property Law Act 1969* (WA) or to s 27 of the *Wills Act 1970* (WA), but to the English anti-lapse provision: see [23.223] and note 1532 below.

children of C and D) take the disposition in question. However, by providing that, for the purposes of the relevant anti-lapse provision, the disposition takes effect as if it were made in equal shares to those of the possible beneficiaries who died leaving a child who survives, or children who survive, the testator, the provisions ensure that the anti-lapse provisions in these jurisdictions operate to the maximum benefit of any issue of the deceased beneficiaries.

23.215 The Northern Territory and Western Australian provisions were not considered in the Discussion Paper, and no submissions were received in relation to them.

The National Committee's view

23.216 The National Committee agrees with the policy underlying section 216(2)(g) of the *Law of Property Act* (NT) and section 120(g) of the *Property Law Act 1969* (WA). Subject to the matters explained below, the National Committee is therefore of the view that the model survivorship provisions should include a provision to the general effect of these sections.

23.217 It should be clear that the model provision applies for the purpose of the relevant anti-lapse provision only.¹⁵²⁷ Where the issue who are the possible beneficiaries, or the possible donees of a power of appointment, if they survive the other or others of them, in fact survive the testator by 30 days, the manner in which property is to devolve or the power of appointment is to be exercised is to be governed by the model provisions recommended earlier in this chapter — namely by the provisions based, respectively, on section 216(2)(e) of the *Law of Property Act* (NT) and section 120(e) of the *Property Law Act 1969* (WA) and on section 216(2)(f) of the *Law of Property Act* (NT) and section 120(f) of the *Property Law Act 1969* (WA).

23.218 The National Committee notes that its model anti-lapse provision is expressed to apply where a person makes a disposition to any of his or her 'issue'. For consistency with that provision, the model survivorship provision should be expressed to apply where a person makes a disposition to his or her 'issue', instead of to his or her 'children or other issue'.

23.219 Further, the effect of the model anti-lapse provision is that the issue of the deceased issue who survive the testator 'by 30 days' take the deceased issue's share in place of the deceased issue. In contrast, the Northern Territory and Western Australian survivorship provisions refer to issue who leave a child or children who survives or survive the testator, and do not impose a 30 day survivorship requirement. For consistency with the model anti-lapse provision, the model survivorship provision should have the effect that a disposition to the possible beneficiaries takes effect as if it were a disposition to those of the testator's issue who leave 'issue who survive the testator for 30 days'.

¹⁵²⁷ Note that s 216(2)(g) of the *Law of Property Act* (NT) is slightly ambiguous in this respect: see note 1525 above.

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

23.220 It is possible that the persons who die in the relevant circumstances of uncertainty could include a testator and one or more of the testator's issue. This raises the issue of the relationship between the general survivorship rule that has been proposed¹⁵²⁸ and the model anti-lapse provision.¹⁵²⁹

23.221 In the Northern Territory and Western Australia, the legislation includes a provision that facilitates the operation of the anti-lapse provision in circumstances where a testator and one or more of his or her issue are among the persons whose order of death is uncertain.

23.222 Section 216(2)(h) of the *Law of Property Act* (NT) provides:

216 Devolution of property in cases where order of death uncertain

...

- (2) If 2 or more persons die or are presumed dead or 1 or more persons die and one or more persons are presumed dead in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them—

...

- (h) in any case where those persons who die or are presumed dead include a testator and one or more of his or her issue (however remote) and section 40 of the *Wills Act*¹⁵³⁰ applies, the testator is to be taken to have survived all of his or her issue who die or are presumed dead and to have died immediately afterwards and, accordingly, a devise or bequest by the testator to any of his or her issue who die or are presumed dead or who had already died during the testator's lifetime—

¹⁵²⁸ See [23.75]–[23.79], [23.83]–[23.84] above.

¹⁵²⁹ The model anti-lapse provision, as substituted by the *Supplementary Wills Report* (2006), is set out at [23.11] above.

¹⁵³⁰ *Wills Act* (NT) s 40 is the Northern Territory anti-lapse provision. It has the same effect as cl 40 of the Draft Wills Bill 1997, which is set out at [23.11] above. Section 40(1) provides:

40 Dispositions not to fail because issue have died before testator

- (1) Subject to this section, if—

- (a) a person makes a disposition to an issue of the person;
- (b) the disposition is not a disposition to which section 38 applies;
- (c) the interest in property disposed is not determinable at or before the death of the issue; and
- (d) the issue does not survive the testator for 30 days,

the disposition is to be held on trust for the issue of the first-mentioned issue who survive the testator for 30 days in the shares they would have taken of the residuary estate of the first-mentioned issue if the first-mentioned issue had died intestate leaving only issue surviving.

- (i) lapses unless any of the donee's issue, other than those persons who die or are presumed dead, survives the testator; or
- (ii) if any of the issue referred to in subparagraph (i) survives the testator — takes effect in accordance with that provision.¹⁵³¹ (notes added)

23.223 Section 120(h) of the *Property Law Act 1969* (WA) is expressed in fairly similar terms:

120 Devolution of property in cases of simultaneous deaths

Where, after 6 December 1962, 2 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—

...

- (h) where the persons so dying include a testator and one or more of his issue, however remote, then for the purpose of section 33 of the *Wills Act 1837* of the United Kingdom Parliament¹⁵³² where that section applies, the testator shall be deemed to have survived all his issue so dying and to have died immediately afterwards, and accordingly, unless a contrary intention is shown by the will, a devise or bequest by the testator to any of his issue who so dies or has already died in the testator's lifetime—
 - (i) lapses unless any of the donee's issue, other than the persons so dying, is living at the time of the death of the testator;
 - (ii) takes effect in accordance with the provisions of section 33 of the *Wills Act 1837* of the United Kingdom Parliament if any such other issue of the donee is living at that time; ... (note added)

23.224 These provisions apply where the persons who die in the relevant circumstances of uncertainty include a testator and one or more of his or her issue. Their purpose is to ensure that, for the purpose of the relevant anti-lapse provision, the testator is taken to have survived any issue so dying. The effect of the provisions is twofold:

¹⁵³¹ However, as a result of the enactment of s 40 of the *Wills Act* (NT), a disposition of the kind referred to in s 216(2)(h) of the *Law of Property Act* (NT) will lapse unless the donee's issue survive the testator by 30 days. This produces an inconsistency between s 216(2)(h) of the *Law of Property Act* (NT) and s 40 of the *Wills Act* (NT).

¹⁵³² As explained at note 1334 above, s 33 of the *Wills Act 1837* (UK) was substituted in 1982, so that the current provision no longer provides that the testator's issue are deemed to have survived the testator. Section 16(3) of the *Interpretation Act 1984* (WA) provides that a reference in a written law to a provision of an Imperial Act is to be construed as a reference to such provision as it may from time to time be amended. See also note 1526 above in relation to the anti-lapse provision referred to in s 120(g) of the *Property Law Act 1969* (WA).

- by providing that the testator is taken to have survived his or her issue who die in the relevant circumstances, any disposition by the testator to issue who do not themselves leave issue who survive the testator will lapse; and
- any issue of the deceased issue who survive the testator take in accordance with the anti-lapse provision.

23.225 The effect of these provisions is illustrated in the following scenario. Suppose a father makes a will leaving his farm in equal shares to his two daughters, A and B. The residuary estate is left to his wife. The father and the two daughters disappear in a boating accident and the bodies of all three are recovered six weeks later. A and B both leave children who survive the testator by 30 days. For the children of A and B to take their respective mother's share, they need to establish that their mother predeceased the testator (or, in the Northern Territory, that their mother failed to survive the testator by 30 days). Because the Northern Territory and Western Australian provisions provide that, for the purpose of the anti-lapse provision, the testator is taken to have survived his daughters and died immediately afterwards, the provisions facilitate the proof of the matters that must be proved by the children of A and B in order to be entitled under the anti-lapse provisions to their respective mother's share.

23.226 The provisions do not establish the survival of the testator for any other purpose. Accordingly, if the father was also a beneficiary under the wills of his daughters, the daughters' property would still devolve in accordance with the general rule proposed earlier in this chapter for the devolution of property where a testator and a beneficiary die in circumstances where the order of their deaths is uncertain. In that situation, the estate of each person so dying devolves as if he or she survived the other persons so dying and died immediately afterwards. Accordingly, the daughters' estates would be distributed on the basis that they survived their father and died immediately afterwards. As a result, the dispositions in the daughters' wills in favour of their father would lapse.

Discussion Paper

23.227 In the Discussion Paper, the National Committee proposed that the model survivorship provisions should not include a provision to the effect of section 120(h) of the *Property Law Act 1969* (WA).¹⁵³³ In the view of the National Committee, such a provision was not necessary as the National Committee had already recommended the adoption of an anti-lapse rule in the modern form in its Wills Report.¹⁵³⁴

¹⁵³³ *Administration of Estates Discussion Paper* (1999) QLRC 255; NSWLRC 364 (Proposal 88). Although s 216(2)(h) of the *Law of Property Act* (NT) is expressed in similar terms to s 120(h) of the *Property Law Act 1969* (WA), the *Law of Property Act* (NT) had not been enacted when the Discussion Paper was published. Consequently, reference was made only to the Western Australian provision.

¹⁵³⁴ *Ibid*, QLRC 254–5; NSWLRC [17.64].

Submissions

23.228 Almost all the respondents who addressed this issue — namely, the Bar Association of Queensland, the Public Trustee of South Australia, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies — agreed with the National Committee's proposal.¹⁵³⁵

23.229 Only the Public Trustee of New South Wales did not support the National Committee's proposal, making the comment that was also made in relation to many of the National Committee's other proposals that:¹⁵³⁶

The proposals could have different results for different estates and may need to be more fully considered. The present survivorship concepts would be changed and may adversely affect planning and wills based on those concepts.

The National Committee's view

23.230 In the situation where a testator makes a disposition to one or more of his or her issue, the only survivorship provision proposed by the National Committee that would apply where the testator and one or more of the issue die in the relevant circumstances of uncertainty is the model provision that is based on section 216(2)(a) of the *Law of Property Act* (NT) and section 120(a) of the *Property Law Act 1969* (WA).¹⁵³⁷ The effect of the model provision is that, where the order in which the testator and one or more of the testator's issue died is uncertain, the testator's property devolves as if the testator survived any issue so dying, and died immediately after them.

23.231 This raises the question of how the property of the testator would devolve if he or she had survived the issue who died in the relevant circumstances and, in particular, whether the model anti-lapse provision would apply to the distribution of the testator's estate.

23.232 The model anti-lapse provision is expressed to apply where, among other matters, a person who is the issue of the testator does not survive the testator for 30 days. Because section 216(2)(h) of the *Law of Property Act* (NT) and section 120(h) of the *Property Law Act 1969* (WA) provide that the testator is taken to have survived all of his or her issue so dying, they provide direct assistance to the issue of the deceased issue who must establish that the deceased issue did not survive the testator (or, in the Northern Territory, did not survive the testator for 30 days) in order to be entitled to take under the relevant anti-lapse provision. In the absence of such a provision it might be difficult to prove positively that the testator's issue did not survive the testator at all or for the required period.

¹⁵³⁵ Submissions 1, 4, 8, 12, 14, 15.

¹⁵³⁶ Submission 11.

¹⁵³⁷ See [23.75]–[23.79] above.

23.233 However, it is not necessary for these provisions to provide additionally, as the Northern Territory and Western Australian provisions currently do, that:

- a disposition by the testator to any of his or her issue, who die in the circumstances of uncertainty or who had already died during the testator's lifetime, lapses unless those issue leave issue who survive the testator; or
- the issue of deceased issue who survive the testator take in accordance with the relevant anti-lapse provision.

23.234 That result is achieved by the combined effect of the doctrine of lapse and the model anti-lapse provision.

23.235 However, it is desirable to have a provision to assist in proving facts that must be established for the anti-lapse provision to operate. It is sufficient for the model provision to provide that, if the testator and one or more of his or her issue die in the specified circumstances of uncertainty, for the purposes of the anti-lapse provision, the testator is taken to have survived all of his or her issue so dying and to have died immediately afterwards.¹⁵³⁸

A presumption of last resort: survivorship of the younger

23.236 The legislation in the Northern Territory and Western Australia that deals with the devolution of property in situations where there are reasonable doubts as to the order in which the relevant persons died provides that, in any case not covered by one of the specific provisions, the deaths are presumed to have occurred in the order of seniority — that is, the younger is deemed to have survived the elder.¹⁵³⁹ Because the seniority rule will not be invoked if one of the more specific provisions applies to the particular fact situation, the legislation creates what is, in effect, a presumption of last resort.

23.237 A similar approach has been adopted in the ACT where the seniority rule applies only to those situations that are not governed by section 49P and 49Q of the *Administration and Probate Act 1929* (ACT).¹⁵⁴⁰

Discussion Paper

23.238 In the Discussion Paper, the National Committee considered whether, in light of the 30 day survivorship rule previously recommended by the National Committee and the availability of Benjamin orders,¹⁵⁴¹ there is a need to deal

¹⁵³⁸ In South Australia, where the effect of the anti-lapse rule is to provide that the deceased issue survived the testator, this provision may require some modification.

¹⁵³⁹ *Law of Property Act* (NT) s 217; *Property Law Act 1969* (WA) s 120(i).

¹⁵⁴⁰ See [23.52]–[23.55] above.

¹⁵⁴¹ Benjamin orders are considered at [23.16]–[23.20] above.

with the order of deaths of people who die in circumstances in which it is uncertain as to which of them survived the other.¹⁵⁴²

23.239 The National Committee proposed that, in situations not covered by one of its specific proposals, the seniority rule should apply so that the younger of the deceased persons is deemed to have survived the older.¹⁵⁴³

Submissions

23.240 The majority of the submissions that addressed this issue agreed that, in a situation that was not covered by one of the specific model provisions, the issue of the order of the deaths of the relevant persons should be resolved by the application of a presumption that the younger survived the elder. This was the view of the Bar Association of Queensland, the Public Trustee of South Australia, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁵⁴⁴

23.241 The support of the New South Wales Law Society was expressed to be subject to the 'availability of specific evidence as to the order of death'.¹⁵⁴⁵

23.242 The National Committee's proposal was opposed by two respondents.

23.243 The Public Trustee of New South Wales again commented:¹⁵⁴⁶

The proposals could have different results for different estates and may need to be more fully considered. The present survivorship concepts would be changed and may adversely affect planning and wills based on those concepts.

23.244 The proposal was also opposed by an academic expert in succession law, who expressed the view that the presumption of the survival of the younger was inappropriate:¹⁵⁴⁷

I now think that to think in the terms of this presumption is inappropriate. It is probably better to say simply that *neither shall be presumed to have survived the other*. This approach is found in s 120(a) of the Western Australian Act ... (emphasis in original)

¹⁵⁴² *Administration of Estates Discussion Paper* (1999) QLRC 253–4; NSWLRC [17.54]–[17.58].

¹⁵⁴³ *Ibid*, QLRC 255; NSWLRC 364 (Proposal 89).

¹⁵⁴⁴ Submissions 1, 4, 8, 14, 15.

¹⁵⁴⁵ Submission 15.

¹⁵⁴⁶ Submission 11.

¹⁵⁴⁷ Submission 12.

The National Committee's view

23.245 The National Committee is conscious that the seniority rule has been criticised on the grounds of producing arbitrary results and not reflecting the probable wishes of the testator.¹⁵⁴⁸ However, that criticism has been made in the context where the seniority rule has been used as the primary rule for determining the issue of survivorship. In the National Committee's view, it is not open to the same criticism when it is used to resolve the issue of survivorship in a situation where none of the more specific proposals made above applies.

23.246 In a situation that is not covered by one of the National Committee's specific proposals, the purpose of the seniority rule would be to produce an actual result in terms of survival. In the absence of such a provision, it is possible that, in a particular situation, the question of survivorship might be found to be incapable of resolution on the available evidence. It is apparent from the decisions in *Underwood v Wing*¹⁵⁴⁹ and *Wing v Angrave*,¹⁵⁵⁰ discussed earlier in this chapter,¹⁵⁵¹ that this would be an undesirable result.

23.247 The National Committee is therefore of the view that the model survivorship provisions should include a presumption of last resort, to the effect of section 217 of the *Law of Property Act* (NT) and section 120(i) of the *Property Law Act 1969* (WA), to provide for the situation where the order in which the relevant persons have died is uncertain, and the particular fact situation is not covered by one of the specific provisions proposed earlier in this chapter. In that situation, the deaths of the relevant persons should be taken to have occurred in the order of seniority — that is, the younger should be taken to have survived the elder. Because of the variety of situations that are addressed by the National Committee's specific proposals, it anticipates that it would be only in quite rare circumstances that it would be necessary to invoke the seniority rule to resolve the issue of survivorship.

The expression of a contrary intention

23.248 The three Australian jurisdictions that do not rely solely on the seniority rule have each adopted a different approach to whether their individual survivorship provisions may be displaced by the expression of a contrary intention.

Australian Capital Territory

23.249 In the ACT, the general rule that the property of a benefactor is to devolve as if he or she survived any beneficiary who also died in the specified

¹⁵⁴⁸ See [23.46]–[23.47] above.

¹⁵⁴⁹ (1854) 19 Beav 459; 52 ER 428, aff'd on appeal, *Underwood v Wing* (1855) 4 DeG M & G 633; 43 ER 655.

¹⁵⁵⁰ (1860) 8 HLC 183; 11 ER 397.

¹⁵⁵¹ See [23.22]–[23.24] above.

circumstances of uncertainty is not expressed to be subject to the appearance of a contrary intention.¹⁵⁵²

23.250 Similarly, the provision dealing with the devolution of property that was owned jointly by persons who died in the specified circumstances of uncertainty is not expressed to be subject to the appearance of a contrary intention.¹⁵⁵³

Northern Territory

23.251 Section 216 of the *Law of Property Act* (NT), which is the principal survivorship provision in the Northern Territory, is expressed to apply:¹⁵⁵⁴

subject to the appearance of a contrary intention in a will, trust, settlement, disposition, appointment or any other instrument.

23.252 The provision does not attempt to restrict the instrument by which a contrary intention may appear to the instrument by which property becomes, or might become, vested in another person.

23.253 However, section 217 of the *Law of Property Act* (NT), under which the presumption that the younger survived the older is to apply in any case not otherwise provided for, is not expressed to be subject to the expression of a contrary intention in any kind of instrument.

Western Australia

23.254 In contrast with the Northern Territory legislation, section 120 of the *Property Law Act 1969* (WA) is not expressed generally to be subject to the appearance of a contrary intention. Instead, the issue of the expression of a contrary intention, including the type of instrument in which a contrary intention may be expressed, is addressed on a case by case basis in the individual paragraphs of section 120:¹⁵⁵⁵

- Paragraph (a) provides that, if the deceased left a will, unless a contrary intention is shown by the will, the person's property devolves as if he or she survived the other persons so dying.
- Paragraph (b), which deals with *donationes mortis causa*, is not expressed to be subject to the appearance of a contrary intention in any kind of instrument.

¹⁵⁵² *Administration and Probate Act 1929* (ACT) s 49P.

¹⁵⁵³ *Administration and Probate Act 1929* (ACT) s 49Q.

¹⁵⁵⁴ *Law of Property Act* (NT) s 216(1).

¹⁵⁵⁵ *Property Law Act 1969* (WA) s 120 is set out at [23.66] above.

- Paragraph (c), which deals with the payment of the proceeds of a life or accident insurance policy, applies unless a contrary intention is shown by the instrument governing the distribution of the proceeds.
- Paragraph (d), which deals with property owned exclusively by joint tenants, is not expressed to be subject to the appearance of a contrary intention in any kind of instrument.¹⁵⁵⁶
- Paragraph (e), which deals with property that would pass under any 'will or trust or other disposition' to the survivor of two or more persons applies unless a contrary intention is shown by 'the will, trust or disposition'.
- Paragraph (f), which deals with a power of appointment conferred on the survivor of two or more persons, applies unless a contrary intention is shown by 'the instrument creating the power'.
- Paragraph (g), which deals with the disposition of property to the survivor of two or more of the testator's children or other issue, is not expressed to be subject to the appearance a contrary intention in any kind of instrument, although the anti-lapse provision in Western Australia,¹⁵⁵⁷ is itself expressed to be subject to a contrary intention that appears in the will.
- Paragraph (h), which deals with the application of the Western Australian anti-lapse provision, applies unless a contrary intention is shown by 'the will, a devise or bequest' by the testator to any of his or her issue.
- Paragraph (i), which provides for the presumption that the younger survived the older to apply in any case not otherwise covered, is not expressed to be subject to the expression of a contrary intention in any kind of instrument.¹⁵⁵⁸

Discussion Paper

23.255 In the Discussion Paper, the National Committee proposed generally that the model provisions dealing with the devolution of property where the order of survivorship was uncertain should be subject to the appearance of a contrary intention, whether in the will or elsewhere.¹⁵⁵⁹

¹⁵⁵⁶ This is also the position in the ACT: see *Administration and Probate Act 1929* (ACT) s 49Q, which is set out at [23.54] above.

¹⁵⁵⁷ *Wills Act 1970* (WA) s 27.

¹⁵⁵⁸ This is also the position in the ACT and the Northern Territory: see *Civil Law (Property) Act 2006* (ACT) s 213, which is set out at [23.52] above and *Law of Property Act* (NT) s 217, which is set out at [23.57] above.

¹⁵⁵⁹ *Administration of Estates Discussion Paper* (1999) QLRC 256; NSWLRC 364 (Proposal 90).

23.256 The National Committee did not consider whether the devolution of property as a result of particular types of transactions should be subject to the appearance of a contrary intention in only specified instruments.

Submissions

23.257 Most respondents agreed with the National Committee's general proposal that the model survivorship provisions should be subject to the appearance of a contrary intention, whether in the will or elsewhere. This was the view of the Bar Association of Queensland, the Public Trustee of South Australia, and the Queensland, ACT and New South Wales Law Societies.¹⁵⁶⁰

23.258 Only two respondents expressed reservations about this proposal.¹⁵⁶¹

23.259 An academic expert in succession law was of the view that the reference to 'elsewhere' might need to be defined.¹⁵⁶²

23.260 The Public Trustee of New South Wales commented that:¹⁵⁶³

The proposals could have different results for different estates and may need to be more fully considered. The present survivorship concepts would be changed and may adversely affect planning and wills based on those concepts.

The National Committee's view

23.261 The National Committee favours the approach adopted by section 120 of the *Property Law Act 1969* (WA), which addresses the expression of a contrary intention on a case by case basis in each paragraph of the section. In the National Committee's view, it is important that the expression of a contrary intention should be restricted to the instrument under which the relevant interest or power is created.

23.262 Moreover, the National Committee is of the view that the provisions that deal with the devolution of property that is the subject of a *donatio mortis causa*, with the devolution of property owned by persons exclusively as joint tenants, and with the presumption of last resort should not be subject to the expression of a contrary intention shown by any kind of instrument. As explained above, this is the position under the Western Australian legislation. In particular, the National Committee is concerned that, if the provision dealing with the devolution of jointly held property were expressed to be subject to the appearance of a contrary intention 'in a will, trust, settlement, disposition, appointment or any other instrument' — as is the case under the Northern Territory legislation — there could be a conflict between the intentions

¹⁵⁶⁰ Submissions 1, 4, 8, 14, 15.

¹⁵⁶¹ Submissions 11, 12.

¹⁵⁶² Submission 12.

¹⁵⁶³ Submission 11.

expressed by the individual joint tenants. However, it is not necessary for the model provisions dealing with the devolution of property that is the subject of a *donatio mortis causa*, or that is held by persons as joint tenants, to state that the provisions are not subject to a contrary intention. The property will simply devolve in accordance with the model provisions. This is the case under section 120(b) and (d) of the *Property Law Act 1969* (WA).

23.263 The National Committee is therefore of the view that, to the extent to which the model survivorship provisions are to be based on the various paragraphs of section 120 of the *Property Law Act 1969* (WA), the model provisions should reflect the approach taken with respect to the expression of a contrary intention in section 120(a), (b), (c), (d), (e), (f), (h)¹⁵⁶⁴ and (i).

23.264 As explained above, although section 120(g) of the *Property Law Act 1969* (WA) does not expressly provide that it is subject to a contrary intention shown by the will, the anti-lapse provision in that jurisdiction is itself subject to a contrary intention that appears in the will.¹⁵⁶⁵ As a result, it is not, strictly speaking, necessary for the model provision that is based on paragraph (g) to be expressed to be subject to a contrary intention shown by the will. Nevertheless, the National Committee is of the view that, in the interests of achieving greater certainty and clarity, the model provision that is based on section 120(g) should be expressed to be subject to a contrary intention shown by the will.

23.265 Earlier in this chapter, the National Committee has expressed the view that the model survivorship provisions should include a provision, not found in the Western Australian or Northern Territory legislation, to deal with substitutional dispositions.¹⁵⁶⁶ That provision is to apply where, among other factors, a person's entitlement to property under a will or trust or other disposition depends on that person's surviving another person. In the National Committee's view, the model provision dealing with substitutional dispositions should be expressed to apply subject to the expression of a contrary intention shown by the will or trust or other disposition.

The degree of uncertainty that must exist for the model survivorship provisions to apply

Background

23.266 The legislation in the various Australian jurisdictions employs essentially one of two formulations to describe the circumstances in which the provisions about survivorship apply.

¹⁵⁶⁴ At [23.230]–[23.235] above, the National Committee has recommended a provision that is to serve the same purpose as s 120(h) of the *Property Law Act 1969* (WA), although it is to be expressed in more concise terms.

¹⁵⁶⁵ See [23.253] above.

¹⁵⁶⁶ See [23.104]–[23.112] above.

23.267 In New South Wales, Queensland, Tasmania and Victoria, where the seniority rule applies, the legislative provisions are expressed to apply where two or more persons have died 'in circumstances rendering it uncertain which of them survived the other or others'.¹⁵⁶⁷

23.268 In the ACT, the various survivorship provisions refer to persons who die 'at the same time or in an order that is uncertain'.¹⁵⁶⁸ The inclusion of the words 'died at the same time' puts beyond doubt that the provision applies whether the deaths occurred consecutively, but in an unknown order, or are thought to have occurred at the same time.¹⁵⁶⁹

23.269 The expression 'in circumstances rendering it uncertain which of them survived the other' has been the subject of litigation in Australia and in England.

23.270 It has been held that the purpose of the presumption that the younger survived the older:¹⁵⁷⁰

was ... to fill up a gap which existed previously in the law, where the Court was unable by a balance of testimony satisfactory to itself to come to a conclusion as to the order of the deaths.

...

this section is intended purely to fill that gap, and supply that presumption. It was not to take away from the Court the power which it had previously of deciding that fact, if it could decide it, by evidence; ...

23.271 However, there has been a division of judicial opinion about the evidence on which the court may satisfactorily come to a conclusion about the order of deaths, such that the presumption does not apply.

23.272 In *Re Zapullo*,¹⁵⁷¹ the Court held that, where a conclusion as to survivorship can be drawn on a 'clear balance of probabilities', the order of deaths is not uncertain within the meaning of the section, and the statutory presumption does not apply.¹⁵⁷² In that case, which concerned the order in which two brothers had drowned, the younger brother was observed by a witness to be floating face down in the water while his older brother was swimming out to him. The Court was satisfied on the evidence that the older brother had survived his younger brother and therefore did not apply the

¹⁵⁶⁷ See [23.27]–[23.29] above.

¹⁵⁶⁸ *Civil Law (Property) Act 2006* (ACT) s 213(1), (2); *Administration and Probate Act 1929* (ACT) ss 49P(2), 49Q(1)(a).

¹⁵⁶⁹ In doing so, it avoids the argument that was raised, but rejected by the majority of the House of Lords in *Hickman v Peacey* [1945] AC 304: see [23.31] above.

¹⁵⁷⁰ *Re Plaister* (1934) 34 SR (NSW) 547, 551, 552 (Harvey CJ in Eq).

¹⁵⁷¹ [1966] VR 390.

¹⁵⁷² *Ibid* 395 (Adam J).

presumption contained in section 184 of the *Property Law Act 1958* (Vic) to determine the devolution of the brothers' property.

23.273 In England, however, it has been suggested that a higher degree of certainty in relation to the order of the deaths is required to exclude the application of the seniority rule.

23.274 In *Hickman v Peacey*,¹⁵⁷³ Viscount Simon LC commented:¹⁵⁷⁴

the uncertainty ... referred to [in section 184 of the *Law of Property Act 1925* (UK)] is uncertainty which is not removed by evidence leading to a defined and warranted conclusion.

23.275 Lord Macmillan suggested that even greater certainty as to the order of the deaths was required to exclude the application of the seniority rule:¹⁵⁷⁵

Can you say for certain which of these two dead persons died first? If you cannot say for certain, then you must presume the older to have died first. ...

In my opinion the legislature in employing the word 'uncertain' in the section ... was not thinking of the kind of certainty with which the law has to be content but was using the word in its ordinary acceptation as denoting a reasonable element of doubt.

All that is necessary, in order to invoke the statutory presumption, is the presence in the circumstances of an element of uncertainty as to which of the deceased survived the other or others. (emphasis added)

23.276 The circumstances in which the Northern Territory and Western Australian provisions apply seem to have been based on the comments made by Lord Macmillan.

23.277 In the Northern Territory, the relevant provision applies where the persons die or are presumed dead:¹⁵⁷⁶

in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them ...

23.278 The Western Australian provision is similar, except that it also includes a reference to persons who died at the same time. It is expressed to apply where two or more persons have died:¹⁵⁷⁷

¹⁵⁷³ [1945] AC 304.

¹⁵⁷⁴ Ibid 318. The test proposed by Viscount Simon LC was subsequently applied in *Re Bate* [1947] 2 All ER 418.

¹⁵⁷⁵ Ibid 323–5. See *Re Bate* [1947] 2 All ER 418, 420, where Jenkins J suggested that, on Lord Macmillan's test, the order of the relevant deaths 'must be proved to the exclusion of all reasonable doubt' in order to exclude the operation of the English seniority rule.

¹⁵⁷⁶ *Law of Property Act* (NT) s 216(2). See also *Law of Property Act* (NT) s 217(b).

¹⁵⁷⁷ *Property Law Act 1969* (WA) s 120.

at the same time or in circumstances that give rise to reasonable doubts as to which of them survived the other or others.

The National Committee's view

23.279 In the National Committee's view, the model survivorship provisions should not be expressed to apply where two or more persons have died 'in circumstances rendering it uncertain which of them survived the other or others'. The National Committee is conscious that this expression has resulted in considerable litigation, and has been the subject of quite different interpretations.¹⁵⁷⁸

23.280 The National Committee has therefore considered whether the model survivorship provisions should use the expression found in the Northern Territory and Western Australian provisions, which refer to circumstances that give rise to 'reasonable doubts' as to which of the persons survived the other. The National Committee considered whether it might be possible to adopt a more robust test by referring to 'any doubt', but was of the view that the concept of reasonableness would still be imported, as any doubts that were held could not be fanciful.

23.281 Consequently, the National Committee is of the view that the model provisions should generally follow the language of the Northern Territory and Western Australian provisions in this respect. In making this proposal, the National Committee does not intend to import the criminal standard of proof into this area of the law.

23.282 In addition, the model survivorship provisions should be expressed to apply where two or more persons have died at the same time.¹⁵⁷⁹ This will avoid arguments about whether it is possible for two or more persons to die at the same time and, if so, whether there is any doubt about the order in which persons have died if they died at the same time.¹⁵⁸⁰

Application of the model survivorship provisions to presumed deaths

23.283 The principal Northern Territory survivorship provision applies not only where two or more persons die in circumstances that give rise to reasonable doubts as to which of those persons survived the other or others, but also where one or more of the persons is presumed to have died in those circumstances.¹⁵⁸¹ Similarly, the seniority rule, which operates in the Territory

¹⁵⁷⁸ See [23.271]–[23.275] above.

¹⁵⁷⁹ See *Civil Law (Property) Act 2006* (ACT) s 213 and *Administration and Probate Act 1929* (ACT) ss 49P, 49Q, which are set out at [23.52] and [23.54] above, and *Property Law Act 1969* (WA) s 120, which is set out at [23.66] above.

¹⁵⁸⁰ See the discussion at [23.31] above about the argument that was ultimately rejected by the House of Lords in *Hickman v Peacey* [1945] AC 304.

¹⁵⁸¹ *Law of Property Act* (NT) s 216, which is set out at [23.57] above.

as a presumption of last resort, applies where two or more persons die, two or more persons are presumed dead, or one or more persons die and one or more persons are presumed dead and there are reasonable doubts as to the order of their deaths.¹⁵⁸²

23.284 In no other Australian jurisdiction is the legislation expressed to apply where one or more of the relevant deaths is presumed.

Discussion Paper

23.285 In the Discussion Paper, the National Committee sought submissions on whether, if the model survivorship provisions include a statutory presumption of survivorship, the legislation should apply to presumed deaths, as well as to actual deaths.¹⁵⁸³

Submissions

23.286 Almost all the respondents who addressed this issue were of the view that any statutory presumption of survivorship should apply to presumed deaths. This was the view of the Bar Association of Queensland, the Queensland Law Society, and the ACT and New South Wales Law Societies.¹⁵⁸⁴

23.287 The Bar Association of Queensland commented:¹⁵⁸⁵

There is no sensible reason why a statutory presumption of survivorship should not apply to presumed, as well as actual deaths.

23.288 The ACT Law Society expressed the view that the overriding consideration should be that the law provides a solution to the problem of succession to property in circumstances where it is not known which of a number of people died first.¹⁵⁸⁶

23.289 The New South Wales Law Society was also of the view that the survivorship provisions should apply to presumed deaths, although its support was subject to:¹⁵⁸⁷

an appropriate provision in legislation to safeguard the legal interests and entitlement of a person proved to have survived beyond the date of presumed death.

¹⁵⁸² *Law of Property Act* (NT) s 217, which is set out at [23.57] above.

¹⁵⁸³ *Administration of Estates Discussion Paper* (1999) QLRC 256; NSWLRC 365.

¹⁵⁸⁴ Submissions 1, 8, 14, 15.

¹⁵⁸⁵ Submission 1.

¹⁵⁸⁶ Submission 14.

¹⁵⁸⁷ Submission 15.

23.290 However, an academic expert in succession law was strongly opposed to extending the model survivorship provisions to cover presumed, as well as actual, deaths:¹⁵⁸⁸

We should avoid the doctrine of presumed deaths altogether. A thirty day rule takes away nearly all the difficulties. It is not appropriate for the court to presume a death. It should merely permit a distribution on the basis that a certain person has predeceased, or survived, another person. This order would be revocable without criticism if later evidence turned up warranting the revocation.

The National Committee's view

23.291 It is important for the model provisions to deal comprehensively with the various situations in which the issue of survivorship can arise. Accordingly, the model survivorship provisions should extend in their application to the case of presumed deaths.

23.292 The National Committee is conscious that the courts have been reluctant to apply the seniority rule to the situation where one or more of the deaths in question has been presumed. In *Re Albert*,¹⁵⁸⁹ Lush J referred to a number of anomalies that could arise if the seniority rule were to apply in these circumstances.¹⁵⁹⁰

23.293 However, under the model survivorship provisions proposed in this chapter, the seniority rule would apply only as a last resort. In the most common situation, where the persons who have died include a testator or an intestate and a person who is a beneficiary of the estate of the testator or intestate, the general rule that will apply will have the effect that the property of the testator or intestate devolves as if he or she had survived the other person. Consequently, in the situation that arose for consideration in *Re Albert*,¹⁵⁹¹ the application of the general rule would have the effect that the aunt's estate would devolve as if she had survived the nephew who had been missing for 30 years when she died.

23.294 The National Committee is therefore of the view that the model survivorship provisions should apply not only in the case of actual deaths, but also where a person's death has been presumed on the basis of the common law presumption of death following an absence of seven or more years, or where the court has otherwise inferred from the circumstances of a particular case that a person has died.

¹⁵⁸⁸ Submission 12.

¹⁵⁸⁹ [1967] VR 875.

¹⁵⁹⁰ See [23.35]–[23.39] above.

¹⁵⁹¹ [1967] VR 875.

The common law presumption of death

23.295 As explained earlier in this chapter, in certain circumstances, if a person has not been seen or heard of for seven years or more, the court may, under the common law, presume that the person is dead. However, the person is not presumed to have died at any particular time. In particular, the person is not presumed to have died at the end of the seven year period.¹⁵⁹²

Alternatives to the common law presumption of death

23.296 Alternative approaches to the common law presumption of death have been enacted or proposed in a number of jurisdictions.

Shortening the seven year period or fixing the date of death

23.297 An alternative to the presumption articulated in *Axon v Axon*¹⁵⁹³ is a statutory provision that shortens the requirement for a seven year absence or fixes a date of death (or does both). The formula used in the United States *Uniform Probate Code* has this effect. Montana has adopted the Code without significant modification. The relevant provision is in the following terms:¹⁵⁹⁴

- (5) An individual whose death is not established under subsections (2) through (4), who is absent for a continuous period of 5 years, during which the individual has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. The individual's death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

23.298 Under the *Uniform Probate Code* provision, the person must have been missing for only a period of five years, and not seven years as required by the common law presumption of death. In addition, the provision has the effect of fixing the date of death at the end of the five year period.

Inclusion of a legislative provision that reflects the common law presumption

23.299 Because the Northern Territory legislation extends to presumed deaths,¹⁵⁹⁵ it includes a provision that sets out the circumstances in which a person is presumed to be dead.¹⁵⁹⁶

23.300 Section 215 of the *Law of Property Act* (NT) provides:

¹⁵⁹² See [23.13]–[23.14] above.

¹⁵⁹³ (1937) 59 CLR 395. See [23.14]–[23.15] above.

¹⁵⁹⁴ *Montana Code Annotated 2007* § 72–1–108 <<http://data.opi.state.mt.us/bills/mca/72/1/72-1-108.htm>> at 22 February 2009.

¹⁵⁹⁵ See [23.56]–[23.57] above.

¹⁵⁹⁶ The common law presumption of death is discussed at [23.12]–[23.14] above.

215 Presumption of death

- (1) For the purposes of sections 216 and 217, a person—
 - (a) whose death is not established;
 - (b) who has been absent for a continuous period of 7 years during which he or she has not been heard from; and
 - (c) whose absence is not satisfactorily explained after diligent search or inquiry,
 is presumed to be dead.
- (2) A will, trust, settlement, disposition, appointment or other instrument by which property devolves on the death of a person does not take effect unless a court of competent jurisdiction of the Commonwealth or a State or Territory has, on the basis of the criteria in subsection (1), made a finding that has the effect of presuming the person to be dead.¹⁵⁹⁷

Discussion Paper

23.301 In the Discussion Paper, the National Committee proposed that the model survivorship provisions not include a provision altering the common law presumption of death.¹⁵⁹⁸

Submissions

23.302 The National Committee's proposal was supported by the Bar Association of Queensland, the Public Trustee of New South Wales and the ACT Law Society.¹⁵⁹⁹

23.303 However, the Queensland Law Society queried whether the necessity for an absence of seven years was consistent with the realities of modern life, referring to the fact that a number of States in the United States base their provisions on a five year absence.¹⁶⁰⁰

23.304 A submission from an academic expert in succession law emphasised the importance of the courts retaining a discretion in relation to determining when a person died, although his comments were perhaps more relevant to the situation of a missing beneficiary, rather than to the situation of a missing testator or intestate.¹⁶⁰¹

¹⁵⁹⁷ Section 215(2) of the *Law of Property Act* (NT) was substituted by s 43 of the *Justice Portfolio (Miscellaneous Amendments) Act 2005* (NT).

¹⁵⁹⁸ *Administration of Estates Discussion Paper* (1999) QLRC 255; NSWLRC 363 (Proposal 82).

¹⁵⁹⁹ Submissions 1, 11, 14.

¹⁶⁰⁰ Submission 8.

¹⁶⁰¹ Submission 12.

The court must consider the evidence and decide not that someone has died but that an estate may be distributed on the basis that a person has died. I think that that is the better approach because the Court does not find itself forced to say that the law says that someone is dead, although in fact there may be insufficient evidence of death and the person may turn out to be alive, when the Court order would look absurd. That is the approach of *Re Benjamin*, a procedure the usefulness of which is I suspect not sufficiently understood by the legal profession.

The National Committee's view

Modification of the common law presumption of death

23.305 In the National Committee's view, the common law presumption of death should not be modified.

23.306 The common law presumption of death is usually applied in those situations where very little is known of a person's disappearance. As explained earlier in this chapter, where there is evidence about the circumstances in which a person is thought to have died, for example, where a person was a passenger on a ship that was lost at sea, it is open to the court to infer, at an earlier time than seven years from when the person was last heard of, that the person has died.¹⁶⁰² Consequently, in the National Committee's view, the requirement for a seven year absence should not be shortened.

23.307 The National Committee is also opposed to any suggestion that a person's death should be fixed as occurring at the end of the seven year period or any other specified period of years. The general rule proposed by the National Committee for the devolution of property¹⁶⁰³ is consistent with the common law requirement that persons claiming through a deceased beneficiary must prove that the beneficiary survived the testator or the intestate, as the case may be. However, a presumption that fixes a person's death at the end of the seven year period could produce results that are inconsistent with the rationale underlying the general rule that has been proposed by the National Committee.

23.308 For example, if a presumption fixing a person's death at the end of a seven year period were applied to the facts of *Re Benjamin*,¹⁶⁰⁴ it would produce the opposite result to the decision in that case. The son who disappeared in 1892 would be presumed to have died in 1899, with the result that his estate would have taken under the will of the father, who died in 1893. On the other hand, the general rule proposed by the National Committee would produce the same result as the decision in that case. Because there was a doubt as to whether the son had survived his father, the father's property would devolve as if he had survived his son.

¹⁶⁰² See [23.15] above.

¹⁶⁰³ See [23.75]–[23.79] above.

¹⁶⁰⁴ [1902] 1 Ch 723.

Statutory enactment of the common law presumption of death

23.309 In the National Committee's view, there are difficulties in attempting to draft a legislative provision that accurately reflects the common law presumption of death.

23.310 Section 215(1)(b) of the *Law of Property Act* (NT) refers to a person 'who has been absent for a continuous period of 7 years during which he or she has not been heard from', whereas the cases generally refer to a person who has not been heard from in that period by persons who would be likely to have received communications from the person.¹⁶⁰⁵ As section 215(1) is expressed in mandatory terms, and does not seem to give the court a discretion, the effect of this omission is that the section represents a slight departure from the common law presumption of death.

23.311 Further, because section 215(1) prescribes the circumstances in which a person is presumed to be dead, rather than the circumstances in which a court may presume that a person is dead, it has been necessary to restrict the operation of section 215(1) by the inclusion of section 215(2), so that 215(1) will apply only where a court is satisfied of the matters set out in that subsection.

23.312 In the National Committee's view, although the model survivorship provisions should apply where the death of a person has been presumed at common law, the legislation should not attempt to define the common law presumption of death.

Benjamin orders

23.313 Earlier in this chapter, the National Committee explained how, in certain circumstances, the court may make an order (known as a Benjamin order) to the effect that a deceased person's estate may be distributed on the basis that a missing beneficiary died before the deceased person.¹⁶⁰⁶

23.314 In the Northern Territory, section 218 of the *Law of Property Act* (NT) preserves the court's power to make a Benjamin order:

218 Nothing in this Part prevents making of *Re Benjamin* orders

Nothing in this Part prevents the distribution of the estate of a deceased person in the case where a beneficiary cannot be found and there is no evidence that the beneficiary predeceased the testator.

¹⁶⁰⁵ See, for example, the comments in *Axon v Axon* (1937) 59 CLR 395, 405 (Dixon J), which are set out at [23.13] above.

¹⁶⁰⁶ See [23.16]–[23.19] above.

Discussion Paper

23.315 In the Discussion Paper, the National Committee proposed that the model survivorship provisions should include a statutory enactment of the rule in *Re Benjamin* to enable the court to order an estate to be distributed as if a missing beneficiary had not survived the testator.¹⁶⁰⁷ It expressed the view that such a provision might overcome the situation where Benjamin orders are not sought through ignorance of their availability.¹⁶⁰⁸

23.316 The National Committee sought submissions on the further issue of whether any statutory enactment of the rule in *Re Benjamin* should be extended so that it also applied where the date of death of a testator (or an intestate) was unknown.¹⁶⁰⁹

Submissions

23.317 The submissions received from the Bar Association of Queensland, the Public Trustee of South Australia and the Queensland, ACT and New South Wales Law Societies agreed with the National Committee's proposal.¹⁶¹⁰

23.318 However, an academic expert in succession law was not convinced that it was desirable to attempt to enact a statutory provision reflecting the Court's power to make a Benjamin order:¹⁶¹¹

We know that the Court has power to make the order and I suspect that sometimes its power has been overlooked ... And what would the legislation say? It might well fail to produce as broad a jurisdiction as is needed. It could be overlong and difficult to understand.

23.319 There was little support, however, for extending any statutory provision so that it also applied in respect of a testator or intestate whose date of death was unknown. Only the Queensland Law Society considered that, in limited circumstances, such a provision would bring 'some certainty'.¹⁶¹²

23.320 Such an extension was opposed by an academic expert in succession law and by the ACT Law Society.¹⁶¹³ The academic expert in succession law commented:¹⁶¹⁴

¹⁶⁰⁷ *Administration of Estates Discussion Paper* (1999) QLRC 255; NSWLRC 363 (Proposal 83).

¹⁶⁰⁸ *Ibid*, QLRC 253; NSWLRC [17.54].

¹⁶⁰⁹ *Ibid*, QLRC 256; NSWLRC 365.

¹⁶¹⁰ Submissions 1, 4, 8, 14, 15.

¹⁶¹¹ Submission 12.

¹⁶¹² Submission 8.

¹⁶¹³ Submissions 12, 14.

¹⁶¹⁴ Submission 12.

This is really about court orders and the court will always have to consider evidence and might wish to attach conditions to an order.

The National Committee's view

23.321 Upon further consideration, the National Committee is now of the view that the model survivorship provisions should not attempt to encapsulate the court's power to make a Benjamin order. If a provision of this kind were to be included in the model survivorship provisions, it would be necessary to prescribe the circumstances in which the court may order the distribution of an estate on the basis:

- that a beneficiary had predeceased the testator or, as the case may be, the intestate; and
- where relevant, that the beneficiary had died without issue.¹⁶¹⁵

23.322 This would raise issues about the evidence that should be sufficient for this purpose. The National Committee agrees with the comments made by the academic expert in succession law that the model provision could fail to confer as broad a jurisdiction as is required, and could be difficult to understand.¹⁶¹⁶

23.323 Although the National Committee expressed concern in the Discussion Paper that the availability of Benjamin orders might not be widely known within the legal profession, it considers that there are other means by which the availability of Benjamin orders may be highlighted. As noted earlier in this chapter, section 218 of the *Law of Property Act* (NT) expressly preserves the court's power to make a Benjamin order.¹⁶¹⁷ In the National Committee's view, the model survivorship provisions should include a provision to that effect, and should also include the citation for the decision in *Re Benjamin*.¹⁶¹⁸

23.324 Further, the National Committee is of the view that the model survivorship provisions should not include a provision to enable the court to make a kind of Benjamin order where it is a testator or an intestate, rather than a beneficiary, who has gone missing and whose date of death is unknown.

23.325 When the court makes a grant on the presumption that a person has died, different issues arise. The main concern is the possibility that the person whose death was presumed may in fact have been alive when the grant was made. This is quite different from the purpose of making a Benjamin order, which is to permit an estate to be distributed on the footing that a beneficiary

¹⁶¹⁵ This would be relevant where the beneficiary was issue of the testator or intestate. See the discussion of the anti-lapse provisions at [23.9]–[23.11] above.

¹⁶¹⁶ See [23.318] above.

¹⁶¹⁷ *Law of Property Act* (NT) s 218 is set out at [23.314] above.

¹⁶¹⁸ [1902] 1 Ch 723.

who has been missing for some time has predeceased the person whose estate is being distributed.

23.326 In the National Committee's view, the issue of the distribution of the estate of a missing person is more appropriately addressed in the context of orders that may be made when a grant is made on the presumption of death.¹⁶¹⁹

The application of the model survivorship provisions

Existing legislative provisions

23.327 The legislation of the Northern Territory and Western Australia includes a provision dealing with the application of the survivorship provisions in those jurisdictions. Both provisions are in similar terms.

23.328 Section 214 of the *Law of Property Act* (NT) provides:

214 Application

- (1) This Part applies in respect of—
 - (a) all property that devolves on the death or presumed death of a person according to a law of the Territory; and
 - (b) all appointments of trustees that are made according to a law of the Territory.
- (2) This Part applies to and in relation to—
 - (a) deaths of persons who die after the commencement of this Act; and
 - (b) presumed deaths of persons who are presumed after the commencement of this Act to be dead,

whether the deaths or presumed deaths occur in the Territory or elsewhere.

23.329 Section 119 of the *Property Law Act 1969* (WA) provides:

119 Application of section 120

- (1) Section 120 applies in respect of—
 - (a) all property of any person that devolves according to the law of this State;
 - (b) all appointments of trustees where the appointments have to be made according to the law of this State.

¹⁶¹⁹

See Chapter 24 of this Report.

- (2) Section 120 so applies whether the deaths occurred in this State or elsewhere.

23.330 Under both Acts, the survivorship provisions apply in respect of property that devolves according to the law of that jurisdiction. Under the choice of law rules, matters affecting movable property are governed by the law of the jurisdiction in which the deceased died domiciled, while matters affecting immovable property are governed by the law of the jurisdiction in which the property is situated.¹⁶²⁰ Accordingly, these provisions will apply in respect of the devolution of:

- immovable property situated in the jurisdiction in question; and
- movable property of persons who, at the time of their death, were domiciled in that jurisdiction.

23.331 The survivorship provisions are also expressed to apply to all appointments of trustees made according to the law of that jurisdiction.

The National Committee's view

23.332 In the National Committee's view, it is desirable to clarify the application of the model survivorship provisions. Accordingly, those provisions should be accompanied by a provision to the effect of section 214 of the *Law of Property Act* (NT). That provision has two advantages over section 119 of the *Property Law Act 1969* (WA).

23.333 First, section 214 of the *Law of Property Act* (NT) provides that the survivorship provisions extend to presumed deaths, which is consistent with the National Committee's earlier recommendations in this chapter.

23.334 Secondly, section 214(2) contains specific transitional provisions. Although the National Committee has not generally given consideration to the transitional provisions of the model legislation (many of which will depend on the effect of the current legislative provisions of the individual jurisdictions), the model survivorship provisions warrant particular attention. In many cases, they will alter the way in which property devolves. For that reason, it is important to specify that the model survivorship provisions apply only in relation to:

- the deaths of persons occurring after the commencement of the provisions; and
- the death of a person that has been inferred or presumed after the commencement of the provisions.¹⁶²¹

¹⁶²⁰ See [36.15]–[36.23] in vol 3 of this Report.

¹⁶²¹ This is necessary because the model survivorship provisions are to apply not only in respect of persons who have died, but also in respect of the deaths of persons whose deaths have been inferred or presumed.

23.335 This provision makes it clear that the model survivorship provisions do not affect interests in property that vested before the commencement of the provisions.

Location of the model survivorship provisions

The existing legislative provisions

23.336 In New South Wales, the Northern Territory, Victoria and Western Australia, the survivorship provisions are located in the property law legislation of the particular jurisdiction.¹⁶²² In Tasmania, the relevant survivorship provision is located in its own separate Act.¹⁶²³

23.337 In the ACT, the relevant provisions are divided between the property law legislation and the administration legislation.¹⁶²⁴

23.338 Queensland is the only Australian jurisdiction whose survivorship provision is contained wholly in its administration legislation. Section 65 of the *Succession Act 1981* (Qld), like the survivorship provisions in the other Australian jurisdictions, is not restricted to resolving issues of survivorship that arise under a will or on the intestacy of a person. The section is expressed to apply ‘for all purposes affecting the title to property’. Although it may be that the section is most commonly used to resolve issues about title that arise in relation to dispositions under a will or on the intestacy of a person, it is unusual, given the wider application of the provision, that it has been located in the *Succession Act 1981* (Qld).

Discussion Paper

23.339 In the Discussion Paper, although the National Committee proposed that the various survivorship provisions should be included in the model legislation, it did not specifically consider the issue of their location or seek submissions on that issue.

Submissions

23.340 The submissions that agreed with the National Committee’s recommendations about the inclusion in the model legislation of the various survivorship provisions did not specifically address the issue of where those provisions would most appropriately be located.

¹⁶²² *Conveyancing Act 1919* (NSW) s 35; *Law of Property Act* (NT) ss 214–218; *Property Law Act 1958* (Vic) s 184; *Property Law Act 1969* (WA) ss 119–120.

¹⁶²³ *Presumption of Survivorship Act 1921* (Tas) s 2.

¹⁶²⁴ *Civil Law (Property) Act 2006* (ACT) s 213; *Administration and Probate Act 1929* (ACT) ss 49P, 49Q.

The National Committee's view

23.341 The model survivorship provisions that have been recommended in this chapter are not restricted to dispositions arising under a will or on the intestacy of a person, but will apply to dispositions under other instruments. The National Committee is therefore of the view that those provisions are more appropriately located in legislation of general application. Accordingly those provisions should be located in the property law legislation of the particular jurisdiction, rather than in the model administration legislation. This is consistent with the position in most Australian jurisdictions.

RECOMMENDATIONS

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).¹⁶²⁵

23-2 The provision referred to in Recommendation 23-1 should apply unless a contrary intention is shown by the person's will.¹⁶²⁶

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.¹⁶²⁷

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:¹⁶²⁸

¹⁶²⁵ See [23.75]–[23.79] above.

¹⁶²⁶ See [23.261], [23.263] above.

¹⁶²⁷ See [23.83]–[23.84] above.

¹⁶²⁸ See [23.104]–[23.106] above.

- (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.¹⁶²⁹

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.¹⁶³⁰

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).¹⁶³¹

¹⁶²⁹ See [23.107]–[23.111] above.

¹⁶³⁰ See [23.265] above.

¹⁶³¹ See [23.122]–[23.123] above.

- 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.¹⁶³²

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).¹⁶³³

- 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.¹⁶³⁴

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).¹⁶³⁵

- 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.¹⁶³⁶

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).¹⁶³⁷

¹⁶³² See [23.261]–[23.263] above.

¹⁶³³ See [23.133]–[23.134] above.

¹⁶³⁴ See [23.261], [23.263] above.

¹⁶³⁵ See [23.157]–[23.158] above.

¹⁶³⁶ See [23.261]–[23.263] above.

¹⁶³⁷ See [23.182]–[23.183] above.

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.¹⁶³⁸

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).¹⁶³⁹

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;¹⁶⁴⁰ and
- (b) apply unless a contrary intention is shown by the instrument creating the power.¹⁶⁴¹

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

¹⁶³⁸ See [23.261], [23.263] above.

¹⁶³⁹ See [23.200]–[23.201] above.

¹⁶⁴⁰ See [23.202] above.

¹⁶⁴¹ See [23.261], [23.263] above.

- (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.¹⁶⁴²

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.¹⁶⁴³

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.¹⁶⁴⁴

23-20 The provision referred to in Recommendation 23-19 should apply unless a contrary intention is shown by the testator's will.¹⁶⁴⁵

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).¹⁶⁴⁶

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

¹⁶⁴² See [23.216]–[23.219] above.

¹⁶⁴³ See [23.264] above.

¹⁶⁴⁴ See [23.230]–[23.235] above.

¹⁶⁴⁵ See [23.261], [23.263] above.

¹⁶⁴⁶ See [23.245]–[23.247] above.

The circumstances in which the model survivorship provisions should apply

23-22 The provisions recommended above should apply where:¹⁶⁴⁷

- (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.¹⁶⁴⁸

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.¹⁶⁴⁹

23-25 The model survivorship provisions should not define the common law presumption of death.¹⁶⁵⁰

¹⁶⁴⁷ See [23.279]–[23.282] above.

¹⁶⁴⁸ See [23.291]–[23.294] above.

¹⁶⁴⁹ See [23.305]–[23.308] above.

¹⁶⁵⁰ See [23.309]–[23.312] above.

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.¹⁶⁵¹

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.¹⁶⁵²

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.¹⁶⁵³

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.¹⁶⁵⁴

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

¹⁶⁵¹ See [23.321]–[23.326] above.

¹⁶⁵² See [23.332]–[23.335] above.

¹⁶⁵³ See [23.341] above.

¹⁶⁵⁴ See [23.159]–[23.160] above.

Chapter 24

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

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INTRODUCTION

24.1 As explained in Chapter 23 of this Report, the situation may sometimes arise where a grant is sought in respect of the will or estate of a person who has disappeared in circumstances from which it may be inferred that the person has died.¹⁶⁵⁵ Alternatively, a grant might be sought in respect of the will or estate of a person who simply disappeared, but who has now been absent for a period of seven or more years. As explained previously, in the latter situation, the court may be prepared to presume that the person is dead.¹⁶⁵⁶ In both situations, an issue arises as to the basis on which the court has jurisdiction to make a grant.

THE COURT'S JURISDICTION

24.2 Within Australia, two different approaches are taken in relation to the court's jurisdiction to make a grant in circumstances where a person's death has been inferred or has been presumed.

24.3 In some States and Territories, the legislation includes a specific provision to confer jurisdiction on the court to make a grant in these circumstances.¹⁶⁵⁷ In other jurisdictions, there is no specific provision and an application for a grant in these circumstances must be made under the provision dealing with the court's ordinary jurisdiction to make a grant.¹⁶⁵⁸

24.4 However, in the absence of a specific legislative provision, the court only has jurisdiction to grant probate of the will or letters of administration of the estate of a 'deceased person'.¹⁶⁵⁹ Consequently, if the court in those States that lack a specific provision makes a grant and it subsequently appears that the grant was made with respect to a person who was living at the time, the grant will be a nullity.¹⁶⁶⁰

¹⁶⁵⁵ See [23.15] above.

¹⁶⁵⁶ The common law presumption of death is described at [23.13]–[23.14] above.

¹⁶⁵⁷ See [24.10]–[24.20] below.

¹⁶⁵⁸ See [24.5]–[24.9] below.

¹⁶⁵⁹ *Ex parte Keegan* (1907) 7 SR (NSW) 565, 566 (Darley CJ). This case was decided before ss 40A–40D were inserted into the *Probate and Administration Act 1898* (NSW).

¹⁶⁶⁰ *Ex parte Keegan* (1907) 7 SR (NSW) 565, 566 (Darley CJ). See also *In the Goods of Napier* (1809) 1 Phill Ecc 83; 161 ER 921; *Fraser v Fraser* (1909) 28 NZLR 962. Although the English Court of Appeal subsequently held in *Hewson v Shelley* [1914] 2 Ch 13 that a revoked grant was not void ab initio, it is arguable that that decision can be distinguished on the basis that it concerned the revocation of letters of administration when a will was subsequently discovered. It did not involve any issue about the court's jurisdiction to make a grant in respect of a person who was not in fact deceased. See *Allen v Dundas* (1789) 3 TR 125; 100 ER 490, 492 where the Court drew a distinction between a forged will that was admitted to probate, which gave the putative executor the power to give a valid discharge to a debtor and the case of probate granted during the life of a person. The Court held that, in the latter case, the grant was a nullity, as the Court never had jurisdiction to grant probate of the will of a living person: see at 492 (Ashurst J), 492 (Buller J).

Jurisdictions without a specific legislative provision

24.5 The legislation in Queensland, South Australia, Tasmania and Western Australia does not contain a specific provision conferring jurisdiction on the court to make a grant in respect of the will or estate of a person whose death has been inferred or of a person who is presumed to be dead.

24.6 Because the court's jurisdiction is expressed in terms of granting probate of the will or letters of administration of the estate of a 'deceased person',¹⁶⁶¹ a person who applies for a grant in these jurisdictions must ordinarily swear to the death of the deceased person.¹⁶⁶² In a situation where the body of the deceased has never been found or recovered, it may not be possible for an applicant to swear to the deceased's death.

24.7 Accordingly, the practice in this situation is for the applicant to apply to the court for leave to swear to the death¹⁶⁶³ and, once leave is granted, to make a common form application for a grant in the usual way.

24.8 The origins of the practice of applying for leave to swear to the death of a person have been described as follows:¹⁶⁶⁴

This practice no doubt evolved in order to help and protect the executors who, without this leave, could not truthfully swear to the death of the testator as required by the common form procedure and who, if they did so swear without leave, might be committing perjury.

24.9 It has been held that '[l]eave to swear to the death is an incident to an application for the grant'.¹⁶⁶⁵

Jurisdictions with a specific legislative provision

24.10 The legislation in the ACT, New South Wales, the Northern Territory and Victoria contains a specific provision that confers jurisdiction on the court to grant probate or administration in circumstances where the court is satisfied, whether by direct evidence or on the presumption of death, that a person is dead.¹⁶⁶⁶

¹⁶⁶¹ *Succession Act 1981* (Qld) s 6; *Administration and Probate Act 1919* (SA) s 5; *Supreme Court Civil Procedure Act 1932* (Tas) s 6(5); *Administration Act 1903* (WA) s 6.

¹⁶⁶² *Re Fulton* [1994] 2 Qd R 505. See also *Uniform Civil Procedure Rules 1999* (Qld) r 602(1)(a)(ii); *The Probate Rules 2004* (SA) r 11.01, Form 40 para 5, Form 48 para 5, Form 52 para 4; *Probate Rules 1936* (Tas) r 62, Forms 3, 17–20, 22–26; *Non-contentious Probate Rules 1967* (WA) rr 6(3), 8(ii), 9(ii).

¹⁶⁶³ *Re Smith* (1975) 6 ALR 123, 124 (Forster J). See *The Probate Rules 2004* (SA) rr 27.06, 67; *Probate Rules 1936* (Tas) r 20B; *Non-contentious Probate Rules 1967* (WA) r 34.

¹⁶⁶⁴ *Re Smith* (1975) 6 ALR 123, 124 (Forster J).

¹⁶⁶⁵ *Re Fulton* [1994] 2 Qd R 505, 506 (Ryan J). Consequently, an application for leave to swear to the death of a person will be dismissed where no grant is sought.

¹⁶⁶⁶ *Administration and Probate Act 1929* (ACT) s 9A; *Probate and Administration Act 1898* (NSW) s 40A; *Administration and Probate Act* (NT) s 15; *Administration and Probate Act 1958* (Vic) s 7.

24.11 The effect of the various provisions is that, if it subsequently appears that the person who was supposedly deceased was, in fact, living at the date of the grant, the grant is not, by reason of that fact, a nullity.¹⁶⁶⁷

24.12 Although the provisions do not refer to a death that is inferred, as such, the reference to direct evidence would seem to include evidence from which the court may infer that a person is dead. Commentators on the New South Wales legislation suggest that, where there is no body, an application for a grant must be made under the relevant New South Wales provision.¹⁶⁶⁸

24.13 Because of the specific jurisdiction conferred on the court, the old practice of applying for leave to swear to the deceased's death no longer applies.¹⁶⁶⁹ As one commentator has observed:¹⁶⁷⁰

If the court is empowered to make a grant when it is satisfied on evidence put before it that a certain person is dead, why ... is it necessary that some person who is, by hypothesis, ignorant of that fact should be given leave to swear to it?

24.14 The current practice is for the relevant evidence to be placed before the court.¹⁶⁷¹

an applicant for a grant should place before the Court what is known as to the circumstances concerning the absence, and then invite the Court (in a case in which the presumption of death is not appropriate) to infer death and to make a grant accordingly; or alternatively invite the Court (in the appropriate case) to act upon the legal presumption of death arising after absence of more than seven years and to make the grant accordingly.

24.15 It has been suggested that it is 'more convenient for the evidence concerning the presumed death of the deceased to be put before the court in the course of the application for the grant' instead of on a preliminary application for leave to swear to the deceased's death.¹⁶⁷²

¹⁶⁶⁷ Note, however, that the legislation in these jurisdictions provides that, where it appears that the person was living at the date of the grant, the court must revoke the grant: see *Administration and Probate Act 1929* (ACT) s 32A; *Probate and Administration Act 1898* (NSW) s 40C; *Administration and Probate Act* (NT) s 42; *Administration and Probate Act 1958* (Vic) s 9. These provisions are considered in Chapter 25 of this Report, which deals with the revocation of grants.

¹⁶⁶⁸ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 315.

¹⁶⁶⁹ *Re Smith* (1975) 6 ALR 123, 124 (Forster J).

¹⁶⁷⁰ Practice Note (1966) 40 *Australian Law Journal* 173.

¹⁶⁷¹ RA Sundberg, *Griffith's Probate Law and Practice in Victoria* (3rd ed, 1983) 14. See also *Supreme Court Rules* (NT) rr 88.23(10) and 88.24(11), which provide that, if there is no official record of the death of the testator or of the deceased, an additional affidavit shall accompany the application setting out the facts relied on to establish his death or a presumption of his death. Similarly, rr 2.04(5) and 4.04(5) of the *Supreme Court (Administration and Probate) Rules 2004* (Vic) provide that an applicant for a grant of probate or administration who is unable to comply with the requirement to exhibit a certified copy of the death certificate in relation to the testator or the deceased may submit other evidence of the death of the testator or of the deceased, as the case may be, to justify an inference or a presumption of death.

¹⁶⁷² Practice Note (1966) 40 *Australian Law Journal* 173.

24.16 The various provisions are set out below.

New South Wales

24.17 Sections 40A of the *Probate and Administration Act 1898* (NSW) provides:

40A Evidence or presumption of death

- (1) Where the Court is satisfied, whether by direct evidence or on presumption of death, that any person is dead, the Court shall have jurisdiction to grant probate of the person's will or administration of the person's estate, notwithstanding that it may subsequently appear that the person was living at the date of the grant.
- (2) The provisions of this Act, the *Testator's Family Maintenance and Guardianship of Infants Act 1916*, Part 15 of the *Conveyancing Act 1919* and Chapter 3 of the *Succession Act 2006* relative to a deceased person and of the *Real Property Act 1900* relative to a deceased proprietor shall, unless the context or subject-matter otherwise indicates or requires, extend to any person with respect to whom the Court is satisfied in accordance with subsection (1) is deceased.
- (3) The provisions of this section shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*, provided that nothing in this section shall affect any action or proceeding decided before or pending at the commencement of that Act.

Australian Capital Territory, Northern Territory

24.18 Section 9A of the *Administration and Probate Act 1929* (ACT) provides:

9A Evidence of death

- (1) Probate of the will, or administration of the estate, of a person may be granted by the Supreme Court if it is satisfied, by direct evidence or by evidence supporting a presumption of death, that the person is, or may be presumed to be, dead.
- (2) A grant of probate of the will, or administration of the estate, of a person made on direct evidence of the death of the person or on evidence supporting a presumption of the death of the person is valid notwithstanding that the person is, after the day the grant was made, found to have been alive on that day.

24.19 Section 15 of the *Administration and Probate Act* (NT) is expressed in virtually identical terms.

Victoria

24.20 Section 7 of the *Administration and Probate Act 1958* (Vic) provides:

7 Grant of probate etc on evidence or presumption of death

- (1) Where the Court is satisfied, whether by direct evidence or on presumption of death, that any person has died leaving property whether real or personal in Victoria, the Court shall have and shall at all times be deemed to have had jurisdiction to grant probate of his will or administration of his estate as if he were a deceased person, notwithstanding that it may subsequently to the grant appear that he was living at the date of the grant.
- (2) Subject to the provisions of this Act, where a grant is or has been made of probate of the will or administration of the estate of any person with respect to whom the Court is satisfied as aforesaid that he is dead, notwithstanding that it may subsequently appear that the person in respect of whose estate the grant was made was living at the date of the grant, the person administering the estate for the time being by virtue of such grant shall have and be deemed to have had the like rights powers privileges duties and liabilities as the personal representative of a deceased person, and in any Act the expression **personal representative** shall include and be deemed at all times to have included the person administering the estate for the time being by virtue of such grant.

THE TERMS OF THE GRANT AND ANY ANCILLARY ORDERS

Jurisdictions without a specific legislative provision

24.21 In Queensland, South Australia, Tasmania and Western Australia, there is no specific legislative provision that deals with the terms of a grant made when the deceased's death has been inferred or presumed, or with any ancillary orders that might be made in conjunction with such a grant.

24.22 Nevertheless, when a court makes a grant, it may attach such conditions or limitations to it as it thinks fit.¹⁶⁷³ Consequently, it is open to the court, when granting probate or administration in these circumstances, to attach conditions to the grant.

Jurisdictions with a specific legislative provision

24.23 In the ACT, New South Wales, the Northern Territory and Victoria — where the legislation expressly confers jurisdiction on the court to make a grant on the presumption of death — the legislation also includes a provision dealing with various aspects of the grant.¹⁶⁷⁴

24.24 The various provisions are expressed to apply where a grant is made on the presumption of death, and provide for the making of orders that would

¹⁶⁷³ In Queensland, there is a specific provision to this effect: see *Succession Act 1981* (Qld) s 6(3).

¹⁶⁷⁴ *Administration and Probate Act 1929* (ACT) s 9B; *Probate and Administration Act 1898* (NSW) s 40B; *Administration and Probate Act* (NT) s 16; *Administration and Probate Act 1958* (Vic) s 8.

protect the estate of the deceased person if it subsequently appeared that the person whose death has been presumed was actually alive when the grant was made.

New South Wales, Victoria

24.25 Section 40B of the *Probate and Administration Act 1898* (NSW) provides:

40B Presumption of death

- (1) If a grant of probate or administration is made on presumption of death only, the provisions of this section shall have effect.
- (2) The grant shall be expressed to be made on presumption of death only.
- (3) The estate shall not be distributed without the leave of the Court.

The leave may be given in the grant of probate or administration or by other order, and either unconditionally or subject to such conditions as the Court deems reasonable, and in particular, if the Court thinks fit, subject to an undertaking being entered into or security being given by any person who takes under the distribution that the person will restore any money or property received by the person or the amount or value thereof in the event of the grant being revoked.

- (4) The Court may direct the executor or administrator before distributing the estate to give such notices as the Court deems proper in the circumstances, in order that the person whose death has been presumed, if the person is still living, or if the person has died since the date of the grant, then in order that any person interested in the estate may lodge with the Registrar within such time as may be specified a caveat against the distribution.

If the Court directs any such notice to be given, the executor or administrator shall not have the benefit of section 92, unless the executor or administrator complies with the direction.

If a caveat is duly lodged within such time as may be specified, the executor or administrator shall not distribute the estate until the caveat is withdrawn or removed.

- (5) An application for leave to distribute the estate and for directions may be made, and a caveat may be lodged withdrawn or removed, as prescribed by the rules, and the Court may make such order in respect of costs and otherwise as it deems proper.
- (6) The provisions of this section, with the exception of subsection (2), shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*, but shall not affect any distribution made before such commencement.

24.26 Section 8 of the *Administration and Probate Act 1958* (Vic) is virtually identical to section 40B(1)–(5) of the *Probate and Administration Act 1898* (NSW).

Australian Capital Territory, Northern Territory

24.27 Section 9B of the *Administration and Probate Act 1929* (ACT) is expressed in similar terms to the New South Wales and Victorian provisions, although it is drafted in a more up-to-date style. There are also some minor differences in terms of the effect of a caveat. Section 9B provides:

9B Grant on presumption of death

- (1) If the Supreme Court makes a grant of probate of the will, or administration of the estate, of a person on evidence supporting a presumption of the death of the person—
 - (a) the grant shall be expressed to be made on presumption of the death of the person; and
 - (b) the estate of the person shall not be distributed without the leave of the court; and
 - (c) the court may, in the probate or administration or by an order made at any time, give leave to distribute the estate; and
 - (d) the court may, in giving leave to distribute the estate of the person, direct that the distribution shall not be made unless each person who is to take under the distribution gives an undertaking or security that he or she will, if the probate or administration is revoked—
 - (i) if the person has received property other than money under the order—restore the property or, at his or her option, pay an amount equal to the value of the property at the time he or she received the property to the person whose death was presumed or, if that person has subsequently died, to the administrator of the estate of that person; or
 - (ii) if the person has received money under the order—pay an amount equal to the amount of the money received under the order to the person whose death was presumed or, if that person has subsequently died, to the administrator of the estate of that person; and
 - (e) the court may direct the executor or the administrator to give, before the estate is distributed, the notices (including a notice specifying a date before which a caveat against the distribution of the estate may be filed in the Supreme Court under the rules) that the court considers appropriate.
- (2) If an executor or administrator of an estate has given the notices directed by the Supreme Court under subsection (1)(e), the executor or administrator—

- (a) may, subject to subsection (3), after the end of the period specified in the notices, distribute the estate among the persons entitled to it, having regard only to the claims of which the executor or administrator has notice at the time of the distribution; and
 - (b) is not liable, in relation to any part of the estate so distributed, to a person entitled to that part of whose claim he or she did not have notice at the time of the distribution.
- (3) If a caveat against the distribution of an estate has been filed in the Supreme Court in accordance with a notice under subsection (1)(e) and the caveat is in force under the rules—
- (a) the executor or administrator shall not distribute the estate among the persons entitled to it except under an order of the Supreme Court under subsection (4); and
 - (b) the executor or administrator, the person who filed the caveat or a person interested in the distribution of the estate may make application to the Supreme Court for an order under subsection (4).
- (4) Despite the filing of a caveat in the Supreme Court in accordance with subsection (1)(e), the court may, on application under subsection (3)(b), make an order authorising the executor or administrator of an estate to distribute the estate among the people entitled to it.
- (5) An order under subsection (4) may authorise the distribution of the estate subject to the conditions the Supreme Court considers appropriate.

24.28 Section 16(1)–(5) of the *Administration and Probate Act* (NT) is virtually identical to section 9B of the *Administration and Probate Act 1929* (ACT). In addition, section 16(7) of the Northern Territory Act provides that, upon application by a person who has given an undertaking or security under subsection (1), or by the executor or administrator of such a person, the court may terminate or modify the obligations under the undertaking or security.

Effect of the provisions

24.29 The various provisions are expressed to apply where a grant is made on the presumption of death, and would not appear to apply where the death of the deceased has been inferred, rather than presumed.

24.30 In all cases, a grant made on the presumption of death must be expressed to be made on that basis, and the estate of the deceased may not be distributed without the leave of the court.

24.31 Although all the provisions enable the court to direct that persons taking under the estate give an undertaking or security to restore the property or money if the grant is revoked, commentators on the New South Wales legislation have suggested that the 'longstanding usual practice is to grant

unconditional leave to distribute the estate', without requiring any undertaking or security.¹⁶⁷⁵

24.32 In addition, all the provisions enable the court to direct the personal representative to give such notices as the court considers appropriate so that, if the person whose death has been presumed is still living, or has died since the grant was made, any person interested in the estate may lodge a caveat against the distribution.

24.33 The New South Wales and Victorian provisions provide that, if a caveat is lodged within the time specified, the personal representative must not distribute the estate until the caveat is withdrawn or removed.¹⁶⁷⁶ The provisions in the Territories are worded slightly differently, although they have a similar effect. They provide that, where a caveat has been lodged against the distribution of the estate, the personal representative must not distribute the estate except under an order of the court. The court may authorise the distribution of the estate notwithstanding the lodging of the caveat.¹⁶⁷⁷

DISCUSSION PAPER

24.34 In the Discussion Paper, the National Committee considered whether provisions to the effect of sections 40A and 40B of the *Probate and Administration Act 1898* (NSW) should be included in the model legislation.

24.35 The National Committee expressed the view that the matters covered by section 40A of the *Probate and Administration Act 1898* (NSW) would be covered by a provision to the effect of section 6 of the *Succession Act 1981* (Qld), which the National Committee had already proposed be included in the model legislation.¹⁶⁷⁸ The National Committee therefore proposed that a provision to the effect of section 40A of the *Probate and Administration Act 1898* (NSW) should not be included in the model legislation,¹⁶⁷⁹ but that each jurisdiction should consider whether a provision to that effect should be included in its court rules.¹⁶⁸⁰

24.36 The National Committee also expressed the view that section 40B of the *Probate and Administration Act 1898* (NSW), which deals with the terms of the grant, was procedural in nature.¹⁶⁸¹ Consequently, the National Committee

¹⁶⁷⁵ RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) 320.

¹⁶⁷⁶ *Probate and Administration Act 1898* (NSW) s 40B(4); *Administration and Probate Act 1958* (Vic) s 8(d).

¹⁶⁷⁷ *Administration and Probate Act 1929* (ACT) s 9B(3), (4); *Administration and Probate Act* (NT) s 16(3), (4).

¹⁶⁷⁸ *Administration of Estates Discussion Paper* (1999) QLRC 24; NSWLRC [4.6]. Section 6 of the *Succession Act 1981* (Qld) is set out at [3.7] in vol 1 of this Report.

¹⁶⁷⁹ *Administration of Estates Discussion Paper* (1999) QLRC 25; NSWLRC 38 (Proposal 6).

¹⁶⁸⁰ Ibid, QLRC 25; NSWLRC 38 (Proposal 7).

¹⁶⁸¹ Ibid, QLRC 24; NSWLRC [4.5].

proposed that a provision to the effect of section 40B should not be included in the model legislation,¹⁶⁸² but that each jurisdiction should consider including a provision to that general effect in its court rules.¹⁶⁸³

24.37 Because of the proposal that consideration be given by the various jurisdictions to including provisions to the effect of sections 40A and 40B in their respective court rules, the National Committee proceeded to consider the form in which any such provisions should be enacted. The National Committee expressed the view that it was unclear whether the term 'presumption of death' that is used in sections 40A and 40B covers cases of what might be called an 'inferred death', as well as cases of what might properly be described as a 'presumed death'.¹⁶⁸⁴ In the view of the National Committee:¹⁶⁸⁵

it should be clear that the provisions are referring to cases where, although the bodies are not found or recovered, the deaths can be inferred from the surrounding circumstances — for example where people drown at sea or are lost in a mine explosion — as well as to cases where the court applies the presumption of death.

24.38 The National Committee therefore proposed that, wherever provisions to the general effect of sections 40A and 40B might be located, it should be clear that the provisions are referring to any death where the body is not found or recovered.¹⁶⁸⁶

SUBMISSIONS

Inclusion of provisions for grants made on the presumption of death

24.39 The submissions received in relation to grants made on the presumption of death were divided as to whether provisions to the effect of sections 40A and 40B of the *Probate and Administration Act 1898* (NSW) should be included in the model legislation.

24.40 The Bar Association of Queensland, the National Council of Women of Queensland and the Queensland Law Society agreed with the National Committee's proposals that provisions in these terms should not be included in the model legislation, but that consideration should be given to including such provisions in court rules.¹⁶⁸⁷

¹⁶⁸² Ibid, QLRC 25; NSWLRC 38 (Proposal 6).

¹⁶⁸³ Ibid, QLRC 25; NSWLRC 38 (Proposal 7).

¹⁶⁸⁴ Ibid, QLRC 24; NSWLRC [4.7].

¹⁶⁸⁵ Ibid, QLRC 24; NSWLRC [4.8].

¹⁶⁸⁶ Ibid, QLRC 25; NSWLRC 38 (Proposals 8, 9).

¹⁶⁸⁷ Submissions 1, 3, 8.

24.41 The Queensland Law Society commented:¹⁶⁸⁸

[The] provisions appear to be designed to preserve the estate for [a] presumed deceased should it eventuate that such person is alive. Such an event is so rare and infrequent that there is no need for special provisions therefore they should not be included in the model legislation.

24.42 The Public Trustee of New South Wales also agreed with the National Committee's proposals, although he was concerned that the proposal could lead to non-uniform court rules:¹⁶⁸⁹

The principal aim of uniformity seems to be unachievable if uniformity is limited to statute whilst rule of court ... are not uniform.

24.43 The National Committee's proposals were opposed by the ACT and New South Wales Law Societies.¹⁶⁹⁰

24.44 The New South Wales Law Society commented in relation to the New South Wales provisions:¹⁶⁹¹

These sections have the importance of assisting the Court as to what investigations it should consider and what distributions may or may not be made. Also it considers the remote and unlikely event of a person being found alive after the date of a grant of Probate. These provisions should not be relegated merely to rules of court which if so enacted and perhaps varied between each State, would encourage forum shopping.

The form of any provisions

24.45 A number of respondents addressed the issue of the terminology that should be used in any provisions that are based on sections 40A and 40B of the *Probate and Administration Act 1898* (NSW).

24.46 The Bar Association of Queensland, the National Council of Women of Queensland, and the New South Wales Law Society agreed that it should be made clear that the provisions are to cover cases of an inferred death, as well as cases of a presumed death, but did not suggest how this purpose might be achieved.¹⁶⁹²

24.47 The Queensland Law Society also agreed that the term used should 'include both inferred death where there are circumstances and yet no body,

¹⁶⁸⁸ Submission 8.

¹⁶⁸⁹ Submission 11.

¹⁶⁹⁰ Submissions 14, 15.

¹⁶⁹¹ Submission 15.

¹⁶⁹² Submissions 1, 3, 15.

and what is referred to “as presumed death” where it would seem that death is presumed because of an absence of contact’.¹⁶⁹³

24.48 The Public Trustee of New South Wales suggested that provisions based on sections 40A and 40B of the *Probate and Administration Act 1898* (NSW) could refer to the situation where there are ‘reasonable grounds to suppose that a person has died’. This suggestion was based on the language used in section 23 of the *Public Trustee Act 1913* (NSW), which sets out the circumstances in which the Public Trustee may apply for an order to administer the estate of a person.¹⁶⁹⁴

24.49 An academic expert in succession law also favoured a provision based to some extent on section 23 of the *Public Trustee Act 1913* (NSW). He proposed a provision to the effect that:¹⁶⁹⁵

Where the court is satisfied from the evidence presented to it that there is reasonable ground to infer that the person is dead the court may, if it deems it appropriate to do so at the time of the application, make a grant of probate or letters of administration of the estate of that person on the basis that the person is dead.

24.50 As a corollary to this provision, he suggested the following provisions to deal with the circumstances in which a person's death may be inferred:¹⁶⁹⁶

- (1) Where a grant of probate or letters of administration of the estate of a person is sought but the death of that person cannot be proved the Court may infer that the person is dead.
- (2) The court may infer that a person is dead from evidence of circumstances prevailing at, or arising subsequently to, the time when the person was last known to be alive, including the circumstance that the person has failed to communicate with anyone with whom the person might reasonably have been expected to communicate if alive.

24.51 Only the ACT Law Society was opposed to the proposal that any provision should make it clear that it is referring to any death where the body is not found or recovered.¹⁶⁹⁷

¹⁶⁹³ Submission 8.

¹⁶⁹⁴ Submission 11.

¹⁶⁹⁵ Submission 12.

¹⁶⁹⁶ Ibid.

¹⁶⁹⁷ Submission 14. The ACT Law Society did not give a reason for this view.

THE NATIONAL COMMITTEE'S VIEW

The court's jurisdiction

The need for a specific provision conferring jurisdiction on the court

24.52 In the National Committee's view, the model legislation should ensure that the court has jurisdiction to make a grant where the death of the deceased person has been inferred or has been presumed. Although the National Committee has proposed that a provision to the effect of section 6 of the *Succession Act 1981* (Qld) should be included in the model legislation,¹⁶⁹⁸ that provision gives the court jurisdiction to grant probate of the will or letters of administration of the estate of a 'deceased person'. Consequently, a grant made under the provision to be based on section 6 would still be a nullity if it subsequently appeared that the person whose death had been inferred or presumed was in fact living when the grant was made.

Form of the model provision

24.53 The National Committee initially favoured the inclusion of a model provision based on a combination of section 40A(1) of the *Probate and Administration Act 1898* (NSW), section 7(1) of the *Administration and Probate Act 1958* (Vic), section 9A of the *Administration and Probate Act 1929* (ACT) and section 15 of the *Administration and Probate Act* (NT).

24.54 The provisions that apply in New South Wales and Victoria confer jurisdiction on the court to make a grant if the court 'is satisfied, whether by direct evidence or on presumption of death' that any person is dead (in Victoria, that any person has died).¹⁶⁹⁹

24.55 The provisions that apply in the ACT and the Northern Territory confer jurisdiction on the court to make a grant if the court:¹⁷⁰⁰

is satisfied, by direct evidence or by evidence supporting a presumption of death, that the person is, or may be presumed to be, dead.

24.56 However, the same effect can be achieved more simply by providing in the model legislation that a reference to a 'deceased person' includes a person whose death is inferred by the court and a person in relation to whom the court declares that the common law presumption of death is satisfied. The advantage of this approach, over a separate provision dealing with the court's jurisdiction to make a grant on the presumption of death, is that it is clear that, in relation to a person falling within the definition of 'deceased person', the court's jurisdiction is as extensive as it is in relation to any other deceased person.

¹⁶⁹⁸ See Recommendation 3-1 in vol 1 of this Report.

¹⁶⁹⁹ *Probate and Administration Act 1898* (NSW) s 40A(1); *Administration and Probate Act 1958* (Vic) s 7(1).

¹⁷⁰⁰ *Administration and Probate Act 1929* (ACT) s 9A(1); *Administration and Probate Act* (NT) s 15(1).

24.57 The model legislation should, however, 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 was living when the grant was made.

Provisions that should not be included in the model legislation

24.58 Section 40A(2) of the *Probate and Administration Act 1898* (NSW) provides that the provisions of various Acts, including that Act, extend to any person with respect to whose death the court is satisfied in accordance with section 40A(1).¹⁷⁰¹

24.59 The National Committee does not consider it necessary to include a provision to this effect in the model legislation. In its view, the grant itself would be sufficient evidence of the death of a person to found, for example, an application for family provision or a conveyance of the person's property.

24.60 Section 7(2) of the *Administration and Probate Act 1958* (Vic) provides that, where a grant is or has been made of the will or of the estate of any person with respect to whose death the court is satisfied under section 7(1), the person administering the estate for the time being by virtue of such a grant has the same rights, powers, privileges, duties and liabilities as the personal representative of a deceased person, even though it may subsequently appear that the person was living when the grant was made.¹⁷⁰²

24.61 The National Committee does not consider it necessary to include a provision to this effect in the model legislation. The purpose of providing that the court has jurisdiction to make a grant in this situation and that the grant is valid even if it subsequently appears that the person was living when the grant was made is to ensure that, until such time as the grant is revoked (if ever), the person appointed as personal representative under the grant is, for all purposes, the deceased person's personal representative.

The terms of the grant and any ancillary orders and matters

Grant expressed to be made on the presumption of death

24.62 The National Committee notes that the provisions that apply in the ACT, New South Wales, the Northern Territory and Victoria provide that, where a grant is made on presumption of death, the grant must be expressed to be made on presumption of death.¹⁷⁰³

¹⁷⁰¹ *Probate and Administration Act 1898* (NSW) s 40A is set out at [24.17] above.

¹⁷⁰² *Administration and Probate Act 1958* (Vic) s 7 is set out at [24.20] above.

¹⁷⁰³ *Administration and Probate Act 1929* (ACT) s 9B(1)(a); *Probate and Administration Act 1898* (NSW) s 40B(2); *Administration and Probate Act* (NT) s 16(1)(a); *Administration and Probate Act 1958* (Vic) s 8(a).

24.63 In Chapter 23 of this Report, the National Committee has explained how some Australian jurisdictions apply the seniority rule to determine the issue of survivorship when two or more persons die in circumstances where the order of their deaths is uncertain.¹⁷⁰⁴ It has been held that the seniority rule does not apply to determine the issue of survivorship where one or more of the relevant deaths have been presumed.¹⁷⁰⁵ Consequently, in those jurisdictions, there is an important reason for it to be obvious on the face of the grant that it has been made on the presumption of death.¹⁷⁰⁶

24.64 However, the National Committee has recommended in Chapter 23 that the model survivorship provisions are to apply regardless of whether any of the deaths has been presumed.¹⁷⁰⁷ As a result, the National Committee considers that an important reason for stating that a grant is made on the presumption of death no longer exists.

24.65 Nevertheless, the National Committee considers that a practical reason still exists for stating that a grant has been made on the presumption of death. As a general rule, the forms for a grant of probate or letters of administration have provision for the date of death of the deceased person to be inserted.¹⁷⁰⁸ If a grant has been made on the presumption of death, it is not possible for the court or the registrar to complete this requirement, as the deceased person's death is not presumed to have occurred on or about a particular date. For this reason, the National Committee is of the view that 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 a grant is made on the presumption of death, the grant must be expressed to be made on the presumption of death. However, this requirement should not apply in the case of a grant made in circumstances where the deceased person's death has been inferred. In many instances, the court will be able to infer that the deceased person died on or about a particular date.

Distribution of the estate

24.66 Under the provisions that apply in the ACT, New South Wales, the Northern Territory and Victoria, the estate of a person whose death has been presumed must not be distributed without the leave of the court.¹⁷⁰⁹

¹⁷⁰⁴ See [23.27]–[23.29] above.

¹⁷⁰⁵ See [23.32]–[23.40] above.

¹⁷⁰⁶ This is also the case in relation to s 120 of the *Property Law Act 1969* (WA), which is not expressed to apply where one or more of the deaths has been presumed. Section 120 is set out at [23.66] above.

¹⁷⁰⁷ See Recommendation 23-23(a) above.

¹⁷⁰⁸ See, for example, *Court Procedures Rules 2006* (ACT) Forms 3.4–3.6; *Uniform Civil Procedure Rules 1999* (Qld) Form 121; *The Probate Rules 2004* (SA) Forms 39, 41, 43, 47, 49, 51, 53.

¹⁷⁰⁹ *Administration and Probate Act 1929* (ACT) s 9B(1)(b); *Probate and Administration Act 1898* (NSW) s 40B(3); *Administration and Probate Act* (NT) s 16(1)(b); *Administration and Probate Act 1958* (Vic) s 8(b).

24.67 The provisions also provide that the court may direct the executor or administrator appointed under the grant, before distributing the estate, to give such notices as the court may direct so that, if the person whose death has been presumed, is still living, or if the person has died since the grant was made, any person interested in the estate may lodge a caveat against the distribution.¹⁷¹⁰ Further provisions deal with the effect on distribution of the lodgment of a caveat.¹⁷¹¹

24.68 In the National Committee's view, the model legislation should not provide that the estate of a person whose death has been presumed may be distributed only with the leave of the court. The model provisions that are generally to deal with notification of an application for a grant and with caveats should be drafted in terms such that they will be capable of applying to an application for a grant made on the presumption of death. If that can be done, it should not be necessary for the court to direct that notices of intended distribution be given or to prohibit the distribution of an estate except with the court's leave. Any doubt about whether the person in respect of whose estate the grant is sought is likely to be living and, therefore, to object to the distribution of the estate should be resolved before the grant is made, rather than being accommodated after the grant is made by the giving of notices.

24.69 However, the model legislation should provide that the court may impose conditions on a grant made on an inference or presumption of death. Further, the model legislation should include, 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.

24.70 The model legislation should also include a provision to the general effect of section 16(7) of the *Administration and Probate Act* (NT) and provide 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.

24.71 In the ACT, New South Wales, Northern Territory and Victoria, the provisions that deal with any ancillary orders that may be made and other matters concerning the distribution of the estate are expressed to apply if the

1710 *Administration and Probate Act 1929* (ACT) s 9B(1)(e); *Probate and Administration Act 1898* (NSW) s 40B(4); *Administration and Probate Act* (NT) s 16(1)(e); *Administration and Probate Act 1958* (Vic) s 8(c).

1711 *Administration and Probate Act 1929* (ACT) s 9B(3)–(5); *Probate and Administration Act 1898* (NSW) s 40B(4), (5); *Administration and Probate Act* (NT) s 16(3)–(5); *Administration and Probate Act 1958* (Vic) s 8(d), (e).

grant is made on the presumption of death (and do not refer to a grant made on an inference of death).¹⁷¹²

24.72 As noted earlier, in the Discussion Paper it was proposed that, if provisions to this effect were adopted (whether in the model legislation or in court rules), they should also apply in the case of a death that is inferred.¹⁷¹³

24.73 The National Committee's view on this issue remains unchanged. Although the potential for the court to make a grant in relation to the estate of a person who is in fact alive when the grant is made is probably greater when a person's death has been presumed on the basis of an unexplained absence of seven years than when death has been inferred, from evidence in the particular case, that a person is dead, there is nevertheless a risk, in either case, that the person may be alive when the grant is made. The National Committee therefore considers it appropriate that the provision proposed in relation to the court's power to impose conditions on the grant should apply whether the grant is made on an inference of death or on a presumption of death.

RECOMMENDATIONS

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.¹⁷¹⁴**

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

¹⁷¹² *Administration and Probate Act 1929* (ACT) s 9B(1)(b)–(e), (2)–(5); *Probate and Administration Act 1898* (NSW) s 40B(3)–(6); *Administration and Probate Act* (NT) s 16(1)(b)–(e), (2)–(7); *Administration and Probate Act 1958* (Vic) s 8(b)–(e).

¹⁷¹³ See [24.38] above.

¹⁷¹⁴ See [24.52]–[24.56] above.

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.¹⁷¹⁵

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.¹⁷¹⁶

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.¹⁷¹⁷

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

¹⁷¹⁵ See [24.62]–[24.65] above.

¹⁷¹⁶ See [24.57] above.

¹⁷¹⁷ See [24.66]–[24.73] above.

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.¹⁷¹⁸

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

¹⁷¹⁸

See [24.70], [24.73] above.

Chapter 25

The revocation of grants and the effect of revocation

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THE POWER TO REVOKE A GRANT AND TO REMOVE A PERSONAL REPRESENTATIVE

Introduction

25.1 There are a number of situations in which the court will consider it appropriate to revoke a grant, for example, where:¹⁷¹⁹

- the grant is based on a false or incorrect statement (such as that the will is the last will of the deceased or that the deceased died without leaving a will);
- the grant was a nullity when it was made;
- due to supervening factors, the grant has become inefficient (for example, where the executor or administrator loses capacity or disappears).

25.2 In some jurisdictions, the legislation includes a specific provision empowering the court to revoke a grant of probate or letters of administration, while, in other jurisdictions, the court relies on its inherent jurisdiction.

25.3 Further, in other jurisdictions, provision is made for the court to remove an executor or administrator from office without revoking the grant under which he or she was appointed. In other jurisdictions, the court may remove an executor or administrator from office only by revoking the grant under which he or she is appointed.

The existing law

Australian Capital Territory, Northern Territory

25.4 The legislation in the ACT and the Northern Territory contains a provision that enables the court to discharge or remove an executor or administrator, without revoking the grant, if the executor or administrator:¹⁷²⁰

- remains out of the Territory for more than two years;
- wants to be discharged from the office of executor or administrator; or
- refuses, or is unfit, to act in the office, or is incapable of acting.

¹⁷¹⁹ See RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [40D.02]–[40D.16].

¹⁷²⁰ *Administration and Probate Act 1929* (ACT) s 32; *Administration and Probate Act* (NT) s 41.

25.5 In these circumstances, the court may order the discharge or removal of the executor or administrator, and the appointment of some proper person as administrator in place of the executor or administrator who has been discharged or removed.

25.6 These provisions are in similar terms to section 34 of the *Administration and Probate Act 1958* (Vic), which is considered below.¹⁷²¹

25.7 In addition, section 26(1) of the *Administration and Probate Act* (NT) confers a power in general terms to revoke a grant of probate or letters of administration, while section 26(3) confers a power to remove an administrator who fails to comply with an order made under section 26(2) to execute a bond or an additional bond. Section 26 provides:

26 Probate or administration may be revoked or further bond required

- (1) At any time after probate of the will, or administration of the estate, of a deceased person has been granted, the Court may, upon the application of a person who is interested in the estate, revoke the probate or administration, as the case may be.
- (2) At any time after administration of the estate of a deceased person has been granted, the Court may, upon the application of a person who is interested in the estate, order the administrator of the estate to execute a bond, or an additional bond,¹⁷²² as the case may be, of such amount and within such time as the Court thinks fit and with one surety, being an insurance company approved by the Minister.
- (3) If an administrator fails to comply with the terms of an order made under subsection (2), the Court may remove the administrator and appoint another person to be an administrator of the estate in his or her place.
- (4) Where the Court has removed an administrator of an estate under subsection (3) and appointed another person to be an administrator of the estate in his or her place, any contract, made before the date on which the administrator was so removed, in respect of which the administrator so removed was, in his or her capacity of administrator of the estate, a party shall, on and after that date, be read and construed, and may be enforced, as if references in the contract to the administrator so removed were references to the administrator so appointed in his or her place. (note added)

¹⁷²¹ See [25.21]–[25.26] below.

¹⁷²² Note, in Chapter 9 of this Report, the National Committee has recommended the abolition of administration bonds and sureties.

25.8 The ACT legislation used to include a provision in almost identical terms to section 26 of the *Administration and Probate Act* (NT). However, that provision was repealed in 2003.¹⁷²³

New South Wales

25.9 In New South Wales, the exercise of the 'Court's jurisdiction to revoke a grant of probate, unlike the Court's power to revoke a grant of letters of administration, depends on the inherent jurisdiction of the Court'.¹⁷²⁴ In *Bates v Messner*,¹⁷²⁵ Asprey JA held that:¹⁷²⁶

the essential basis of the exercise of the court's inherent jurisdiction to revoke a grant of probate is that emphasized by Jeune P [in *In the Goods of Loveday*¹⁷²⁷], namely that the real object which the court must always keep in view is the due and proper administration of the estate in the interests of the parties beneficially entitled thereto on the part of the person to whom and by whose oath as to the faithful performance of his duties the court has been induced to entrust the office of executor.

25.10 In New South Wales, '[t]he only way one can remove an executor is by revocation of the grant and the making of a fresh grant'.¹⁷²⁸ The court cannot 'simply strike out the name of one executor from a grant and continue on without revoking the grant'.¹⁷²⁹ The rationale for recalling and revoking the original grant and making a fresh grant has been explained in terms of the need for the grant to be complete on its face.¹⁷³⁰

The revocation is a revocation in toto, not a partial revocation, and the fresh grant to the remaining executor or executors entirely supplants the former grant. ...

That the original grant should be recalled and revoked and that a fresh grant should be made is necessary because a grant of probate is a public document and often must be produced to third parties so that the executors can get in and administer the property of the deceased's estate. The grant must be, and must appear to be, complete on its face so that third parties may act upon it without concern that it may have subsequently been varied as to the continuance in office of one of the named executors.

1723 See *Administration and Probate Act 1929* (ACT) s 18A, which was repealed by the *Justice and Community Safety Legislation Amendment Act 2003* (ACT) s 5.

1724 *Bates v Messner* (1967) 67 SR (NSW) 187, 191 (Asprey JA).

1725 (1967) 67 SR (NSW) 187.

1726 Ibid 191.

1727 [1900] P 154, 156.

1728 *Morgan v MacRae* [2001] NSWSC 1017, [21] (Young CJ in Eq), suggesting that the decision to the contrary in *Profilio v Profilio* [1999] NSWSC 657 must have been decided *per incuriam*.

1729 Ibid [23].

1730 *Gorman v McGuire* [2002] NSWSC 1089, [6]–[7] (Palmer J).

25.11 Where a grant to two executors is revoked and a new grant is made to one of the original executors, the court does not require the continuing executor to prove again all the matters that were proved in order to obtain the original grant.¹⁷³¹

25.12 Although the *Probate and Administration Act 1898* (NSW) does not contain a specific provision dealing with the revocation of a grant of probate, it does contain a specific provision enabling the court to revoke a grant of letters of administration and, in very limited circumstances, to remove an administrator without revoking the grant. Section 66 of the *Probate and Administration Act 1898* (NSW) provides:

66 Administration may be revoked or further bond required

The Court may at any time, upon the application of any person interested in the estate:

- (a) revoke the administration already granted, or
- (b) order the administrator to execute a further bond in such sum and within such time as may seem right with or without sureties as aforesaid, and
- (c) upon default remove the administrator and appoint an administrator in the removed administrator's place, with power to sue or be sued upon any contract made by the removed administrator.

25.13 The removal of an administrator under section 66(c) of the *Probate and Administration Act 1898* (NSW) is said to be rare.¹⁷³²

Removal of an administrator under s 66(c) is very rare, because the power to remove under that subsection is, it seems, limited to failure to provide a supplemental bond if required to do so under s 66(b). The normal procedure for effecting the removal of an administrator is to revoke the administration already granted in terms of s 66(a), and to make a supplemental grant to another person.

Queensland

25.14 In Queensland, section 6 of the *Succession Act 1981* (Qld) confers a broad jurisdiction on the court to revoke grants of probate and letters of administration. Section 6 provides in part:

6 Jurisdiction

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

¹⁷³¹ *Gould v Gould* [2005] NSWSC 914, [9] (Campbell J).

¹⁷³² RS Geddes, CJ Rowland and P Studdert, *Wills, Probate and Administration Law in New South Wales* (1996) [40D.15].

matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

...

- (4) Without restricting the generality of subsections (1) to (3) the court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*. (emphasis added)

25.15 In *Williams v Williams*,¹⁷³³ which concerned an application to remove an executor who had not taken out a grant of probate, Wilson J noted that section 6(4) of the *Succession Act 1981* (Qld) confers jurisdiction on the court to make any order that the court has jurisdiction to make under the *Trusts Act 1973* (Qld) in relation to the administration of trust property. Her Honour was of the view that section 6(4) would therefore enable the court to substitute a new executor or administrator for an existing executor or administrator.¹⁷³⁴

Under s 80 of the *Trusts Act* the Court has power to appoint a new trustee in substitution for an existing trustee or trustees when it is expedient to do so and it is inexpedient, difficult or impracticable to do so without the assistance of the Court. Although s 80 does not itself confer a power to appoint an executor or administrator (subs (4)), I consider that the Court may do so under s 6(4) of the *Succession Act*, as it would be an order it would have jurisdiction to make in relation to the administration of trust property under the *Trusts Act*.

25.16 Wilson J further held that, even if that were not the case, the powers conferred on the court by section 6(1) of the *Succession Act 1981* (Qld) 'are ... clearly wide enough to include the removal of an executor who has not taken out probate and the appointment of an administrator in his stead'.¹⁷³⁵

25.17 In *Baldwin v Greenland*,¹⁷³⁶ the Queensland Court of Appeal held that it was not necessary, in order to remove an executor under section 6 of the *Succession Act 1981* (Qld), to find that the executor was not a fit and proper person to carry out the duties of executor,¹⁷³⁷ as the 'ultimate basis' for the exercise of the court's discretion under section 6 is 'the due and proper administration of the estate'.¹⁷³⁸

1733 [2005] 1 Qd R 105.

1734 Ibid 109.

1735 Ibid.

1736 [2007] 1 Qd R 117.

1737 Ibid 130, 131 (Jerrard JA).

1738 Ibid 130.

25.18 The *Uniform Civil Procedure Rules 1999* (Qld) also deal with the revocation of grants. Rule 642 provides:

642 Revocation of grants and limited grants

- (1) The court may, on application, revoke a grant or make a limited grant if—
 - (a) it appears to the court that—
 - (i) the personal representative is no longer capable of acting in the administration; or
 - (ii) the personal representative can not be found; or
 - (iii) the grant was made because of a mistake of fact or law; or
 - (b) the personal representative wants to retire from the administration.
- (2) With the consent of the parties, the registrar may exercise the jurisdiction of the court under this rule.
- (3) If the court revokes a grant or replaces it with a limited grant, the personal representative must bring the original grant into the registry as soon as practicable after the order is made.
- (4) On the hearing of an application under this rule, the court may direct that the proceeding continue as if started by claim and give any directions it considers appropriate.

South Australia

25.19 In South Australia, an executor or administrator may be removed from office only by the revocation of the grant under which he or she is appointed.¹⁷³⁹

There is no specific statutory provision in South Australia empowering the making of an order for the removal of a personal representative from office. Nevertheless, he or she may be removed from office by a revocation of his or her grant of representation and by the appointment of a substituted personal representative.

Tasmania

25.20 The *Administration and Probate Act 1935* (Tas) does not include an express provision dealing with the revocation of grants. However, rule 82A(1) of the *Probate Rules 1936* (Tas) provides that, 'where a judge is satisfied upon

¹⁷³⁹

DM Haines, *Succession Law in South Australia* (2003) [19.1]. The *Administration and Probate Act 1919* (SA) s 5 provides that the 'like voluntary and contentious jurisdiction and authority as immediately before the coming into operation of this Act belonged to or were vested in the Supreme Court, in relation to granting or revoking probate of wills and letters of administration of the effects of deceased persons, shall be vested in and exercised by the said Court in relation to granting or revoking probate of wills and letters of administration of the estate, as well real as personal, of deceased persons within the said State'.

summons supported by an affidavit that a grant should be amended or revoked, he may make an order accordingly’.

Victoria

25.21 In Victoria, section 34 of the *Administration and Probate Act 1958* (Vic) enables the court, in specified circumstances, to order the discharge or removal of an executor or administrator and, if it thinks fit, the appointment of a person or trustee company as administrator in place of the executor or administrator who has been discharged or removed. Section 34 provides:¹⁷⁴⁰

34 Discharge or removal of executor or administrator

- (1) Notwithstanding anything contained in any Act where an executor or administrator to whom probate or administration has been granted whether before or after the commencement of this Act or where an administrator who has been appointed under this section or any corresponding previous enactment—
 - (a) remains out of Victoria for more than two years;
 - (b) desires to be discharged from his office of executor or administrator; or
 - (c) after such grant or appointment refuses or is unfit to act in such office or is incapable of acting therein—

the Court upon application in accordance with the Rules of Court may order the discharge or removal of such an executor or administrator and also if the Court thinks fit the appointment of some proper person or trustee company as administrator in place of the executor or administrator so discharged or removed upon such terms and conditions as the Court thinks fit; and may make all necessary orders for vesting the estate in the new administrator and as to accounts and such order as to costs as the Court thinks fit.
- (2) Notice of such application may be served if the Court thinks it necessary upon such persons as it directs.
- (3) An executor or administrator so removed or discharged shall from the date of the order cease to be liable as such for acts and things done after that date.
- (4) Upon such appointment the property and rights vested in and the liabilities properly incurred in the due administration of the estate by the executor or administrator so discharged or removed shall become and be vested in and transferred to the administrator appointed by such order who shall as such have the same privileges rights powers duties discretions and liabilities as if probate or administration had been granted to him originally.

¹⁷⁴⁰

This section is in virtually the same terms as s 32 of the *Administration and Probate Act 1929* (ACT) and s 41 of the *Administration and Probate Act* (NT).

25.22 If more than one executor or administrator has been appointed under a grant, the court may discharge or remove one of the executors or administrators without appointing a substitute administrator.¹⁷⁴¹

25.23 Although section 34(1)(b) confers a power to remove or discharge an executor or administrator who wishes to be discharged from the office of executor or administrator, the court must exercise its discretion having regard to the circumstances of the case:¹⁷⁴²

I think that ... the Judge has a considerable amount of discretion, and that I could refuse to discharge an executor; 'may' certainly does not mean 'shall' in this sub-section. The state of matters in connection with the trust might be such that I should think it advisable to keep an executor in his position as such; for instance, the accounts might be so unsatisfactory, or of such a character, that I might consider it desirable to retain him in his office.

25.24 The reference in section 34(1)(c) to an executor or administrator who is 'unfit to act' has been construed broadly. It is not restricted to unfitness by reason of some personal disqualification, such as bankruptcy or criminal conviction, but applies in respect of any 'serious dereliction of duty as an executor', regardless of 'whether the dereliction is born of intent, of carelessness, or of incompetence'.¹⁷⁴³

25.25 Although the grounds for an order under section 34 of the *Administration and Probate Act 1958* (Vic) and its counterparts in the ACT and the Northern Territory are similar to the grounds for the revocation of a grant under rule 642 of the *Uniform Civil Procedure Rules 1999* (Qld), the difference is that, in the former jurisdictions, an executor or administrator may be removed or replaced without the revocation of the grant.

25.26 If the court makes an order under section 34 of the *Administration and Probate Act 1958* (Vic) discharging or removing an executor or administrator, the order must be attached to the original grant. Rule 6.09 of the *Supreme Court (Administration and Probate) Rules 2004* (Vic) provides:

6.09 Substituted administrator to furnish guarantee

- (1) An order under section 34 of the Act may contain a condition requiring the substituted administrator to provide a guarantee from one or more sureties.
- (2) The guarantee shall be for such amount as the Court thinks fit and shall contain an undertaking that the surety or sureties will make good any loss (not exceeding the sworn value of the estate) which any person interested in the estate may suffer as a consequence of a breach of duty by the administrator.

¹⁷⁴¹ *Re Coverdale* [1909] VLR 248; *R v Registrar of Titles; Ex parte Irish* [1915] VLR 622.

¹⁷⁴² *Re Coverdale* [1909] VLR 248, 249 (Cussen J).

¹⁷⁴³ *Monty Financial Services Ltd v Delmo* [1996] 1 VR 65, 73 (Ashley J), approved in *Dimos v Skaftouros* (2004) 9 VR 584, 592 (Winneke P, with whom Batt JA agreed), 608 (Dodds-Streeton AJA).

- (3) A copy of such an order shall be attached to the grant of representation and reference to the making of the order and its nature shall be indorsed on the grant.

Western Australia

25.27 Although the *Administration Act 1903* (WA) does not include a specific provision dealing with the court's power to revoke a grant of probate, the court has 'an inherent jurisdiction to remove an executor (by revocation of the grant of probate to him) for just cause'.¹⁷⁴⁴

25.28 The *Administration Act 1903* (WA) does, however, confer on the court the express power to revoke a grant of letters of administration.¹⁷⁴⁵ Section 29(1) provides:

29 Court may revoke grant of administration

- (1) Where administration of the estate of a person has been granted the Court may, at any time, upon the application of any person interested in the estate or of its own motion on the report of the Principal Registrar, revoke the administration.

Discussion Paper

25.29 In the Discussion Paper, the National Committee observed that, under the model provision that is to be based on section 6 of the *Succession Act 1981* (Qld), the court has a broad jurisdiction to revoke grants of probate and administration. It considered whether, in light of that provision, it was necessary to include a specific provision such as section 26(1) of the *Administration and Probate Act* (NT) or section 29(1) of the *Administration Act 1903* (WA) (NT).¹⁷⁴⁶

25.30 The National Committee's preliminary view was that the provision to be based on section 6 of the *Succession Act 1981* (Qld) was 'sufficiently wide to deal with the revocation of grants and the removal of executors or administrators'.¹⁷⁴⁷ The National Committee therefore proposed that the model legislation should not include a specific provision to deal with the revocation of grants or the removal of executors or administrators.¹⁷⁴⁸

Submissions

25.31 The National Committee's proposal that it was not necessary to include a further provision dealing with the revocation of grants or the removal of

¹⁷⁴⁴ *Porteous v Rinehart* (1998) 19 WAR 495, 506 (White J). See also *Phelan v Booth* (1941) 43 WALR 60.

¹⁷⁴⁵ See *Administration Act 1903* (WA) s 3 (definition of 'administration').

¹⁷⁴⁶ *Administration of Estates Discussion Paper* (1999) QLRC 53; NSWLRC [7.19].

¹⁷⁴⁷ *Ibid*, QLRC 53; NSWLRC [7.20].

¹⁷⁴⁸ *Ibid*, QLRC 53; NSWLRC 79 (Proposal 22).

executors or administrators was supported by the Bar Association of Queensland, the National Council of Women of Queensland, the Public Trustee of New South Wales, an academic expert in succession law and the New South Wales Law Society.¹⁷⁴⁹

25.32 However, the ACT Law Society did not support the National Committee's proposal. In its view, the legislation should include specific provisions 'so that the intention of the legislation can be readily understood by lay people and practitioners alike'.¹⁷⁵⁰

The National Committee's view

25.33 In the National Committee's view, the preferred means of removing an executor or administrator is by revoking the grant under which he or she is appointed and making a fresh grant to any continuing or new executors or administrators. As the Supreme Court of New South Wales has observed, this approach has the advantage that the fresh grant is complete on its face, and does not need to be read in conjunction with the order by which an executor or administrator has been discharged or removed, or by which a substitute administrator has been appointed.¹⁷⁵¹

25.34 Further, the removal of an executor or administrator by way of revocation of the grant under which he or she is appointed is generally consistent with the provisions recommended in Chapter 10 of this Report dealing with the vesting of property when a grant is revoked¹⁷⁵² and with the provisions recommended later in this chapter about the effect of the subsequent revocation of a grant on acts done under the grant.¹⁷⁵³

25.35 If an executor or administrator is removed or substituted by a court order, but the original grant remains on foot, provisions that refer to the person to whom a subsequent grant is made¹⁷⁵⁴ or to the revocation of a grant¹⁷⁵⁵ will not of their own force apply in that situation. It is for that reason that it is necessary for section 34(4) of the *Administration and Probate Act 1958* (Vic) to provide that the property and rights vested in, and the liabilities properly incurred in the due administration of the estate by, the executor or administrator who is discharged or removed are to be vested in and are transferred to the substitute administrator, and that the substitute administrator is to have the

1749 Submissions 1, 3, 11, 12, 15.

1750 Submission 14.

1751 See [25.10] above.

1752 See Recommendations 10-4 and 10-5 in vol 1 of this Report.

1753 See Recommendation 25-2 below.

1754 See Administration of Estates Bill 2009 cl 202 (On the making of a grant of representation).

1755 See Administration of Estates Bill 2009 cl 368 (Disposition to personal representative is a valid discharge), 369 (Distribution or disposition by personal representative), 370 (Personal representative may recover particular distributions), 371 (Proceedings may be continued by or against new personal representative).

same privileges, rights, powers, duties, discretions and liabilities as if probate or administration had been granted to the substitute administrator originally.

25.36 For these reasons, the National Committee is of the view that the model legislation should not include a provision to the effect of section 34 of the *Administration and Probate Act 1958* (Vic).

25.37 In Chapter 3 of this Report, the National Committee has recommended the inclusion in the model legislation of provisions to the effect of section 6 of the *Succession Act 1981* (Qld). As noted above, section 6(1) provides that ‘the court has jurisdiction in every respect as may be convenient ... to revoke probate of the will or letters of administration of the estate of any deceased person’, while section 6(4) confers ‘jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order’ that the court has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973* (Qld). These provisions have been held to be wide enough to enable the court to remove an executor who has not yet applied for a grant of probate.¹⁷⁵⁶

25.38 In view of the National Committee’s decision to include provisions in the model legislation based on section 6 of the *Succession Act 1981* (Qld), the National Committee does not consider it necessary to include any additional provision to deal with the court’s power to revoke a grant.

RELINQUISHING THE OFFICE OF EXECUTOR OR ADMINISTRATOR

25.39 Grants are ‘occasionally revoked because grantees wish to be relieved of their duties, but special circumstances must be shown’.¹⁷⁵⁷

25.40 Several Australian jurisdictions have a legislative provision dealing with the situation of an executor or administrator who no longer wishes to continue in office. In Queensland, the *Uniform Civil Procedure Rules 1999* (Qld) include a rule dealing with revocation in these circumstances. The various provisions are considered below.

25.41 Of course, if the executor or administrator has completed the executorial duties and has become a trustee, he or she may be discharged from office in accordance with the relevant provisions of the trustee legislation and does not need to obtain a court order to authorise his or her retirement.¹⁷⁵⁸

¹⁷⁵⁶ See [25.15]–[25.16] above.

¹⁷⁵⁷ JR Martyn and N Caddick, *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (19th ed, 2008) [27-23].

¹⁷⁵⁸ See [13.38]–[13.43] in vol 1 of this Report and *Re Dunn* [1963] VR 165, which is discussed at [13.116]–[13.117] in vol 1 of this Report.

Existing legislative provisions

Australian Capital Territory, New South Wales, Northern Territory

25.42 The administration legislation of the ACT, New South Wales and the Northern Territory provides that a personal representative cannot be required to continue as trustee by managing property during an 'enforced suspension of sale'.¹⁷⁵⁹

25.43 Section 59 of the *Probate and Administration Act 1898* (NSW), which is in virtually the same terms as the corresponding provisions in the ACT and the Northern Territory, provides:¹⁷⁶⁰

59 Personal representative not required to continue to act against the personal representative's own consent

No personal representative shall be required against the personal representative's own consent to continue the duty of a trustee by managing the property during an enforced suspension of sale, but shall be entitled upon such suspension being ordered to relinquish the personal representative's trust to such person as the Court may appoint.

25.44 In *In the Estate of Keenan*,¹⁷⁶¹ Walker J commented on the obscurity of this provision:¹⁷⁶²

Sect 59 ... is one which, so far as I know, has never been interpreted, and I am not disposed unnecessarily to attempt the solution of the enigma.

25.45 Commentators on the New South Wales legislation have suggested, however, that the section appears to be:¹⁷⁶³

directed to relieving the personal representative of the obligation to continue to act where the court has directed a postponement of the sale of estate property, whether under s 57 or under s 63 of the *Trustee Act 1925*.

Queensland

25.46 In Queensland, rule 642(1)(b) of the *Uniform Civil Procedure Rules 1999* (Qld) provides that the court may revoke a grant if 'the personal representative wants to retire from the administration'.¹⁷⁶⁴

¹⁷⁵⁹ *Administration and Probate Act 1929* (ACT) s 53; *Probate and Administration Act 1898* (NSW) s 59; *Administration and Probate Act* (NT) s 85.

¹⁷⁶⁰ *Probate and Administration Act 1898* (NSW) ss 57–59 had their origins in ss 3, 4, and 7 of the *Real Estate of Intestates Distribution Act of 1862* (NSW).

¹⁷⁶¹ (1899) 20 LR (NSW) B & P 10.

¹⁷⁶² Ibid 15.

¹⁷⁶³ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1293.1] (at 20 February 2009).

¹⁷⁶⁴ *Uniform Civil Procedure Rules 1999* (Qld) r 642 is set out at [25.18] above.

Victoria

25.47 As noted earlier, section 34(1)(b) of the *Administration and Probate Act 1958* (Vic) provides that the court may discharge or remove an executor or administrator who wishes to be discharged from the office of executor or administrator.¹⁷⁶⁵

Western Australia

25.48 In Western Australia, section 20 of the *Administration Act 1903* (WA) provides:

20 Personal representative may relinquish trust

- (1) A personal representative may at any time, by leave of the Court, and on such conditions as the Court may impose, relinquish his trust to such person as the Court may appoint.
- (2) Notwithstanding any such order, such personal representative shall continue liable for all acts and neglects whilst he was acting as executor or administrator, but not otherwise or further.

25.49 It has been suggested that, if the court postponed the sale of estate property, the personal representative could apply under this provision 'to be relieved of the burdens of office'.¹⁷⁶⁶

Discussion Paper

25.50 In the Discussion Paper, the National Committee proposed that the model legislation should not include provisions to the effect of section 59 of the *Probate and Administration Act 1898* (NSW) or section 20 of the *Administration Act 1903* (WA).¹⁷⁶⁷ It was of the view that the meaning of these provisions was unclear.¹⁷⁶⁸ It also considered that provisions already existed enabling a personal representative to retire from office before completing the administration of the estate, referring to the predecessor of rule 642 of the *Uniform Civil Procedure Rules 1999* (Qld)¹⁷⁶⁹ and to section 34 of the *Administration and Probate Act 1958* (Vic).¹⁷⁷⁰

¹⁷⁶⁵ *Administration and Probate Act 1958* (Vic) s 34 is set out at [25.21] above.

¹⁷⁶⁶ JJ Hockley, PR Macmillan and JC Curthoys, *Wills Probate & Administration WA* (LexisNexis online service) [1125.1] (at 21 February 2009).

¹⁷⁶⁷ *Administration of Estates Discussion Paper* (1999) QLRC 100; NSWLRC 143 (Proposal 48).

¹⁷⁶⁸ Ibid, QLRC 98; NSWLRC [8.132].

¹⁷⁶⁹ See *Rules of the Supreme Court 1900* (Qld) O 71 r 84 (repealed).

¹⁷⁷⁰ *Administration of Estates Discussion Paper* (1999) QLRC 99–100; NSWLRC [8.134]–[8.135].

25.51 Although the National Committee had proposed earlier in the Discussion Paper that it was not necessary for the model legislation to include a specific provision dealing with the revocation of grants or the removal of executors and administrators, in the context of the relinquishing of office, the National Committee proposed that the model legislation should include a provision to the effect of section 34 of the *Administration and Probate Act 1958* (Vic).¹⁷⁷¹

Submissions

25.52 The National Committee's proposals were supported by the Bar Association of Queensland, the Queensland Law Society, an academic expert in succession law, and the ACT and New South Wales Law Societies.¹⁷⁷²

The National Committee's view

25.53 Earlier in this chapter, the National Committee has expressed the view that the preferred means of removing an executor or administrator should be the revocation of the grant under which the executor or administrator is appointed, and that the model legislation should therefore not include a provision to the effect of section 34 of the *Administration and Probate Act 1958* (Vic).¹⁷⁷³

25.54 The National Committee has nevertheless considered whether the grounds specified in section 34(1) of the *Administration and Probate Act 1958* (Vic) for ordering the discharge or removal of an executor or administrator should be included in the model legislation as grounds on which the court may revoke a grant.

25.55 In Chapter 3 of this Report, the National Committee has recommended the inclusion in the model legislation of a provision to the effect of section 6(2) of the *Succession Act 1981* (Qld), which provides that a grant may be made to a person, even though the person is not resident or domiciled in Queensland.¹⁷⁷⁴ It would be inconsistent with that recommendation to provide that a personal representative's two year absence from the jurisdiction should be a ground for revoking his or her grant.

25.56 Further, the National Committee is concerned that the inclusion of the other grounds provided for by section 34(1) of the *Administration and Probate Act 1958* (Vic), or even any additional grounds, could never be exhaustive, and

¹⁷⁷¹ Ibid, QLRC 100; NSWLRC 143 (Proposal 48).

¹⁷⁷² Submissions 1, 8, 12, 14, 15.

¹⁷⁷³ See [25.33]–[25.36] above. *Administration and Probate Act 1958* (Vic) s 34 enables the court to discharge or remove an executor or administrator without revoking the grant under which he or she is appointed: see [25.21]–[25.22].

¹⁷⁷⁴ See Recommendation 3-1.

that any provision prescribing grounds for the revocation of a grant would need to be expressed not to limit the court's power to revoke a grant.

25.57 For example, section 34(1)(c) of the *Administration and Probate Act 1958* (Vic) provides that the court may order the removal of an executor or administrator who refuses or is unfit to act in the office or who is unable to act in the office. However, the Queensland Court of Appeal, has held that it is not necessary, in order to revoke a grant of probate under section 6 of the *Succession Act 1981* (Qld), to find that the executor is not a fit and proper person to carry out the duties of executor; the ultimate basis for the exercise of the discretion to revoke a grant is the due and proper administration of the estate.¹⁷⁷⁵

25.58 Similarly, although section 34(1)(b) of the *Administration and Probate Act 1958* (Vic) provides that the court may order the discharge of an executor or administrator who wishes to be discharged from that office, the Supreme Court of Victoria has acknowledged that there might be reasons why it is not appropriate, in the exercise of the court's discretion, to discharge the executor or administrator.¹⁷⁷⁶

25.59 In the National Committee's view, the guiding principle for the court in exercising its discretion to revoke a grant should continue to be the due and proper administration of the estate. Accordingly, the model legislation should not prescribe specific grounds for the revocation of a grant.

EFFECT OF REVOCATION OF A GRANT

Introduction

25.60 As explained earlier in this chapter, a grant may be revoked in a variety of situations — for example, where a will is discovered after letters of administration have been granted or where, after probate has been granted, it is discovered that the testator had made a later will.

25.61 When a grant is revoked, questions inevitably arise about:

- the validity of payments and dispositions of property made to the personal representative before the grant was revoked — for example, where a debtor of the estate made a payment to the personal representative under the grant that was subsequently revoked;

¹⁷⁷⁵ See [25.17] above.

¹⁷⁷⁶ See [25.23] above.

- the validity of payments and dispositions of property made by the personal representative before the grant was revoked — for example, where the personal representative, acting under a grant that was subsequently revoked, sold property to a third party in order to pay the debts of the estate;
- the validity of acts done by third parties in reliance on the grant, such as the registration, by the relevant registrar of land titles, of land in the name of the personal representative;
- where the estate or a part of it was distributed under the revoked grant and different beneficiaries are entitled under the subsequent grant — the liability of the personal representative in respect of the distributions made and the rights of the true beneficiaries to recover from the personal representative or from the persons incorrectly thought to be entitled as beneficiaries.

25.62 Since the eighteenth century, it has been settled that a debtor of the estate of a deceased person who makes a payment to the person appointed under a grant receives a valid discharge notwithstanding the subsequent revocation of the grant. In *Allen v Dundas*,¹⁷⁷⁷ it was held that, even though the executor was appointed under a grant of probate of a forged will, the debtor who made a payment to the executor so appointed received a valid discharge, and could not be required to pay a second time when the grant was revoked and a new personal representative was appointed.¹⁷⁷⁸ The Court held that the probate was conclusive until it was repealed,¹⁷⁷⁹ and that the debtor received a valid discharge in respect of money paid ‘to a person who had at that time a legal authority to receive it’.¹⁷⁸⁰

25.63 More recently, in *Hewson v Shelley*,¹⁷⁸¹ the English Court of Appeal held that, when a grant is revoked, it is not void ab initio; on the contrary:¹⁷⁸²

the person for the time being clothed by the Court of Probate with the character of legal personal representative is the legal personal representative, and enjoys all the powers of a legal personal representative, unless and until the grant of administration is revoked or has determined.

¹⁷⁷⁷ (1789) 3 Tr 125; 100 ER 490.

¹⁷⁷⁸ See the discussion at note 1660 above of the distinction drawn in *Allen v Dundas* (1789) 3 Tr 125; 100 ER 490 between a grant of probate of a forged will, where the court had jurisdiction to make a grant, and a grant made in respect of a person who was in fact living at the date of the grant. The Court considered in that, in the latter situation, the grant would be a nullity.

¹⁷⁷⁹ *Allen v Dundas* (1789) 3 Tr 125, 130; 100 ER 490, 492 (Buller J).

¹⁷⁸⁰ *Ibid* 129; 492 (Ashhurst J).

¹⁷⁸¹ [1914] 2 Ch 13.

¹⁷⁸² *Ibid* 29 (Cozens-Hardy MR).

25.64 Accordingly, the Court held that, where an administrator under letters of administration sold property to a purchaser for value without notice, the purchaser obtained a good title to the property, notwithstanding that the letters of administration were subsequently revoked when it was discovered that the deceased had left a will.¹⁷⁸³

Existing legislative provisions

25.65 All Australian jurisdictions have provisions that deal, to varying degrees, with the effect of the revocation of a grant. Although there are common elements among the various provisions, there is still considerable disparity.

25.66 In all jurisdictions except Queensland, the relevant provisions are scattered across a number of provisions in the administration legislation.¹⁷⁸⁴ In Queensland, the various provisions dealing with the effect of revocation of a grant are collected in a single section.

Queensland

25.67 Section 53 of the *Succession Act 1981* (Qld), which is arguably the most comprehensive of the various provisions that deal with the effect of revocation of a grant, is in the following terms:

53 Effect of revocation of grant

- (1) Every person making or permitting to be made any payment or disposition in good faith under a grant shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the grant.
- (2) All payments and dispositions made in good faith to the personal representative named in a grant before the making or the revocation thereof shall be a valid discharge to the person making the same; and a personal representative who has acted under a grant which is subsequently revoked may retain and reimburse himself or herself in respect of payments and dispositions made by him or her which the person to whom a grant is afterwards made might properly have made.
- (3) Without prejudice to any order of the court made before the commencement of this Act all dispositions of any interest in property made to a purchaser in good faith by a person to whom a grant has been made are valid notwithstanding any subsequent revocation thereof.

¹⁷⁸³ Ibid 29 (Cozens-Hardy MR), 36 (Buckley LJ), 46 (Phillimore LJ).

¹⁷⁸⁴ *Administration and Probate Act 1929* (ACT) ss 31, 32B, 62, 63; *Probate and Administration Act 1898* (NSW) ss 40D, 81, 90, 91; *Administration and Probate Act* (NT) ss 40, 43, 94, 95; *Administration and Probate Act 1919* (SA) ss 42, 43; *Administration and Probate Act 1935* (Tas) ss 20, 28, 37; *Administration and Probate Act 1958* (Vic) ss 10, 23, 31, 42; *Administration Act 1903* (WA) ss 41, 46, 47.

- (4) A personal representative who in good faith and without negligence has sought and obtained a grant is not liable for any legacy paid or asset distributed in good faith and without negligence in reliance on the grant notwithstanding any subsequent revocation thereof.
- (5) The personal representative under any grant made subsequent to a grant which has been revoked may recover any legacy paid or asset distributed (or the value thereof) in reliance on the revoked grant from the person to whom the legacy or asset was paid or distributed, being a legacy or asset which is not payable or distributable to that person under the subsequent grant, but if that person has received the payment or distribution in good faith and has so altered that person's position in reliance on the propriety of the payment or distribution that, in the opinion of the court, it would be inequitable to order the repayment of the legacy or the return of the asset or its value, the court may make such order as it considers to be just in all the circumstances.
- (6) If, while any legal proceeding is pending in any court by or against a personal representative to whom a grant has been made, the grant is revoked, that court may order that the proceeding be continued by or against the new personal representative in like manner as if the same had been originally commenced by or against the personal representative, but subject to such conditions and variations (if any) as the court directs.
- (7) For the purposes of this section revocation includes any partial revocation by way of a variation of the grant or otherwise.

25.68 Section 53(1) of the *Succession Act 1981* (Qld) protects a person who in good faith makes, or permits to be made, a payment or disposition under a grant, even though there may be a defect affecting the validity of the grant.¹⁷⁸⁵ It has been suggested that this section would protect a company that registers a transfer of shares on the basis of a grant that is produced to it.¹⁷⁸⁶

25.69 Section 53(2) specifically protects a person who makes a payment or disposition in good faith to a personal representative before the grant is revoked. Such a person receives a valid discharge in respect of the payment or disposition.¹⁷⁸⁷ This ensures that a person, such as a debtor, who pays a personal representative before the grant is revoked cannot be required by the personal representative appointed under the subsequent grant to pay the same debt. This provision is consistent with the decision in *Allen v Dundas*.¹⁷⁸⁸

¹⁷⁸⁵ Section 53(1) of the *Succession Act 1981* (Qld) is based on s 27(1) of the *Administration of Estates Act 1925* (UK). Provisions in similar terms are found in most other Australian jurisdictions: see *Administration and Probate Act 1929* (ACT) s 63; *Probate and Administration Act 1898* (NSW) s 91; *Administration and Probate Act* (NT) s 95; *Administration and Probate Act 1935* (Tas) s 28(1); *Administration and Probate Act 1958* (Vic) s 31(1); *Administration Act 1903* (WA) s 47.

¹⁷⁸⁶ AA Preece, *Lee's Manual of Queensland Succession Law* (6th ed, 2007) [8.490].

¹⁷⁸⁷ Section 53(2) of the *Succession Act 1981* (Qld) is based on s 27(2) of the *Administration of Estates Act 1925* (UK). Similar provisions are found in Tasmania, Victoria and Western Australia: *Administration and Probate Act 1935* (Tas) s 28(2); *Administration and Probate Act 1958* (Vic) s 31(2); *Administration Act 1903* (WA) s 46(1).

¹⁷⁸⁸ (1979) 3 Tr 125; 100 ER 490. This decision is discussed at [25.62] above.

25.70 The second limb of section 53(2) protects a personal representative in respect of payments and dispositions properly made by ensuring that the personal representative is entitled to retain or reimburse himself or herself in respect of those payments and dispositions if they might properly have been made by the personal representative who is subsequently appointed.¹⁷⁸⁹

25.71 Section 53(3) provides that a disposition of any interest in property made by a personal representative to a purchaser in good faith is valid, notwithstanding the subsequent revocation of the grant. In recommending a provision to this effect in its 1978 Report, the Queensland Law Reform Commission commented that the provision gave effect to the decision in *Hewson v Shelley*.¹⁷⁹⁰

25.72 Section 53(6) of the *Succession Act 1981* (Qld) enables the court to order that proceedings that are pending by or against a personal representative when a grant is revoked be continued by or against the new personal representative.¹⁷⁹¹ In its 1978 Report, the Queensland Law Reform Commission commented that section 53(6), which was based on section 17 of the *Administration of Estates Act 1925* (UK), had been widened as the English provision dealt only with the revocation of temporary grants.¹⁷⁹² Provisions of this kind ensure that the revocation of a grant does not prejudice an action that is pending at that time.¹⁷⁹³

25.73 The main difference between the Queensland provisions dealing with the effect of revocation and the provisions in the other jurisdictions lies in section 53(4) and (5). Those provisions were recommended by the Queensland Law Reform Commission in its 1978 Report, and made a 'substantial change in favour of the personal representative whose grant has been revoked'.¹⁷⁹⁴ The Commission was concerned to provide greater protection for a personal representative who made distributions under a grant that was subsequently revoked.¹⁷⁹⁵

¹⁷⁸⁹ Most Australian jurisdictions have an equivalent provision: see *Administration and Probate Act 1929* (ACT) s 62; *Probate and Administration Act 1898* (NSW) s 90; *Administration and Probate Act* (NT) s 94; *Administration and Probate Act 1935* (Tas) s 28(2); *Administration and Probate Act 1958* (Vic) s 31(2); *Administration Act 1903* (WA) s 46(2).

¹⁷⁹⁰ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37. For a discussion of *Hewson v Shelley* [1914] 2 Ch 13, see [25.63] above.

¹⁷⁹¹ All Australian jurisdictions have a provision that has substantially the same effect: see *Administration and Probate Act 1929* (ACT) s 31; *Probate and Administration Act 1898* (NSW) s 81(1), (2); *Administration and Probate Act* (NT) s 40; *Administration and Probate Act 1919* (SA) s 42; *Administration and Probate Act 1935* (Tas) s 20; *Administration and Probate Act 1958* (Vic) s 23; *Administration Act 1903* (WA) s 41. But see note 1801 below in relation to the narrower scope of the Tasmanian and Victorian provisions.

¹⁷⁹² Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37.

¹⁷⁹³ L Handler and R Neal, *Succession Law & Practice NSW* (LexisNexis online service) [1409.1] (at 20 February 2009).

¹⁷⁹⁴ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37.

¹⁷⁹⁵ *Ibid.*

Hitherto if a grant was revoked under which a personal representative had paid out legacies or made intestacy distributions he would be personally liable to those to whom the payments should have been made under a later grant and he could not recover anything from the person paid under the revoked grant.¹⁷⁹⁶

That rule is considered to be unjust and we recommend that if the personal representative has acted in good faith and without negligence he should not be liable for such payments. (emphasis in original; note added)

25.74 The Commission also wished to ensure that the personal representative appointed under the subsequent grant could recover distributions that were not payable under that grant:¹⁷⁹⁷

We further recommend that the personal representative under a subsequent grant may recover any legacy or distributive share paid under the revoked grant, if it is not payable under the subsequent grant. But we wish to extend to the distributee the defence of change of position already given, by s 109 of the *Trusts Act 1973*, in the case of mistaken payments made out of a trust fund, so as to give him some protection particularly if there is delay in the bringing of proceedings for recovery.¹⁷⁹⁸ (note added)

Other Australian jurisdictions except South Australia

25.75 With the exception of South Australia, the provisions in the other Australian jurisdictions that deal with the effect of the revocation of a grant have several provisions that generally correspond with some of the provisions of section 53 of the *Succession Act 1981* (Qld). In addition, the legislation in the ACT, New South Wales, the Northern Territory and Victoria contains provisions not found in section 53 of the Queensland legislation. These provisions are considered below.

Provisions similar to the Queensland provisions

25.76 The legislation in the ACT, New South Wales, the Northern Territory, Tasmania, Victoria and Western Australia contains provisions in similar terms to section 53(1), the second limb of section 53(2), and section 53(6) of the *Succession Act 1981* (Qld). Accordingly, the legislation:

¹⁷⁹⁶ At the time, if a personal representative distributed property to persons whom he or she supposed were beneficiaries, the payment was regarded as voluntary and as having been paid under a mistake of law: WA Lee, *Lee's Manual of Queensland Succession Law* (1st ed, 1975) §61. See now *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 in relation to the recovery of moneys paid under a mistake of law.

¹⁷⁹⁷ Queensland Law Reform Commission, *The Law Relating to Succession*, Report No 22 (1978) 37.

¹⁷⁹⁸ *Trusts Act 1973* (Qld) s 109(3) is considered at [22.24]–[22.29] above.

- provides that a person who in good faith makes a payment or transfer in relation to the estate of the deceased person is indemnified and protected in respect of that act;¹⁷⁹⁹
- provides that the personal representative appointed under the revoked grant is entitled to be reimbursed in respect of any payments made by him or her that might lawfully have been made by the personal representative appointed under the subsequent grant;¹⁸⁰⁰ and
- enables the court to order that a proceeding that is pending by or against a personal representative when a grant is revoked can be continued by or against the personal representative appointed under the subsequent grant.¹⁸⁰¹

25.77 In addition, the legislation in Tasmania, Victoria and Western Australia provides, in terms similar to the first limb of section 53(2) of the *Succession Act 1981* (Qld), that all payments and dispositions (in Western Australia, all payments) made in good faith to a personal representative before a grant is revoked are to be a valid discharge to the person making the payments or dispositions.¹⁸⁰²

25.78 The Tasmanian and Victorian legislation also provides, in terms similar to section 53(3) of the *Succession Act 1981* (Qld), that all conveyances of any interest in property made to a purchaser by a person acting under a grant are valid notwithstanding the subsequent revocation or variation of the grant.¹⁸⁰³

Additional provisions: Australian Capital Territory, New South Wales, Northern Territory, Victoria

25.79 The legislation in the ACT, New South Wales, the Northern Territory, and Victoria contains an additional provision that is not found in the Queensland

¹⁷⁹⁹ *Administration and Probate Act 1929* (ACT) s 63; *Probate and Administration Act 1898* (NSW) s 91 (although where the deceased died on or after 31 December 1981 the indemnity and protection applies only in relation to property of the estate that is listed in a document issued by the court in relation to the grant); *Administration and Probate Act* (NT) s 95; *Administration and Probate Act 1935* (Tas) s 28(1); *Administration and Probate Act 1958* (Vic) s 31(1); *Administration Act 1903* (WA) s 47.

¹⁸⁰⁰ *Administration and Probate Act 1929* (ACT) s 62; *Probate and Administration Act 1898* (NSW) s 90(2); *Administration and Probate Act* (NT) s 94; *Administration and Probate Act 1935* (Tas) s 28(2); *Administration and Probate Act 1958* (Vic) s 31(1); *Administration Act 1903* (WA) s 46(2).

¹⁸⁰¹ *Administration and Probate Act 1929* (ACT) s 31; *Probate and Administration Act 1898* (NSW) s 81(1), (2); *Administration and Probate Act* (NT) s 40; *Administration and Probate Act 1935* (Tas) s 20; *Administration and Probate Act 1958* (Vic) s 23; *Administration Act 1903* (WA) s 41. The Tasmanian and Victorian provisions are narrower in their operation than their counterparts in the other jurisdictions, as they refer to a legal proceeding that is pending by or against 'an administrator to whom a temporary administration is granted'. The Western Australian provision also differs slightly in that the continuance of the pending proceedings by or against the new personal representative does not depend on the court making an order, but occurs by operation of law.

¹⁸⁰² *Administration and Probate Act 1935* (Tas) s 28(2); *Administration and Probate Act 1958* (Vic) s 31(2); *Administration Act 1903* (WA) s 46(1).

¹⁸⁰³ *Administration and Probate Act 1935* (Tas) s 37; *Administration and Probate Act 1958* (Vic) s 42.

legislation or in the legislation of the other Australian jurisdictions.¹⁸⁰⁴ Section 40D of the *Probate and Administration Act 1898* (NSW), which is in substantially the same terms as the provisions in the other jurisdictions,¹⁸⁰⁵ provides:

40D Effect of revoking grant

- (1) If a grant of probate or administration is revoked, the provisions of this section shall have effect.
- (2) The executor or administrator under the revoked grant shall be bound duly to account and to pay and transfer all money and property received by or vested in the executor or administrator and then remaining in the executor's or administrator's hands as the Court may direct, but shall not be liable for any money or property paid or transferred by the executor or administrator in good faith under the probate or administration before the revocation.

Nothing in this subsection shall affect any commission protection indemnity reimbursement or right to which the executor or administrator is entitled under any other provision of this Act.
- (3) The revocation shall not invalidate any payment or transfer lawfully made by or to the executor or administrator in the course of administration before the revocation, but nothing in this subsection shall prejudice the right of any person to follow assets into the hands of the persons or any of them among whom the same may have been distributed, or who may have received the same.
- (3A) No action shall lie against the Registrar-General for loss, damage or deprivation suffered in consequence of the registration of a transfer or other dealing with land under the provisions of the *Real Property Act 1900* lawfully made by the executor or administrator before the revocation.
- (4) In any case where a grant of probate or administration is revoked under section 40C the person, or if the person has died since the date of the grant, the executor or administrator to whom a grant of probate or administration is made consequent on the revocation, shall be entitled to receive from the Consolidated Revenue Fund the amount of death duty paid thereto in respect of the revoked grant.
- (5) The Court may make such vesting order as it deems proper.
- (6) The provisions of this section, with the exception of subsection (4), shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*.

¹⁸⁰⁴ *Administration and Probate Act 1929* (ACT) s 32B; *Probate and Administration Act 1898* (NSW) s 40D; *Administration and Probate Act* (NT) s 43; *Administration and Probate Act 1958* (Vic) s 10.

¹⁸⁰⁵ Note, however, that s 10 of the *Administration and Probate Act 1958* (Vic) does not apply generally on the revocation of a grant, but only when the court revokes a grant made on the presumption of death.

25.80 Section 40D of the *Probate and Administration Act 1898* (NSW), as originally enacted in 1932,¹⁸⁰⁶ applied only when the court revoked a grant made on the presumption of death because it subsequently appeared that the person who was presumed to be dead was in fact living at the date of the grant. It was amended in 1938 so that it now applies generally when a grant is revoked.¹⁸⁰⁷

25.81 In Victoria, section 10 of the *Administration and Probate Act 1958* (Vic) is in similar terms to section 40D, except that it is still limited to situations where a grant made on the presumption of death is revoked because it appears that the person whose estate was the subject of the grant was living when the grant was made.

25.82 The ACT, New South Wales and Northern Territory provisions (and the Victorian provision when it applies):

- require the personal representative under the revoked grant to account for the property he or she has received, or that vested in him or her, as personal representative, and to pay all property then remaining in his or her hands as the court may direct;¹⁸⁰⁸
- provide that the personal representative is not liable in respect of money paid or property transferred (in the ACT and the Northern Territory, 'property disposed of') in good faith under the grant before it was revoked;¹⁸⁰⁹
- provide that revocation of the grant does not of itself invalidate any payment or transfer (in the ACT and the Northern Territory, 'a disposal of property') made by, or to, the personal representative before the grant was revoked;¹⁸¹⁰
- provide that no action lies against the registrar of land titles for loss suffered by a person as a result of the registration of a transfer or dealing

¹⁸⁰⁶ Section 40D of the *Probate and Administration Act 1898* (NSW) was inserted by s 2 of the *Wills Probate and Administration (Amendment) Act 1932* (NSW). It was part of a series of provisions dealing with grants made on the presumption of death. Those provisions are considered in Chapter 24 of this Report.

¹⁸⁰⁷ Section 40D was amended by s 6(c)(i) of the *Conveyancing, Trustee and Probate (Amendment) Act 1938* (NSW).

¹⁸⁰⁸ *Administration and Probate Act 1929* (ACT) s 32B(1)(a); *Probate and Administration Act 1898* (NSW) s 40D(2); *Administration and Probate Act* (NT) s 43(1)(a); *Administration and Probate Act 1958* (Vic) s 10(a).

¹⁸⁰⁹ *Administration and Probate Act 1929* (ACT) s 32B(1)(b); *Probate and Administration Act 1898* (NSW) s 40D(2); *Administration and Probate Act* (NT) s 43(1)(b); *Administration and Probate Act 1958* (Vic) s 10(a).

¹⁸¹⁰ *Administration and Probate Act 1929* (ACT) s 32B(1)(c); *Probate and Administration Act 1898* (NSW) s 40D(3); *Administration and Probate Act* (NT) s 43(1)(c); *Administration and Probate Act 1958* (Vic) s 10(b).

under the relevant real property legislation that was lawfully made by the personal representative before the grant was revoked;¹⁸¹¹

- provide that the court may make such vesting orders as it considers appropriate.¹⁸¹²

25.83 The New South Wales, Northern Territory and Victorian provisions preserve the right of a person to follow an asset into the hands of a person to whom the asset was distributed or who has received it.¹⁸¹³ The ACT provision is framed differently. It provides that a person who is entitled to property that has been distributed by the personal representative under a grant that has since been revoked may apply to the Supreme Court for an order that the person having possession of the property either return the property to the applicant or pay the applicant such sum as the court considers reasonable in the circumstances.¹⁸¹⁴

25.84 The New South Wales and Victorian provisions provide that, where a grant made on the presumption of death is revoked because the person who was supposed to be dead was in fact alive when the grant was made, the person (or, if the person has since died, the person's personal representative) is entitled to recover the amount of death duty paid in respect of the revoked grant.¹⁸¹⁵

South Australia

25.85 In South Australia, section 43 of the *Administration and Probate Act 1919* (SA) protects certain acts and dealings done in reliance on a grant that is subsequently revoked. That section provides:

43 Protection to persons acting in reliance on probate or administration

- (1) The revocation or rescission of probate or administration granted under this Act does not render the executor or administrator liable for any prior act done by him in good faith and in reliance on the probate or administration.

¹⁸¹¹ *Administration and Probate Act 1929* (ACT) s 32B(1)(e); *Probate and Administration Act 1898* (NSW) s 40D(3A); *Administration and Probate Act* (NT) s 43(1)(d). There is no equivalent provision in the *Administration and Probate Act 1958* (Vic).

¹⁸¹² *Administration and Probate Act 1929* (ACT) s 32B(1)(f); *Probate and Administration Act 1898* (NSW) s 40D(5); *Administration and Probate Act* (NT) s 43(1)(e); *Administration and Probate Act 1958* (Vic) s 10(d).

¹⁸¹³ *Probate and Administration Act 1898* (NSW) s 40D(3); *Administration and Probate Act* (NT) s 43(2)(b); *Administration and Probate Act 1958* (Vic) s 10(b) (although assets may not in Victoria be followed into the hands of a purchaser for value without notice that the person supposed to be dead was actually alive at the date of the grant). See Chapter 22 of this Report in relation to the right to follow assets.

¹⁸¹⁴ *Administration and Probate Act 1929* (ACT) s 32B(1)(d), (2).

¹⁸¹⁵ *Probate and Administration Act 1898* (NSW) s 40D(4); *Administration and Probate Act 1958* (Vic) s 10(c). These provisions are now otiose. As explained in Chapter 35, the payment of death duties has been abolished in all Australian jurisdictions: see [35.127]–[35.132] in vol 3 of this Report.

- (2) Subject to this Act, where a person, acting in good faith and in reliance on probate or administration granted under this Act, deals with an asset of the estate of a deceased person, he incurs no personal liability by so doing notwithstanding that the probate or administration may subsequently prove to be invalid or be revoked or rescinded.
- (3) This section does not affect the rights that may lie against any person to whom property has been invalidly transferred, or to whom a payment has been invalidly made, by an executor or administrator.
- (4) In this section—

administration includes an order under section 9 of the *Public Trustee Act 1995* authorising the Public Trustee to administer the estate of a deceased person.

25.86 Section 43(1) protects a personal representative in respect of acts done in good faith before the revocation of a grant and in reliance on the grant. For example, where a personal representative in good faith made distributions to persons who were believed to be beneficiaries, but the grant is revoked when a later will is discovered, the personal representative would not be liable to the persons entitled under the later will.

25.87 Section 43(2) protects from liability a person who in good faith deals with an asset of the estate in reliance on a grant that is subsequently revoked.

25.88 However, section 43 does not protect a person to whom a distribution is invalidly made. Section 43(3) expressly provides that the section does not affect the rights that may lie against a person to whom a personal representative has invalidly transferred property or invalidly made a payment. Accordingly, in the situation mentioned above where a grant of probate is revoked after the personal representative has distributed the estate in reliance on the grant, the beneficiaries who are entitled under the subsequent grant are not prevented from exercising any rights they may have against the persons to whom the distributions were wrongly made.

25.89 The South Australian legislation also includes a provision, similar to section 53(6) of the *Succession Act 1981* (Qld), to enable legal proceedings pending by or against a personal representative to be continued against the personal representative appointed under the subsequent grant.¹⁸¹⁶

Discussion Paper

25.90 In the Discussion Paper, the National Committee proposed that the model legislation should include a provision to the effect of section 53 of the *Succession Act 1981* (Qld).¹⁸¹⁷

¹⁸¹⁶ *Administration and Probate Act 1919* (SA) s 42.

¹⁸¹⁷ *Administration of Estates Discussion Paper* (1999) QLRC 144; NSWLRC 205 (Proposal 62).

Submissions

25.91 The National Committee's proposal that the model legislation should include a provision to the effect of section 53 of the *Succession Act 1981* (Qld) was supported by the Bar Association of Queensland, the Queensland Law Society, the Public Trustee of New South Wales, an academic expert in succession law and the ACT and New South Wales Law Societies.¹⁸¹⁸

25.92 The New South Wales Law Society commented that the Queensland provision goes further than the current New South Wales provisions in dealing with the recoverability of dispositions under a revoked grant.¹⁸¹⁹

The National Committee's view

25.93 Section 53 of the *Succession Act 1981* (Qld) deals comprehensively with the effect of the revocation of a grant.¹⁸²⁰ Although a number of aspects of that section have corresponding provisions in the other Australian jurisdictions, section 53 provides the clearest protection for a personal representative who in good faith and without negligence pays a legacy or distributes an asset in reliance on a grant that is subsequently revoked.¹⁸²¹ It is also the only provision to provide expressly that the personal representative appointed under any subsequent grant may recover any legacy paid or asset distributed that is not payable or distributable under the subsequent grant, subject to the beneficiary's defence of a change in position.¹⁸²²

25.94 For these reasons, the National Committee is of the view that the model legislation should include a provision to the general effect of section 53 of the *Succession Act 1981* (Qld).

25.95 However, the language of the model provision that is based on section 53(1) of the *Succession Act 1981* (Qld) should be modified slightly. That section deals with the liability of a person who in good faith makes, or permits to be made, a payment or disposition under a grant. Like the corresponding provisions in the other Australian jurisdictions,¹⁸²³ section 53(1) provides that in the specified circumstances the person making the payment or disposition, or permitting it to be made, 'shall be indemnified and protected in so doing'. In the National Committee's view, it would be clearer for the model provision to be expressed in terms that, in the specified circumstances, the person 'is not

¹⁸¹⁸ Submissions 1, 8, 11, 12, 14, 15.

¹⁸¹⁹ Submission 15.

¹⁸²⁰ *Succession Act 1981* (Qld) s 53 is set out at [25.67] above and is considered at [25.68]–[25.74] above.

¹⁸²¹ See *Succession Act 1981* (Qld) s 53(4).

¹⁸²² See *Succession Act 1981* (Qld) s 53(5).

¹⁸²³ See *Administration and Probate Act 1929* (ACT) s 63; *Probate and Administration Act 1898* (NSW) s 91(1); *Administration and Probate Act* (NT) s 95; *Administration and Probate Act 1935* (Tas) s 28(1); *Administration and Probate Act 1958* (Vic) s 31(1); *Administration Act 1903* (WA) s 47.

liable'. This would also be more consistent with the language used in section 53(4).

25.96 The National Committee notes that section 53(3) of the *Succession Act 1981* (Qld), which deals with the validity of dispositions of property, provides that a disposition of any interest in property made to a purchaser 'in good faith' is valid, notwithstanding any subsequent revocation of the grant. The equivalent provisions in Tasmania and Victoria validate all conveyances made to a purchaser by a person acting under a grant that is subsequently revoked, and do not limit the operation of the provisions to a conveyance made to a purchaser in good faith.¹⁸²⁴

25.97 As noted earlier in this chapter,¹⁸²⁵ the Queensland provision is consistent with the decision of the English Court of Appeal in *Hewson v Shelley*,¹⁸²⁶ which held that a purchaser for value without notice obtained a good title to property, notwithstanding the subsequent revocation of the grant. In the National Committee's view, it is appropriate that the limitation found in section 53(3) of the *Succession Act 1981* (Qld) be imported into the model legislation. Where a purchaser does not act in good faith, for example, because he or she purchases property from a personal representative when he or she has reason to believe that the grant is likely to be revoked, the disposition to the purchaser should not be validated by the model provision.

25.98 The enactment of provisions to the effect of section 53 of the *Succession Act 1981* (Qld), modified as discussed above, provides a comprehensive scheme regarding the effect of revocation of a grant. In the National Committee's view, it is not necessary for the model legislation to include any additional provisions to the effect of any of the provisions that apply in any of the other Australian jurisdictions. In particular, the National Committee does not consider it necessary for the model legislation to include a provision to the effect of section 40D(3A) of the *Probate and Administration Act 1898* (NSW),¹⁸²⁷ or the corresponding provisions in the ACT and the Northern Territory,¹⁸²⁸ to protect the registrar of titles from liability. A registrar of titles who registers a transfer in favour of a personal representative or a beneficiary in reliance on a grant that is subsequently revoked will be protected from liability by the model provision that is based on section 53(1) of the *Succession Act 1981* (Qld).

¹⁸²⁴ See [25.78] above.

¹⁸²⁵ See [25.71] above.

¹⁸²⁶ [1914] 2 Ch 13. This decision is discussed at [25.63] above.

¹⁸²⁷ *Probate and Administration Act 1898* (NSW) s 40D is set out at [25.79] above.

¹⁸²⁸ See note 1811 above.

REVOCATION OF GRANT MADE IN RESPECT OF A LIVING PERSON

Existing legislative provisions

25.99 In Chapter 24 of this Report, the National Committee has recommended that the model legislation should ensure that the court has jurisdiction to make a grant where the death of a person is either inferred or presumed.¹⁸²⁹

25.100 The legislation in the ACT, New South Wales, the Northern Territory and Victoria deals specifically with the situation where the person whose death has been inferred or presumed was in fact living at the time the grant was made.¹⁸³⁰ In that circumstance, the court must revoke the grant on such terms, if any, as the court thinks proper.

25.101 Section 40C of the *Probate and Administration Act 1898* (NSW), which is typical of these provisions, provides:

40C Person living at date of grant

- (1) Where the Court grants probate of the will or administration of the estate of any person, and it subsequently appears that the person was living at the date of the grant, the Court shall revoke the grant on such terms, if any, with respect to any proceedings at law or in equity commenced by or against the executor or administrator, and in respect of costs and otherwise, as the Court thinks proper.
- (2) Proceedings for the revocation may be taken either by the person, or if the person has died since the date of the grant, by any person entitled to apply for probate or administration or by any person interested in the estate.
- (3) The Court may at any time, whether before or after the revocation, make such orders, including an order for an injunction against the executor or administrator or any other person, and an order for the appointment of a receiver, as the Court may deem proper for protecting the estate.
- (4) The provisions of this section shall extend to a case where the grant of probate or administration was made before, as well as to a case where the grant is made after the commencement of the *Wills Probate and Administration (Amendment) Act 1932*.

Discussion Paper

25.102 In the Discussion Paper, the National Committee suggested that section 40C of the *Probate and Administration Act 1898* (NSW) was procedural

¹⁸²⁹ See Recommendation 24-1 above.

¹⁸³⁰ *Administration and Probate Act 1929* (ACT) s 32A; *Probate and Administration Act 1898* (NSW) s 40C; *Administration and Probate Act* (NT) s 42; *Administration and Probate Act 1958* (Vic) s 9.

in nature, and was therefore better dealt with in the court rules of individual jurisdictions.¹⁸³¹ It therefore proposed that a provision to the effect of section 40C should not be included in the model legislation,¹⁸³² but that individual jurisdictions should consider including such a provision in their court rules.¹⁸³³

Submissions

25.103 The submissions received in relation to this issue were divided as to whether the model legislation should include a provision to the effect of section 40C of the *Probate and Administration Act 1898* (NSW).

25.104 The Bar Association of Queensland, the National Council of Women of Queensland and the Queensland Law Society agreed with the National Committee's proposal that a provision in these terms should not be included in the model legislation, but that consideration should be given to including such a provision in court rules.¹⁸³⁴

25.105 The Queensland Law Society commented:¹⁸³⁵

[The provisions] appear to be designed to preserve the estate for [a] presumed deceased should it eventuate that such person is alive. Such an event is so rare and infrequent that there is no need for special provisions therefore they should not be included in the model legislation.

25.106 The Public Trustee of New South Wales also agreed with the National Committee's proposals, although he was concerned that the proposal could lead to non-uniform court rules:¹⁸³⁶

The principal aim of uniformity seems to be unachievable if uniformity is limited to statute whilst rules of court ... are not uniform.

25.107 The National Committee's proposals were opposed by the ACT and New South Wales Law Societies.¹⁸³⁷ The New South Wales Law Society was of the view that section 40C of the *Probate and Administration Act 1898* (NSW) addressed the remote and unlikely event of a person being found alive after the date of the grant of probate, and that a provision in those terms should be included in the model legislation.¹⁸³⁸

1831 *Administration of Estates Discussion Paper* (1999) QLRC 24; NSWLRC [4.5].

1832 Ibid, QLRC 25; NSWLRC 38 (Proposal 6).

1833 Ibid, QLRC 25; NSWLRC 38 (Proposal 7).

1834 Submissions 1, 3, 8.

1835 Submission 8.

1836 Submission 11.

1837 Submissions 14, 15.

1838 Submission 15.

The National Committee's view

25.108 As noted previously in this chapter, the preliminary view expressed in the Discussion Paper was that the model legislation should not include a provision to the effect of section 40C of the *Probate and Administration Act 1898* (NSW). However, the National Committee has recommended in Chapter 24 of this Report that the model legislation should:¹⁸³⁹

- ensure that the court has jurisdiction to grant probate of the will, or letters of administration of the estate, of a deceased person whose death is inferred or presumed; and
- include a provision, based generally on section 9A(2) of the *Administration and Probate Act 1929* (ACT), to ensure 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 in fact living when the grant was made.

25.109 A provision to the effect of section 40C of the *Probate and Administration Act 1898* (NSW) will operate as a corollary to the proposed provisions by requiring the court, if it subsequently appears that the person whose death was inferred or presumed was, in fact, living when the grant was made, to revoke the grant, and by dealing with certain ancillary matters. Accordingly, the National Committee is now of the view that the model legislation should include a provision to the effect of section 40C of the New South Wales legislation.

RECOMMENDATIONS

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.¹⁸⁴⁰

¹⁸³⁹ See Recommendations 24-1 and 24-3 above.

¹⁸⁴⁰ See [25.33]–[25.38], [25.53]–[25.59] above.

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).¹⁸⁴¹

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.¹⁸⁴²

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).¹⁸⁴³

See Administration of Estates Bill 2009 cl 372.

¹⁸⁴¹ See [25.93]–[25.94] above.

¹⁸⁴² See [25.95] above.

¹⁸⁴³ See [25.99]–[25.108] above.