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**NATIONAL COMMITTEE
FOR
UNIFORM SUCCESSION LAWS**

**ADMINISTRATION OF ESTATES
OF DECEASED PERSONS**

Discussion Paper
MP 37

Queensland Law Reform Commission
June 1999

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You are invited to make comments and submissions on the issues raised in, or on other matters relevant to the subject of, this Discussion Paper.

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2. Issues Paper, *Uniform Succession Laws for Australian States and Territories - Family Provision* (QLRC WP 47, 1995)
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11. *Admission of Extrinsic Evidence*
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13. *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (1997) (QLRC MP 29, 1997; NSWLRC R 85, 1998)
14. *Report to the Standing Committee of Attorneys General on Family Provision* (1997) (QLRC MP 28, 1997)

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² See note 1 of this Report.

³ Papers 3-11 were published as Queensland Law Reform Commission, Miscellaneous Paper, *Uniform Succession Laws: Wills* (MP 15, 1996). Paper No 12 was published as Queensland Law Reform Commission, Miscellaneous Paper, *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (MP 16, 1996).

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PREFACE

1. THE NATIONAL COMMITTEE FOR UNIFORM SUCCESSION LAWS

In 1991 the Standing Committee of Attorneys General approved the development of uniform succession laws for the whole of Australia. In 1992 the Queensland Law Reform Commission was requested by the Queensland Attorney-General to co-ordinate that project.

In order to ensure that the Uniform Succession Laws Project maintained an Australia-wide focus and was regarded as an undertaking of all Australian jurisdictions, the Queensland Law Reform Commission, as co-ordinator of the project, asked the Queensland Attorney-General to request each of his counterparts in other Australian jurisdictions to nominate a person or agency to represent his or her respective jurisdiction on a National Committee to guide the project. Nominees were subsequently appointed in each Australian jurisdiction.

The New Zealand Law Commission asked to be represented on the National Committee. As the New Zealand Law Commission was also working on succession law reform, Professor Richard Sutton, a Commissioner of the Law Commission and subsequently in Professor Sutton's place, Mr D F Dugdale, Commissioner of the New Zealand Law Commission, were welcomed on to the National Committee.⁴ However, as the New Zealand Law Commission no longer has a reference relating to succession laws, it is no longer represented on the National Committee, although it continues to provide valuable assistance upon request.

The current members of the National Committee are:⁵

- Professor Don Chalmers, Professor of Law, University of Tasmania⁶
- Professor Michael Tilbury, Academic Secretary to the Victorian Attorney-General's Law Reform Advisory Council and Commissioner, New South Wales Law Reform Commission
- Mr Peter Hennessy, Executive Director, New South Wales Law Reform Commission
- Mr Joseph Waugh, Legal Officer, New South Wales Law Reform Commission

⁴ Professor Sutton has subsequently retired from the Law Commission.

⁵ In August 1997, Dr Peter Handford, of the Law Reform Commission of Western Australia, resigned from the National Committee following the decision by the Attorney-General of Western Australia to restructure the Law Reform Commission of Western Australia of which Dr Handford was then Executive Officer and Director of Research. There is currently no Western Australian representative on the National Committee.

⁶ Formerly the Tasmanian Law Reform Commissioner.

- Ms Katherine O'Neill⁷, Senior Legal Officer, Policy and Legislation, Attorney General's Department, South Australia
- Mr Robert Bradshaw, Law Officer, Policy Division, Northern Territory Attorney-General's Department
- Associate Professor Charles Rowland, Special Adviser (Succession Law), Law Reform Commission, Attorney-General's Department, Australian Capital Territory
- Mr David Edwards PSM, Deputy President, Australian Law Reform Commission
- Mr Wayne Briscoe, Commissioner, Queensland Law Reform Commission
- Ms Claire Riethmuller, Senior Research Officer, Queensland Law Reform Commission
- Ms Penny Cooper, Director, Queensland Law Reform Commission

Since the National Committee was first formed there have been some changes in its membership. This was to be expected given the nature of the organisations from which most National Committee members were drawn. Also, a number of the Attorneys-General who were in office at the time the original nominations were made no longer hold office. Nevertheless, the National Committee has retained the expertise in succession law that is vital to the success of the project.

Individual members of the National Committee are not necessarily plenipotentiaries of the organisations they represent, although, wherever possible, members of the National Committee have sought the views of their organisations before adopting a stance in relation to particular issues discussed at the National Committee level.

The Queensland Law Reform Commission as co-ordinating body for the project is indebted to the individual members of the National Committee for their interest and efforts to date. It is hoped that the National Committee structure will continue for future uniform succession law topics to be dealt with by this project.

2. THE NATIONAL COMMITTEE'S WORK ON WILLS AND FAMILY PROVISION

In 1996 the National Committee forwarded an interim Report to the Standing Committee of Attorneys General on a number of significant issues relating to *The Law of Wills*.⁸

⁷ Ms O'Neill has recently replaced Ms Margaret Doyle as the South Australian representative on the National Committee.

⁸ National Committee for Uniform Succession Laws, Report, *Uniform Succession Laws for the Australian States and Territories: Report to the Standing Committee of Attorneys General: The Law of Wills* (QLRC MP 19, 1996).

In 1997 the National Committee forwarded a Consolidated Report to the Standing Committee of Attorneys General on the issues covered by the 1996 interim Report as well as a number of outstanding wills issues.⁹ The Consolidated Report included model wills legislation based upon the National Committee's recommendations. The model legislation was prepared for the National Committee by the Office of New South Wales Parliamentary Counsel.

The National Committee's *Report on Family Provision* was presented to the Standing Committee of Attorneys General in December 1997. The Report included drafting instructions for model family provision legislation. At the date of this Discussion Paper, the Office of New South Wales Parliamentary Counsel had made significant progress in drafting the model legislation, although a number of issues remain to be resolved.

The National Committee is grateful to the Office of New South Wales Parliamentary Counsel for the assistance provided by that office to this project.

3. THE NATIONAL COMMITTEE'S WORK ON THE ADMINISTRATION OF ESTATES

The administration of estates is the third stage of the Uniform Succession Laws Project. The administration of estates stage has itself been divided into two parts to facilitate identification of issues and for ease of discussion. This Discussion Paper represents the National Committee's work to date on the first part, which is a review of the general law relating to the administration of estates in all Australian States and Territories. The second part, which will be the subject of a separate Discussion Paper and a separate Report to the Standing Committee of Attorneys General, will concentrate on the *Recognition of Interstate and Foreign Grants of Probate and Letters of Administration*. A draft discussion paper on the second part is currently being prepared for the National Committee by Dr Peter Handford of the Law School, University of Western Australia, pursuant to funding from the Queensland Department of Justice and Attorney-General and the Western Australian Ministry of Justice.

For the first part of the administration of estates project, the National Committee has used the relevant provisions of the *Succession Act 1981* (Qld) as the starting point for its deliberations. That Act represents the most recent overall revision of the law in this area.

Two members of the National Committee, Professor Don Chalmers and Associate Professor Charles Rowland met with all Australian Registrars of Probate at a meeting of the Registrars in Melbourne in October 1997 to discuss the National Committee's project with the Registrars. As a result of the interest expressed in the project by the

⁹

National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997); New South Wales Law Reform Commission, *Report, Uniform Succession Laws: The law of wills* (R 85, 1998).

Registrars at that meeting, the National Committee invited all Australian Registrars of Probate to participate in the project. The National Committee recognised that the Registrars would be able to make an invaluable contribution to the development of the National Committee's recommendations in this area because of their day to day involvement with issues relating to the administration of estates.

The National Committee met with the Probate Registrars in June 1998 and in November 1998.

The Registrars of Probate who have contributed to the project are:¹⁰

Mrs Jill Circosta (ACT)
Ms Jenni Daniel-Yee (NT)
Mr Alured Faunce-de Laune (SA)
Mr John Finlay (NSW)
Mr Michael Halpin (VIC)
Mr Ken Toogood (QLD)
Mr Robert Walker (TAS)
Mr Colin Watt (WA)

The views and proposals of the National Committee are generally achieved by consensus. However, not all decisions may have been considered by all members.

The aim of the National Committee is to produce model legislation to deal with the administration of estates (as it has done for the wills and family provision stages of this project) which will be attached to its report to the Standing Committee of Attorneys General.

4. THE NEXT STAGE OF THIS PROJECT

The next stage of the Uniform Succession Laws project will be a review of the Intestacy Rules. In 1993 the Queensland Law Reform Commission reported to its Attorney General on reform of the Queensland intestacy rules.¹¹ Being the most recent significant review of this area of the law, that report will form the basis of the National

¹⁰ The National Committee also acknowledges the assistance of the Honourable Mr Justice D Harper of the Supreme Court of Victoria for his assistance in ensuring that the Registrars were able to meet with the National Committee.

¹¹ Queensland Law Reform Commission, Report, *Intestacy Rules* (R 42, 1993).

Committee's deliberations. It is anticipated that work will commence on this stage of the project in the year 2000.



**The Honourable Mr Justice John Muir
Chairman
Queensland Law Reform Commission
Co-ordinating Agency for the National Committee for Uniform Succession Laws**

28 May 1999

GLOSSARY

administration: in general terms, the process of collecting the assets, paying the debts and distributing the balance of a deceased estate according to the will of a deceased person or the intestacy rules

administrator: a person appointed by the court by a grant of letters of administration to administer a deceased estate

beneficiary: the person/s entitled to a share of a deceased estate according to a will or the intestacy rules

devolution of property: the passing or "handing down" of property on death

domicile: the place where a person is ordinarily or permanently resident, requiring both physical presence and an actual intention to reside

donatio mortis causa (or donationes as plural): a gift in contemplation of death; a gift becoming absolute on the death of the donor

estate: the property of a person, comprising both real estate (land) and personal estate (goods, money)

executor: a person appointed by a will to administer a deceased estate

executor de son tort: "executor of his own wrong"; a person not appointed as executor by the will or as administrator by the court but who so acts

family provision: provision made by way of court order for the proper maintenance of and support for a deceased person's family or dependants from the deceased's estate

grant: an appointment or authorisation by the court officially recognising the right of an executor or an administrator to administer a deceased estate and vesting title to assets in the executor or the administrator

guardian: in relation to a minor person, a person with the legal right to protect the interests and property of the minor

intestate: either a person dying without a will or a valid will, or the state of being without a valid will in whole or in part

letters of administration of the estate: a grant by the court authorising an administrator to administer a deceased estate

personal representative/s: a general term referring to the person/s who performs acts associated with the administration of a deceased estate - either an executor or administrator

power of appointment: a power or authorisation given by deed or will and vested in a person/donee to dispose of property; this power can be general, special or hybrid

probate: the certification from the court that a will is valid or "proved"; see **grant**

testator: the person making a will

trustee: a person who holds property on trust for another

will: a formal document/s by a testator disposing of his or her property on death and normally appointing an executor to administer the estate

CHAPTER 1

INTRODUCTION

1. PURPOSE OF DISCUSSION PAPER

This Discussion Paper outlines, and invites comments on, the issues identified to date by the National Committee in relation to the administration of estates, with the exception of issues relating to the recognition of interstate and foreign grants of probate and letters of administration. The latter issues will be the subject of a further Discussion Paper to be prepared by the National Committee.

2. ABBREVIATIONS

Throughout this Discussion Paper, reference is made to the legislation of the Australian States and Territories, the United Kingdom and New Zealand and to the relevant rules of court of the Australian States and Territories. Unless otherwise stated, those references are to the legislation and rules set out in the following tables. To date, the National Committee has not identified and/or validated the relevant provisions in all the jurisdictions reviewed. The National Committee would be grateful for any additional information which would assist it to provide a more comprehensive coverage of the law relating to the issues under review in its Report to the Standing Committee of Attorneys General.

(a) Legislation

QLD	<i>Succession Act 1981 (Qld)</i>
ACT	<i>Administration and Probate Act 1929 (ACT)</i>
VIC	<i>Administration and Probate Act 1958 (Vic)</i>
NSW	<i>Wills, Probate and Administration Act 1898 (NSW)</i>
SA	<i>Administration and Probate Act 1919 (SA)</i>
WA	<i>Administration Act 1903 (WA)</i>
NT	<i>Administration and Probate Act (NT)</i>
TAS	<i>Administration and Probate Act 1935 (Tas)</i>
UK	<i>Administration of Estates Act 1925 (UK)</i>
NZ	<i>Administration Act 1969 (NZ)</i>

(b) Rules of Court

QLD	<i>Rules of the Supreme Court 1900 (Qld)</i>
ACT	<i>Supreme Court Rules (ACT)</i>
VIC	<i>Supreme Court (Administration and Probate) Rules 1994 (Vic)</i>
NSW	<i>Supreme Court Rules 1970 (NSW)</i>
SA	<i>The Probate Rules 1998 (SA)</i>
WA	<i>Non-Contentious Probate Rules 1967 (WA)</i>
NT	<i>Rules of the Supreme Court (NT)</i>
TAS	<i>Probate Rules 1936 (Tas)</i>

3. COMMENTS AND SUBMISSIONS

The National Committee invites members of the public and organisations with an interest or expertise in the issues under review to comment on any issue considered by the National Committee and on the National Committee's proposals set out at the end of the discussion of each issue or set of issues. Specific questions have also been included in this Discussion Paper.

Comments on any relevant issue not addressed in the Discussion Paper would also be welcomed. In particular, the National Committee seeks comments on issues which will need to be addressed in model legislation on the administration of estates.

Details on how to make written, electronic or oral submissions are provided at the beginning of this Discussion Paper.

CHAPTER 2

AUTHORITY TO ADMINISTER AN ESTATE

1. INTRODUCTION

When a person dies leaving real or personal property, that property must be dealt with according to law. In particular, the debts of the estate must be paid and any remaining assets must be distributed according to the applicable succession laws. Statute law and case law in each Australian jurisdiction govern such matters as:

- who is entitled to administer the deceased person's estate;
- in whose name the property vests until dealt with according to the deceased person's legally enforceable expressed intentions (for example, by will) or according to the law governing the situation where the deceased person has not effectively disposed of his or her property by will (intestacy); and
- the rights and responsibilities of the persons entrusted with the task of administering the deceased person's estate.

One of the difficulties in the administration of estates, however, is that the law in respect of all these issues is not uniform, or even consistent, between the Australian States and Territories.

2. PERSONAL REPRESENTATIVES

A person with authority to administer a deceased person's estate may be either an executor or an administrator. An executor is a person appointed by the deceased person's will to administer the estate. An administrator is a person appointed by the court to administer the estate where there is no will or, for some reason, no executor who is willing and able to act.¹² Executors and administrators are commonly referred to as "personal representatives".

Atherton and Vines describe the general law regarding the role of executors and administrators and the significance of a grant of representation.¹³

In all Australian jurisdictions someone is appointed to attend to the administration of the estate of a deceased person. That person is generically called a legal personal representative or personal representative, but has different specific names, depending upon whether the deceased appointed a representative or not. The deceased's chosen

¹² The possibility of administering a deceased estate other than by a personal representative acting pursuant to a grant is discussed in Chapters 10 and 11 of this Discussion Paper.

¹³ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.1.1.

representative is called an executor and any other representative is called an administrator. The essential difference is between a representative chosen by the deceased and one chosen by the court. They both administer the deceased's estate. The executor, however, has the additional task of obtaining probate of the will, that is proving that it is the last and valid will of the deceased, the testator. The authority of the representative is officially conferred through a grant of representation: probate, for executors; letters of administration, for administrators. Even where there is a will an administrator may be required, for example if there is no executor appointed or the nominated executor has died before the testator. In such cases letters of administration with the will annexed ... will be required.

(a) Probate

A grant of probate of a will is official recognition that an executor has the right to administer the deceased's estate according to the terms of the will in question.

(b) Letters of administration

An administrator acts under what is generally referred to as a grant of letters of administration, the terms and conditions of which, if any are required, are set out by the court.

The grant of letters of administration empowers the administrator to deal with the deceased person's property in the manner considered appropriate by the court, and otherwise according to the law. A grant of letters of administration is official recognition that an administrator has the right to administer the deceased's estate.

Different kinds of letters of administration are granted for a number of different purposes. A grant of letters of administration is a "limited" or "special" grant if restricted in its purpose or objects; the time in which it operates; or in the extent to which it operates over the deceased person's property.¹⁴ If a grant of letters of administration is unrestricted, it is referred to as a "general" grant.

Legislation, rules of court or both may regulate aspects of some of these grants and the restrictions which may be attached to them. However, if the legislation is silent, the court still has the residual power to attach conditions.¹⁵

¹⁴ Atherton RF, Vines P and Brown B, *Halsbury's Laws of Australia* (looseleaf), "Succession" at para 395-3055.

¹⁵ *Id* at para 395-3180.

(i) General grants of letters of administration

General grants of letters of administration include:¹⁶

- letters of administration *cum testamento annexo* - with the will annexed (cta);¹⁷
- letters of administration *de bonis non* - of the unadministered assets (dbn).¹⁸

(ii) Limited grants of letters of administration

Grants of limited (or special) administration are usually of the following kinds:

- *durante minore aetate* - during infancy;¹⁹
- *durante absentia* - during absence;²⁰
- during incapacity;²¹
- *pendente lite* - where there is a suit pending;²²

¹⁶ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at paras 814-824.

¹⁷ Where there is no executor willing and able to act pursuant to a will, letters of administration cta will be granted by the court. A copy of the will is annexed to the letters of administration.

¹⁸ Lee describes this type of grant in the following terms (Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 815):

Wherever a grant has been made and the executor or administrator can no longer act - for instance if he or she is dead or has been discharged by the court - leaving no one to represent the estate, and part of the estate in question is unadministered, the court will grant letters of administration de bonis non administratis - of the unadministered assets - of the estate, enabling the grantee to complete the administration of the estate. [note omitted]

¹⁹ Lee describes this type of grant as follows (id at para 817):

Where the executor appointed, or where there is no executor the person entitled to the grant of letters of administration, happens to be an infant at the date of the application for the grant, a grant of letters of administration will be made to an adult until the infant attains adulthood. When a grant durante minore is made power is usually reserved to the infant to seek a grant upon attaining adulthood. [note omitted]

²⁰ Lee describes this type of grant as follows (id at para 818):

Where a representative is out of the jurisdiction, a grant may be made to her or his attorney durante absentia. The court has a discretion to make the grant elsewhere - for instance to a beneficiary. [notes omitted]

²¹ Lee notes (id at para 819):

Where a representative is incapacitated, a grant will be made until he or she recovers.

²² Lee describes this type of grant as follows (id at para 820):

Where there is a suit pending which touches upon the validity of the will, or calls for a revocation of a grant, then until that suit is determined the court may appoint an administrator, who is virtually an officer of the court, to perform certain acts in relation to the estate, although it cannot be distributed. There must be a pending suit - the existence of a caveat only being insufficient - and there must be a reason for the grant,

- *cessate* - second grant upon expiry of grant of limited duration;²³
- *ad colligenda bona* - for the collection of assets;²⁴
- *ad litem* - for the purposes of litigation.²⁵

Some jurisdictions have also included in their legislation a provision to the effect that, where any person named as executor or the person entitled to administration is out of the jurisdiction, administration may be granted to an attorney of that person.²⁶ This provision applies where no grant has been made and the person entitled to the grant appoints an attorney. This type of grant can be distinguished from the grant of administration *durante absentia* which applies in the case where a grant has already been made, and the grantee is residing out of the jurisdiction.

in particular that assets require protection or administration. [notes omitted]

- 23 Lee describes this type of grant as follows (id at para 821):
Upon the expiry of a grant of limited duration, a second or cessate grant is made to the person entitled, that is to the infant now an adult, the absentee who has returned or the incapacitated person who has recovered. If such person dies before taking out the grant, or fails to take it out, letters of administration de bonis non must be obtained.
- 24 Lee describes this type of grant as follows (id at para 823):
Where there may be a delay before a personal representative can be appointed and there are assets of the deceased's which require to be protected, or debts or taxes which need to be paid from them, a grant *ad colligenda bona* may be made.
- 25 Lee describes this type of grant as follows (id at para 824):
Where the estate is so small that it seems unlikely that anyone will wish to take out a grant, but there is some person having a right of action against the estate which cannot be pursued because there is no representative to fulfil the role of defendant, a grant *ad litem* may be issued to any convenient person. The action must be within the jurisdiction appointing such administrator. [notes omitted]
- 26 For example, s 72 of the *Wills, Probate and Administration Act 1898* (NSW) reads:
Administration to be granted to attorney in certain cases
(1) When any person named as executor, or any husband or wife or the next of kin entitled to probate or administration is out of the jurisdiction or is engaged on war service within the meaning of the *Trustee and Wills (Emergency Provisions) Act 1940*, but has some other person within the jurisdiction appointed under power of attorney to act for the person, administration may be granted to such attorney, but on behalf of the person entitled thereto, and on such terms and conditions as the Court thinks fit.
(2) A grant of administration under this section shall continue in force notwithstanding the death of the donor of the power, unless the grant in terms provides that it shall determine on such event.

For other jurisdictions see *Rules of the Supreme Court 1900* (Qld) O 71 r 30; *Administration and Probate Act 1929* (ACT) s 22; *Administration and Probate Act 1919* (SA) s 34; *The Probate Rules 1998* (SA) r 41; *Administration Act 1903* (WA) ss 34, 141; *Administration and Probate Act* (NT) s 31; and *Probate Rules 1936* (Tas) r 42.

3. PURPOSE OF A GRANT

Lee refers to the grant of probate or letters of administration as:²⁷

... official recognition of the right of the personal representatives named in the grant [of probate or administration] to administer the deceased's estate and of the vesting in them of the title to those assets passing to them upon the death or grant. Where there is a need for personal representatives to prove formally their title to any assets, production of the grant is necessary. Persons owing money to the deceased, for instance, or having title, or the control of title, of property belonging to the deceased, may insist on seeing the grant to protect themselves upon payment of the debt owing or upon transfer of the title in question. Where the deceased was a shareholder in a company, for instance, then normally the company will insist on seeing the grant before it will register the personal representatives as shareholders in place of the deceased. Where personal representatives embark on litigation, they will ordinarily have to produce the grant to the court before they can obtain a decree of the court because that is the only way in which they can prove the title they assert. [notes omitted]

The general effect of a grant of probate or administration is referred to in section 49(2) of the *Succession Act 1981* (Qld) as follows:²⁸

Upon the making of a grant and subject thereto, the powers of personal representatives may be exercised from time to time only by those personal representatives to whom the grant is made; and no other person shall have power to bring actions or otherwise act as personal representatives without the consent of the Court.

Grants offer the personal representatives some degree of protection from liability in the administration of the estate which they would not otherwise have. Grants may also inspire some confidence in those dealing with a personal representative in relation to property which is the subject of the grant, in that the legal authority of the personal representative to deal with the deceased person's estate has been confirmed by the court.

4. APPLICATION FOR A GRANT

In each Australian jurisdiction, application for a grant may be made to the Supreme Court of that particular jurisdiction by the executor named in the will or by a person who wishes to be appointed as the administrator. An application can be made for a grant in either "solemn" or "common" form.

²⁷ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 802.

²⁸ See Chapter 8 of this Discussion Paper for a discussion of s 49 (which, apart from s 49(3), the National Committee has accepted).

(a) Grants in “common form”

Grants in common form are normally made by a Registrar of the court pursuant to his or her delegated power.²⁹

Lee explains the basis of a grant in common form:³⁰

A common form application is based on the assumption that there is no litigable issue arising respecting the admission of the will to probate or the grant of letters of administration. Even if there are some features of a will sought to be admitted to probate which raise a doubt, a grant in common form may still issue although the court may require affidavits in explanation to satisfy the doubt. Thus, if a will contains no attestation clause, a court may require an affidavit of due execution from at least one of the attesting witnesses, or, if that cannot be obtained, from a non-attesting witness, swearing that the due formalities of execution have been observed; or if there are alterations to a will, an affidavit may be required of someone present when the will was executed to show whether the alterations were written before the will was executed or not.

(b) Grants in “solemn form”

More formality is required in relation to a grant in solemn form:³¹

... it is the product of judicial proceedings where an issue touching the validity of the will has been determined, such as whether the testator had the requisite capacity or was subject to undue influence.³² ... Application for probate in solemn form may be made although probate in common form has been granted. [substance of one note preserved and noted below; other note omitted]

The purpose of seeking a grant in solemn form is to put an end to the litigable issue. Where such a grant follows the determination of a litigated issue, the parties to the issue cannot seek to revoke the grant because the issue is *res judicata*.³³ The only bases upon which such a grant can be revoked are:³⁴

²⁹ *Administration and Probate Act 1929* (ACT) s 10; *Administration and Probate Act* (NT) s 17; *Supreme Court Rules* (NT) r 88.05(1)(a); *Supreme Court Rules 1970* (NSW) Pt 78 r 5(1)(a); *Rules of the Supreme Court 1900* (Qld) O 71 r 7(1); *The Probate Rules 1998* (SA) rr 5, 7; *Administration and Probate Act 1958* (Vic) ss 12(1), 12(2); *Administration Act 1903* (WA) s 5, *Non-Contentious Probate Rules 1967* (WA) r 4. There is no equivalent provision in Tasmania, although s 5 of the *Administration and Probate Act 1935* (Tas) preserves the court practice current at the commencement of that Act.

³⁰ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 832.

³¹ *Ibid.*

³² Lee refers to: *Re Bowles* [1952] QWN 41; *Russell v Williams* [1953] QWN 42; *Re Flynn* [1982] 1 WLR 310.

³³ Once a matter between parties has been litigated and decided, it cannot be raised again between the same parties, although other parties are not so bound. A grant in solemn form can also bind people who are not parties to the litigation. See *Tristram and Coote's Probate Practice* (28th ed 1995) at 596-598. See also *Court Forms, Precedents and Pleadings* (Qld) at para 56,010.

³⁴ Atherton RF, Vines P, Brown B, *Halsbury's Laws of Australia* (looseleaf), “Succession” at para 395-3435.

- (1) a later will is found to exist;
- (2) it is later established that subsequent to the making of the will the testator either married³⁵ or divorced;³⁶
- (3) the order for grant was obtained by fraud;³⁷
- (4) the applicant now seeking to set aside the grant was prevented, on a sufficient basis,³⁸ from being heard on the obtaining of the grant in solemn form. [substance of the notes preserved and noted below]

5. DEFINITIONS

(a) Personal representative

(i) Introduction

Section 5 of the *Succession Act 1981* (Qld) defines “personal representative” in the following terms:

“personal representative” means the executor, original or by representation, or administrator of a deceased person.

This section does not expressly refer to the situation of a trustee corporation appointed by a will as an executor of an estate or by the court as an administrator. Section 16 of the *Administration and Probate Act 1935* (Tas) provides for trustee corporations to take grants of probate or letters of administration. The section provides:

Grant of representation to a trust corporation

- (1) Where a trust corporation is appointed an executor in a will, either alone or jointly with another person, the Court may grant probate to such corporation either solely or jointly with another person, as the case may require, and the corporation may act as executor accordingly.
- (2) Administration may be granted to any trust corporation either solely or jointly with another person, and the corporation may act as administrator accordingly.

³⁵ Subject to the statutory provisions that do not invalidate a will made in contemplation of marriage [reference omitted].

³⁶ This applies only if the applicant is the ex-spouse, whose entitlement is abrogated by statute [reference omitted].

³⁷ For example, see *Birch v Birch* [1902] P 130.

³⁸ Atherton, Vines and Brown refer to *Young v Holloway* [1895] P 87 and *Osborne v Smith* (1960) 105 CLR 153 (except for good cause being shown, a person interested in the estate is bound by the making of a grant in solemn form).

- (3) Representation shall not be granted to a syndic or nominee on behalf of any trust corporation.
- (4) Any officer authorised for the purpose by any such corporation or by the directors or governing body thereof may swear affidavits, give security, and do any other act or thing which the Court may require on behalf of the trust corporation with a view to the grant of representation to the corporation, and the acts of such officer shall be binding on the corporation, and he shall be entitled to be kept indemnified by the corporation in regard to matters so authorised as aforesaid.
- (5) Where at the commencement of this Act any interest in real or personal estate is vested in a syndic on behalf of any trust corporation acting as the personal representatives of a deceased person, the same shall, by virtue of this Act, vest in the corporation, and the syndic shall be kept indemnified by the corporation in regard to the interest so vested.

This subsection does not apply to securities registered in the name of a syndic, or to land, or to a mortgage or charge of which the syndic is registered proprietor under the *Land Titles Act 1980*, but any such securities, land, mortgage, or charge shall be transferred by the syndic to the corporation, or as the corporation may direct.
- (6) This section has effect whether the deceased died before or after the commencement of this Act; and no such vesting or transfer as aforesaid shall operate as a breach of a covenant or condition against alienation or give rise to a forfeiture.

(ii) Issues considered by the National Committee

The National Committee considered whether:

- (1) a definition of "personal representative" to the effect of that in section 5 of the *Succession Act 1981* (Qld) should be included in the model legislation;
- (2) it is necessary to clarify that an executor to whom a grant has not been made is a "personal representative" for the purposes of the model legislation;
- (3) it is necessary to specify at what point a personal representative becomes a trustee;
- (4) the definition of "personal representative" should contain the words "the estate of" before the words "a deceased person";
- (5) there should be a provision in the model legislation enabling trustee corporations to be appointed as personal representatives;
- (6) the definition of "personal representative" in the model legislation should be defined to include a trustee corporation.

(iii) The National Committee's preliminary view

The National Committee considered it arguable that the definition of "personal representative" should be more clearly defined to state expressly whether a grant is necessary for an executor to come within the definition. "Administrator" must mean a person appointed by the court, because no person can be an administrator unless a grant has been made to that person. However, the National Committee came to the view that its concerns on this issue would be addressed by the redraft of section 54 of the *Succession Act 1981* (Qld) which it considers in Chapter 10 of this Discussion Paper.

It was suggested that it would not be helpful to try to define when a personal representative becomes a trustee as, even once a personal representative holds assets as a trustee, he or she can still become the personal representative in relation to further assets or liabilities accruing to the estate.

The National Committee noted that most jurisdictions have legislation setting out the powers of trustee corporations. However, it was suggested that such provisions are more appropriately located in trustee corporation legislation, and should not be included in the model legislation.

The National Committee was of the view that the definition of "personal representative" in the model legislation should not identify trustee corporations. The purpose of the definition is to describe the types of appointment that constitute a person or entity as a personal representative, not the identity of particular entities. For example, if a trustee corporation is appointed by will as an executor, the corporation will, under the existing definition in the *Succession Act 1981* (Qld), be a "personal representative" without the need for specific inclusion.

(iv) Proposals

- (1)** The definition of "personal representative" in section 5 of the *Succession Act 1981* (Qld) should be included in the model legislation in its existing form, except that the words "the estate of" should be inserted before the words "a deceased person".
- (2)** It is unnecessary to refer, in the definition of "personal representative", to trustee corporations.

(v) Question for discussion

2.1 Should the definition of “grant” in section 5 of the *Succession Act 1981* (Qld) be included in the model legislation? “Grant” is defined in section 5 as “grant of probate of the will or letters of administration of the estate of a deceased person and includes the grant of an order to administer and the filing of an election to administer such an estate”.³⁹

(b) Administration**(i) Introduction**

Section 3 of the *Wills, Probate and Administration Act 1898* (NSW) defines “administration” as follows:

“**Administration**” includes all letters of administration of the real and personal estate and effects of deceased persons whether with or without the will annexed, and whether granted for general, special, or limited purposes, also exemplification of letters of administration or such other formal evidence of the letters of administration purporting to be under the seal of a Court of competent jurisdiction as is in the opinion of the Court deemed sufficient.

(ii) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a definition of “administration” to the effect of the definition in section 3 of the *Wills, Probate and Administration Act 1898* (NSW).

(iii) The National Committee’s preliminary view

The National Committee was of the view that inclusion in the model legislation of a provision to the effect of the definition of “administration” in section 3 of the *Wills, Probate and Administration Act 1898* (NSW) would highlight the existence of the different kinds of letters of administration.

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See Chapter 11 of this Discussion Paper in relation to the filing of an election to administer an estate.

(iv) Proposal

The definition of “administration” in section 3 of the *Wills, Probate and Administration Act 1898* (NSW) should be included in the model legislation.

CHAPTER 3

JURISDICTION OF COURT

1. SCOPE OF STATUTORY JURISDICTION

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK ⁴⁰	NZ
6	9	6 17(1) ⁴¹	33, 40 41A	5	4, 6 18 ⁴²	14	13, 15 6(5) ⁴³	61, Sch1	5

(a) Introduction

The jurisdiction of a court to determine matters relating to the administration of estates is determined by case law and by statute. The statutes are not consistent. The Queensland provision is in very general terms. It gives the court the jurisdiction and power to determine all matters relating to the administration of estates and making of grants. In the other States and Territories, the jurisdiction and powers of the court tend to be separated into a number of different provisions. The powers conferred on the court in these provisions are more specific because they relate to matters of detail such as the different types of grants of administration.

(b) Queensland

Section 6 of the *Succession Act 1981* (Qld) provides:

Jurisdiction

- (1) Subject to this Act, the court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person; and has jurisdiction to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.
- (2) The court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that the deceased person left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.

⁴⁰ *Supreme Court Act 1981* (UK).

⁴¹ *Supreme Court Act 1986* (Vic).

⁴² *Supreme Court Act 1935* (WA).

⁴³ *Supreme Court Civil Procedure Act 1932* (Tas).

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

The Queensland Law Reform Commission, in a 1978 Report, stated in relation to the first limb of section 6(2) of the *Succession Act 1981* (Qld):⁴⁴

Today there is an additional reason for stressing that the Court has jurisdiction even though there is no estate at all at the date of the death: this is where litigation is contemplated against an "estate" where the "estate" is merely a cover for litigation against the deceased's insurers, as in *Kerr v Palfrey* [1970] VR 825.

In relation to the second limb of section 6(2) of the *Succession Act 1981* (Qld), the Commission noted that, in practice, probate and letters of administration were frequently granted to persons in other Australian States but that, since the language of section 6(2) was not mandatory, the court would be able to refuse to make a grant if no good reason for making the grant could be shown.⁴⁵ A similar provision in New South Wales is section 41A of the *Wills, Probate and Administration Act 1898* (NSW), which allows probate for family provision "whether or not the deceased person left property in New South Wales".

(c) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 6 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(d) The National Committee's preliminary view

The National Committee considered that a significant advantage of section 6 of the *Succession Act 1981* (Qld) is that it collects all the powers and jurisdiction of the court in relation to the administration of estates and the making of grants into one section. In other jurisdictions (as in Queensland before the enactment of the *Succession Act 1981* (Qld)) the court has these powers, although they are not conveniently collected.

The National Committee recognised that the powers given by the Queensland provision are wide enough to cover powers given by a large number of other provisions.

⁴⁴ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 5.

⁴⁵ *Id* at 5-6.

Consequently, the enactment of a provision modelled on section 6 would mean that those other provisions would no longer be required. Each jurisdiction should decide which provisions in its own legislation can be repealed once a provision based on this section is enacted.

In its 1978 Report, for example, the Queensland Law Reform Commission noted that some twelve provisions of the then Queensland legislation could be eliminated by the enactment of section 6 of the *Succession Act 1981* (Qld).⁴⁶ The Commission expressed the policy behind section 6(1) as follows:⁴⁷

The intention of this section is to give the Court plenary jurisdiction in respect of all matters in this area of the law. Jurisdiction is given in respect of "the estate" as well as "the administration of the estate" to embrace matters affecting estates which may not be strictly speaking administration matters, such as, for instance, questions of family maintenance, and the recognition of foreign decrees.

A further advantage of section 6, in the view of the National Committee, is that it omits reference to matters that are of practice rather than of substance; matters of practice being left to be regulated by the rules of court. The Queensland Law Reform Commission noted that this was done with an eye to the possibility of uniform probate practice throughout Australia in the future.⁴⁸

The National Committee considered the extent to which the model legislation should be transparent, and the extent to which matters of detail could be spelt out in rules of court. It was noted that section 6 of the *Succession Act 1981* (Qld), which was drafted at a high level of abstraction, was aimed at practitioners, rather than lay members of the public, who would need more information to be included in the legislation. There was also concern that a broad general provision would leave room for rules and court interpretation to diverge in different jurisdictions, endangering the concept of uniformity.

Three possibilities were canvassed by the National Committee in relation to the model legislation:

- inclusion of a provision based on section 6 of the *Succession Act 1981* (Qld);
- inclusion of a provision based on section 6 of the *Succession Act 1981* (Qld), with some additional elaboration;
- inclusion of specific powers.

⁴⁶ Id at 5.

⁴⁷ Ibid.

⁴⁸ Ibid.

(e) **Issues for discussion**

A further issue which was raised within the National Committee's deliberations was the constitutional validity of a provision such as section 6 of the *Succession Act 1981* (Qld), which could be read as purporting to give jurisdiction to a State court over property in another State or Territory.⁴⁹

Windeyer J in *Balajan v Nikitin*⁵⁰ found that the New South Wales legislature was not competent to affect property outside New South Wales of a deceased person who had been domiciled outside of New South Wales, and so read down section 11(1)(b) of the *Family Provision Act 1982* (NSW) to operate as he claimed it was intended to operate.⁵¹ Section 11(1)(b) of the *Family Provision Act 1982* (NSW) reads:

An order for provision out of the estate or notional estate of a deceased person (whether or not an order made in favour of an eligible person) may:

...

- (b) be in respect of property which is situated in or outside New South Wales at the time of, or at any time after, the making of the order, whether or not the deceased person was, at the time of death, domiciled in New South Wales.

Under section 2(1) of the *Australia Act 1986* (Cth), State Parliaments are able, subject to the *Constitution Act 1900* (Cth), to make laws which have extra-territorial operation. However, for a law to be valid there must be a nexus between the subject matter of the law and the State or Territory enacting the law.

In *Flaherty v Girgis*⁵² McHugh JA stated:⁵³

Domicile, residence or even presence within the jurisdiction is always sufficient to give the legislature power to impose any liability whatsoever on the person so residing, domiciled or present. But in respect of persons who do not reside and are not domiciled or present within the State, the liability must be imposed by reference to a fact, event, thing or transaction which has a direct connection with the State. Sufficient connection can be found in the ownership or control of, or in the beneficial interest in, property situated within the jurisdiction or in the participation, directly or through an agent, in any

⁴⁹ See also Queensland Law Reform Commission, Miscellaneous Paper, *Uniform Succession Laws: The Effect of the Lex Situs and Mozambique Rules on Succession to Immovable Property* (MP 16, 1996).

⁵⁰ (1994) 35 NSWLR 51.

⁵¹ Windeyer J's interpretation of how s 11(1) of the *Family Provision Act 1982* (NSW) was meant to operate was based in part on a reading of paragraph 4.8 of the New South Wales Law Reform Commission Report, *Jurisdiction of Local Courts over Foreign Land* (R 63, 1988). The New South Wales Commission had recommended that the jurisdiction of the court should be extended to real estate outside New South Wales in the case of a deceased person domiciled in New South Wales. However, the amending legislation which was to give effect to the New South Wales Law Reform Commission's recommendations did not include such a limitation or restriction relating to domicile.

⁵² (1985) 4 NSWLR 248.

⁵³ Id at 267-268.

event or transaction occurring in the jurisdiction. But it is not enough that indirectly the person upon whom the liability is imposed obtains a benefit from the use of property or the occurrence of an event within the jurisdiction.

On the other hand, it has been suggested that, where the deceased person had been domiciled in another jurisdiction but still in Australia and where the property was in another jurisdiction but still in Australia, the position adopted by Windeyer J is contrary to the concept of cross-vesting⁵⁴ and the full faith and credit provisions of the Constitution.⁵⁵

(f) Proposal

A provision to the effect of section 6 of the *Succession Act 1981* (Qld) should be included in the model legislation. If some additional express powers are to be conferred on the court in the model legislation, it is desirable that those powers should be expressed to be in addition to the broad general provision, and not in derogation from it.

(g) Questions for discussion

- 3.1** Should a provision based on section 6 of the *Succession Act 1981* (Qld) be restricted in its operation to matters involving a direct connection with the jurisdiction in which proceedings are brought?
- 3.2** The National Committee specifically seeks submissions on the constitutional validity of section 6 of the *Succession Act 1981* (Qld) to the extent that it purports to operate extra-territorially.

⁵⁴ See *Bankinvest v Seabrook* (1988) 14 NSWLR 711 per Street J at 713-715.

⁵⁵ See *Rowe v Silverstein* [1996] 1 VR 509 per Batt J at 511-513.

2. ISSUES ARISING FROM CONFERRAL OF GENERAL JURISDICTION

(a) Introduction

The adoption of a provision such as section 6 of the *Succession Act 1981* (Qld) which confers jurisdiction on the court in general terms raises a number of issues about the inclusion of additional, more specific, provisions. An example of these issues is the inclusion in the model legislation of reference to the various kinds of letters of administration which the court may grant.

(b) Particular types of grants of letters of administration

(i) Issue considered by the National Committee

The National Committee considered whether a list of the different types of grants of letters of administration should be included in the model legislation, given the wide scope of section 6 of the *Succession Act 1981* (Qld).⁵⁶

(ii) The National Committee's preliminary view

The National Committee was of the view that the court's power to grant probate of the will or letters of administration, under section 6 of the *Succession Act 1981* (Qld), is sufficiently wide to encompass the different types of general and limited grants currently recognised in the various jurisdictions.

The National Committee considered listing the different types of administration in legislation. However, the National Committee was of the view that this could limit the development of the types of letters of administration.

The National Committee was also of the view that, wherever relevant in the model legislation, Latin terminology used in relation to some kinds of grants should be replaced by an English translation.

(iii) Question for discussion

3.3 Should the different types of letters of administration be set out in the model legislation?

⁵⁶

The different kinds of grant and the purposes for which they are made are discussed in Chapter 2 of this Discussion Paper.

(c) Administration granted to guardian of minor executor

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK ⁷¹	NZ
6(3)	21	26	70, 71	r 42	33	30	23	r 32	9

(i) Introduction

For the case where the person named as executor in the will is a minor, most jurisdictions make specific provision for administration to be granted to the guardian of the minor or to some other person as the court thinks fit. For example, sections 70 and 71 of the *Wills, Probate and Administration Act 1898* (NSW) provide:

70. Minority of sole executor

Where a minor is sole executor, administration with the will annexed may be granted to:

- (a) a guardian of the person or of the estate of the minor; or
- (b) such other person as the Court thinks fit,

until the minor attains the age of eighteen years, with full or limited powers to act in the premises until probate is granted to the executor or administration is granted to some other person.

71. Who shall have the same power as where administration is granted *durante minore aetate* of the next of kin

The person to whom such administration is granted shall have the same powers vested in the person as an administrator by virtue of an administration granted to the person *durante minore aetate* of the next of kin.

Section 6(3) of the *Succession Act 1981* (Qld) is exceptional, since it is expressed in very general terms:

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

(ii) Issue considered by the National Committee

The National Committee considered whether, in light of the general wording of section 6(3) of the *Succession Act 1981* (Qld), a provision to the effect of sections 70 and 71 of the *Wills, Probate and Administration Act 1898* (NSW) should be included in the model legislation.

(iii) The National Committee's preliminary view

The National Committee was of the view that section 6 of the *Succession Act 1981* (Qld) is wide enough to cover an appointment such as the guardian of a minor as administrator of an estate of which the minor has been named executor. However, the National Committee considered that a footnote in the model legislation which referred to details such as those which appear in sections 70 and 71 of the *Wills, Probate and Administration Act 1898* (NSW) would be sufficient to exemplify the kinds of power conferred on the court by section 6 of the *Succession Act 1981* (Qld). Different jurisdictions may need to adopt the most appropriate method of achieving the same result according to their own Parliamentary Counsel's drafting style.

(iv) Proposal

It is not necessary for the model legislation to include provisions to the effect of sections 70 and 71 of the *Wills, Probate and Administration Act 1898* (NSW). However, a footnote in the model legislation should refer to the details which currently appear in sections 70 and 71 of the *Wills, Probate and Administration Act 1898* (NSW) without referring to these provisions in particular.

CHAPTER 4

JURISDICTION TO GRANT PROBATE OR ADMINISTRATION WHERE DEATH PRESUMED

1. INTRODUCTION

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
6	9A, 9B, 32A	7-9	40A-C			15,16, 42			

A number of jurisdictions have provisions which enable the court to grant probate or letters of administration on the presumption that a person has died, even though it may subsequently be discovered that the person was not dead at that time.

2. NEW SOUTH WALES

Sections 40A, 40B and 40C of the *Wills, Probate and Administration Act 1898* (NSW) provide:

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 the *Family Provision Act 1982* 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.

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.

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*.

3. ISSUES CONSIDERED BY THE NATIONAL COMMITTEE

The National Committee considered whether:

- (1) provisions dealing with the form of grant and distribution on a presumption of death should be included in the model legislation;
- (2) if the model legislation should contain such provisions, provisions to the general effect of sections 40A, 40B and 40C of the *Wills, Probate and Administration Act 1898* (NSW) should be included.

4. THE NATIONAL COMMITTEE'S PRELIMINARY VIEW

It was noted that grants pursuant to sections 40A, 40B and 40C of the *Wills, Probate and Administration Act 1898* (NSW) are made at least 12 times a year in New South Wales.

However, the National Committee considered that sections 40B and 40C of the *Wills, Probate and Administration Act 1898* (NSW) are procedural in nature, and were therefore better dealt with in the rules of court of each jurisdiction.

Further, the National Committee was of the view that a provision to the effect of section 40A of the *Wills, Probate and Administration Act 1898* (NSW) would be covered by a provision based on section 6 of the *Succession Act 1981* (Qld), which the National Committee has accepted for inclusion in the model legislation.⁵⁸

The National Committee considered it to be unclear whether the term "presumption of death" in sections 40A and 40B of the *Wills, Probate and Administration Act 1898* (NSW) covers cases referred to as "inferred death", as well as what can properly be described as a "presumed death".

The National Committee was of the view that 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.⁵⁹

⁵⁸ See Chapter 3 of this Discussion Paper in relation to the National Committee's adoption of s 6 of the *Succession Act 1981* (Qld).

⁵⁹ See Chapter 17 of this Discussion Paper.

5. PROPOSALS

- (1) Provisions based on sections 40A, 40B and 40C of the *Wills, Probate and Administration Act 1898* (NSW) should not be included in the model legislation.
- (2) Each jurisdiction should consider including in its rules of court provisions to the effect of sections 40B and 40C of the *Wills, Probate and Administration Act 1898* (NSW).
- (3) A more appropriate term than "presumption of death" should be used, so that it is clear such provisions (wherever located) would cover what the cases refer to as an "inferred death", as well as to what can properly be described as a "presumed death".
- (4) It should be made clear that the provisions are referring to a death where the body is not found or recovered.

CHAPTER 5

APPOINTMENT, REMOVAL AND DELAY IN APPOINTMENT OF PERSONAL REPRESENTATIVE

1. INTRODUCTION

Some jurisdictions have specific statutory provisions relating to the appointment of personal representatives.

The Australian Capital Territory,⁶⁰ Victorian,⁶¹ Northern Territory⁶² and New Zealand⁶³ administration and probate legislation gives the court in those jurisdictions the power to discharge or remove an executor or administrator.

All jurisdictions enable the application for, or the granting of, probate or letters of administration to be delayed by means of a caveat.

2. POWER TO APPOINT ADMINISTRATOR

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
6	24, 25	15	74, 75		37	33, 34			19

(a) Introduction

A number of jurisdictions contain provisions along the lines of sections 74 and 75 of the *Wills, Probate and Administration Act 1898* (NSW), which give the court the specific power in certain circumstances to appoint an administrator. Section 74 provides:

Power as to appointment of administrator

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

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

⁶⁰ *Administration and Probate Act 1929* (ACT) s 32.

⁶¹ *Administration and Probate Act 1958* (Vic) s 34.

⁶² *Administration and Probate Act* (NT) s 41.

⁶³ *Administration Act 1969* (NZ) s 21.

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

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

Section 75 provides:

Proceeding where executor neglects to prove will

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

the Court may upon the application of:

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

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

...

(b) Issue considered by the National Committee

The National Committee considered whether, in light of the wording of section 6 of the *Succession Act 1981* (Qld), it is necessary for the model legislation to include a specific provision to enable the court to appoint an administrator in circumstances such as those specified in sections 74 and 75 of the *Wills, Probate and Administration Act 1898* (NSW).

(c) The National Committee's preliminary view

The National Committee was of the view that the jurisdiction conferred on the court by section 6 of the *Succession Act 1981* (Qld) gives the court very wide general powers in relation to the administration of estates and the granting of probate and administration and that sections 74 and 75 of the *Wills, Probate and Administration Act 1898* (NSW) do not really add anything to those general powers.

Moreover, section 74 of the *Wills, Probate and Administration Act 1898* (NSW) overlaps with other provisions in that Act, which may cause difficulties of interpretation. For example, there is an overlap between sections 74 and 63 of the New South Wales Act.⁶⁴ Both of these sections give the court the power to make a general or limited grant. However, they differ in a number of respects, including the scope of their application and the extent of the discretion conferred on the court as to whom to appoint. Section 74 confers a wide discretion on the court. However, section 63 gives a more restricted discretion, where a person dies intestate, to appoint an administrator. It does not allow for the passing over of the surviving spouse and next of kin except in certain limited circumstances, yet the court retains its wide discretion under section 74 to appoint a person lower down the order of preference.⁶⁵ In practice, however, courts have resolved the discrepancy by requiring that special circumstances exist before a person normally entitled to administration is passed over.⁶⁶

The National Committee considered that sections 74 and 75 of the *Wills, Probate and Administration Act 1898* (NSW) provide examples of the kinds of situations in which the power of the court to make grants and to limit them can be used and that, as long as it is made clear that the provisions in no way detract from or modify the powers given by the general jurisdiction provision in the model legislation based on section 6 of the *Succession Act 1981* (Qld), it may be useful to have similar provisions in the model legislation.

(i) An express power to appoint an administrator

The National Committee was of the view that, although under section 6 of the *Succession Act 1981* (Qld) the court would have the power to appoint an administrator, it may nevertheless be desirable to set out in the model legislation particular circumstances in which an administrator could be appointed. This may be of some assistance to lay people. The Probate Registrars agreed with this view.

The following draft provision, which is an amalgamation of sections 74 and 75 of the *Wills, Probate and Administration Act 1898* (NSW), was considered by the National Committee:

- (1) Without derogating from the generality of section 6(1) [*Succession Act 1981* (Qld)], where the court finds that there is a reasonable likelihood that were probate to be granted to the executor named in the will the grant would subsequently have to be revoked, the court may -

⁶⁴ Section 63 of the *Wills, Probate and Administration Act 1898* (NSW) is set out at p 36 of this Discussion Paper.

⁶⁵ See pp 34-37 of this Discussion Paper in relation to the conventional order of ranking of applicants for letters of administration.

⁶⁶ See Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at para 74.02; *Re Chave* (1930) 30 SR (NSW) 180; *Re McCormack* (1902) 2 SR (NSW) B & P 48. See also s 13(b) of the *Administration and Probate Act 1935* (Tas) ("special circumstances").

- (a) refuse temporarily or permanently to grant probate to the person named in the will; and
 - (b) grant probate to some other person named in the will as executor, or grant administration to some other person; and
 - (c) make such other orders as to the court seem fit.
- (2) Without derogating from the generality of section 6(1), the court may, in any case where a person dies -
- (a) intestate; or
 - (b) leaving a will, but without having appointed an executor thereof, or
 - (c) leaving a will and having appointed an executor thereof, where -
 - (i) such executor is not willing and competent to take probate; or
 - (ii) such executor is resident out of [the jurisdiction];

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

The National Committee generally accepted this redraft. However, it was considered that, with the greater ease of communication over distances, it was no longer appropriate to include as a ground for the appointment of an administrator that the executor was resident out of the particular jurisdiction. It was agreed that it was more appropriate to refer to an executor who was resident out of Australia. The Probate Registrars concurred with this position.

(ii) Passing over a named executor

The National Committee was also generally of the view that it would be desirable to give the court a discretion, in certain circumstances, to pass over a named executor and appoint an administrator.⁶⁷ Although it was acknowledged that the executor was chosen by the testator, it was also recognised that beneficiaries have a very real interest in the efficiency and cost effectiveness of the administration of estates.

In some cases, a particular executor may be chosen because the beneficiaries are minors at the time the will is made. However, by the time the testator dies, those beneficiaries may all be of full age and capacity, and the basis for the original choice of executor may no longer be justified. In those circumstances,

67

The Court will not lightly interfere with the testator's choice of executor, particularly in cases where the beneficiaries are opposed to the appointment of an executor by the testator who, at the time the will is made, is aware of the circumstances and position of the executor: *Re Jensen* [1998] 2 Qd R 374 (hostility on the part of beneficiaries due to religious intolerance towards executor held not to be sufficient).

it is difficult to see why the beneficiaries should not be able to seek the appointment of an administrator who is, to them, a more appropriate appointment than that made by the will.

The National Committee also recognised that, although it is possible to remove an executor who is not administering an estate properly, it may sometimes be difficult to do so if the conduct complained of falls just short of that which would usually be grounds for removal. It was seen that a provision that would facilitate the removal of an executor in those circumstances would be a desirable reform of the law. The Probate Registrars agreed with this view.

The following draft provision was considered:

- (1) Without derogating from the generality of section 6(1) [*Succession Act 1981 (Qld)*], the court may, in any case where a person dies leaving a will and having appointed an executor thereof, where -
 - (a) there are grounds for believing that such executor has committed an offence relating to the testator's death;
 - (b) there are grounds for believing that the grant of probate to such executor is likely to prejudice the due and proper administration of the estate or the interests of persons who are or may be interested in the estate or lead to unnecessary expense; or
 - (c) all beneficiaries being of full age and capacity agree that the grant be made to some other person;

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

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

The National Committee was generally in favour of adopting a provision of this kind. Although there was a concern expressed that subsection (1)(b) detracted from the principle of giving effect to the testator's wishes, it was noted that the effect of that subsection would be qualified by subsection (2). The Probate Registrars concurred with this view.

The National Committee endorsed the effect of subsection (1)(c) in promoting recognition of cost effectiveness and, by enabling a change of service provision, giving effect to competition policy. The Probate Registrars generally agreed it should be possible to pass over a named executor but considered that the matter should not be open to the exercise of the court's discretion where all the beneficiaries were of full age and capacity and agreed that the grant should be made to some other person.

(d) Proposal

A provision to the general effect of the proposed redraft of sections 74 and 75 of the *Wills, Administration and Probate Act 1898* (NSW), including a provision to facilitate the passing over of a named executor in particular circumstances, should be included in the model legislation.

3. APPOINTMENT OF PUBLIC TRUSTEE TO ADMINISTER WITHOUT STRICT PROOF OF DEATH

QLD	ACT	VIC	NSW ⁶⁸	SA ⁶⁹	WA	NT ⁷⁰	TAS	UK	NZ
			23	9(2)		40			

Section 23 of the *Public Trustee Act 1913* (NSW) provides that, where there is reasonable ground to suppose that a person has died, the court has power to appoint the Public Trustee to administer the estate of the deceased person without requiring strict proof of the death. The section reads:

When there is reasonable ground to believe that any person has died intestate leaving property in the jurisdiction, the Public Trustee may obtain order to administer without strict proof of death

- (1) Whenever it is made to appear to the Court that there is reasonable ground to suppose that any person has died either in or out of the jurisdiction of the Court intestate, leaving property within such jurisdiction, the Court may order and empower the Public Trustee to administer the estate of such person both real and personal.
- (2) Every such order shall be valid until revoked, and shall empower the Public Trustee to:
 - (a) collect, manage, and administer the personal estate of such supposed deceased person; and
 - (b) enter upon and receive the rents and profits and otherwise manage the real estate; and
 - (c) pay and discharge the debts and liabilities of such person,

⁶⁸ *Public Trustee Act 1913* (NSW).

⁶⁹ *Public Trustee Act 1995* (SA).

⁷⁰ *Public Trustee Act* (NT).

in like manner as if such person were certainly dead and the Public Trustee had obtained a grant of probate or letters of administration under the provisions of section 18.

- (3) The Public Trustee shall not proceed to any distribution of the assets without an order of the Court specially authorising the Public Trustee to make such distribution.

(a) Issue considered by the National Committee

The National Committee considered whether the model legislation should give jurisdiction to the court to enable the Public Trustee to administer an estate without strict proof of death, or whether such a provision would be more appropriately located in Public Trustee legislation.

(b) The National Committee's preliminary view

The National Committee considered that a provision to the effect of section 23 of the *Public Trustee Act 1913* (NSW) should not be included in the model legislation. This would be consistent with the National Committee's recommendation in Chapter 17 of this Discussion Paper that the model legislation include a statutory formulation of *Re Benjamin* orders. However, the National Committee did consider that if such a provision were to be retained it should be made clear that the court can impose such terms and conditions on the grant as it considers appropriate.

(c) Proposal

A provision to the effect of section 23 of the *Public Trustee Act 1913* (NSW) should not be included in the model legislation. However, if it is retained by individual jurisdictions, whether in probate and administration legislation or in Public Trustee legislation, the following words should be added, by way of clarification of the court's powers:

and the Court may impose such terms and conditions as the Court deems fit.

4. THE COURT'S DISCRETION IN GRANTING LETTERS OF ADMINISTRATION

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
							13		6

(a) Introduction

Tasmania and New Zealand have provisions that set out the matters to which the court must have regard in granting letters of administration. Section 13 of the *Administration and Probate Act 1935* (Tas) provides:

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

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

Provided that -

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

(b) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision to the effect of section 13 of the *Administration and Probate Act 1935* (Tas).

(c) The National Committee's preliminary view

It was generally agreed that it was desirable to include a broad statement of principle in the model legislation as to the matters to which the court must have regard when granting letters of administration. In this context, the following redraft of section 13 of the *Administration and Probate Act 1935* (Tas) was suggested and considered:

In granting letters of administration the Court shall have regard to the rights of all persons interested in the estate of the deceased and in particular the rights of those who have the greatest interest in the due administration of the estate.

The National Committee considered that inclusion of such a provision in the model legislation would have the benefit of signposting the ranking of applicants for letters of administration as an issue. The Registrars of Probate agreed with this view.

(d) Proposal

The model legislation should include a provision to the effect of section 13 of the *Administration and Probate Act 1935 (Tas)*, as redrafted above, signposting the issue of ranking of applicants for letters of administration.

(e) Question for discussion

5.1 Is it necessary or desirable for the suggested provision to refer to the court having particular regard to "the rights of those who have the greatest interest ..."?

5. THE CONVENTIONAL RANKING OF APPLICANTS FOR LETTERS OF ADMINISTRATION

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK ⁷¹	NZ
	12		63	rr 31, 32, 36	25	22	13, rr 21-23	rr 20, 22, 28	

(a) Introduction

If a person dies intestate or dies leaving a will that does not appoint an executor or if, for some reason, a person named as executor is unwilling or unable to act, it may be necessary for an administrator to be appointed to administer the deceased estate.

There is a conventional ranking of applicants for letters of administration which is derived from the *Non-Contentious Probate Rules 1954 (UK)*, which have been revoked and replaced by the *Non-Contentious Probate Rules 1987 (UK)*. The ranking is not absolute; the court retains a discretion in the appointment of an administrator.⁷²

⁷¹ *Non-Contentious Probate Rules 1987 (UK)*.

⁷² *Bath v British and Malayan Trustees Ltd* (1969) 90 WN (NSW) 44 per Helsham J at 49.

The conventional order applies in Queensland.⁷³ The conventional ranking which operates in Queensland has been described by Lee as follows:⁷⁴

- 1 Trustees of the residuary estate come first. The reason for this is that the testator has reposed sufficient confidence in them to appoint them as trustees, and, if they are to protect the residuary estate, they must see to the efficient administration of the whole.⁷⁵
2. The persons beneficially entitled to the residuary estate are next preferred, because it is in their interest to ensure that the entire estate is efficiently administered.⁷⁶ Where the residuary estate is divided between a life tenant and a remainderman, the life tenant will be preferred.
3. If there is no residuary clause in the will, then the persons entitled to the residuary estate - that is those entitled on the intestacy of the testator - will be preferred.
4. Failing any of the above, a legatee may apply.
5. Failing any of the above, the court may grant letters of administration with the will annexed to a creditor,⁷⁷ or to a person who has acquired the whole beneficial interest under the will.⁷⁸
6. The Public Trustee may apply for and be granted an order to administer the estate.⁷⁹
7. Trustee companies are entitled to take out grants of letters of administration under the *Trustee Companies Act 1968* in cases of testacy and intestacy.⁸⁰

Within any class the person with the largest interest is preferred.⁸¹

⁷³ See discussion in Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at paras 826-828. The basis for the operation of the conventional ranking in Queensland is somewhat circuitous. Section 70 of the *Succession Act 1981* (Qld) provides that the practice of the court shall, except where otherwise provided for under that or any other Act or by rules of court for the time being in force, be regulated so far as the circumstances of the case will admit by the practice of the court before the passing of the *Succession Act 1981* (Qld). Prior to the passing of that Act the practice of the court was, so far as the circumstances of the case would admit, according to the practice of the Court of Probate in England: *Probate Act 1867* (Qld). The *Probate Act 1867* (Qld) was repealed by the *Succession Act 1981* (Qld), but its effect in this respect is preserved by s 70 of the *Succession Act 1981* (Qld). As a result, the ranking of applicants for letters of administration in Queensland is governed by the Non-Contentious Probate Rules of the Court of Probate in England, as they applied immediately prior to the enactment of the *Succession Act 1981* (Qld).

⁷⁴ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 827.

⁷⁵ Lee refers to *Goods of Poyer* (1856) Deane 184; 164 ER 543 and *Estate of Mackenzie* [1909] P 305.

⁷⁶ Lee refers to *Bigg v Keen* (1752) 1 Lee 124; 161 ER 46.

⁷⁷ Lee refers to *Re Phillips* [1906] QWN 18.

⁷⁸ Lee refers to *Will of Reilly* (1907) 24 WN (NSW) 164.

⁷⁹ Lee refers to *Public Trustee Act 1978* (Qld) s 29.

⁸⁰ Lee refers to *Re McInnes* [1939] QWN 35 and *Re Milne* [1952] QWN 9 as examples.

⁸¹ Lee refers to *Budd v Silver* (1813) 2 Phill 115; 161 ER 1094.

Provisions in statutes in some jurisdictions refer to, or seem to alter, the conventional ranking.⁸² For example, section 63 of the *Wills, Probate and Administration Act 1898* (NSW) reads:

To whom administration may be granted

The Court may grant administration of the estate of an intestate person to the following persons, not being minors, that is to say to:

- (a) the husband or wife of the deceased, or
- (b) one or more of the next of kin, or
- (c) the husband or wife conjointly with one or more of the next of kin,

or if there be no such person or no such person within the jurisdiction:

- (i) who is, of the opinion of the Court, fit to be so trusted, or
- (ii) who, upon being required in accordance with the rules, or as the Court may direct, to pay for administration, complies with the requirement or direction,

then to:

- (d) any person, whether a creditor or not of the deceased, that the Court thinks fit.

(b) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision stipulating the ranking of applicants for letters of administration or whether the question of the ranking of applicants for letters of administration should be left to the general law, as it is in Queensland.

(c) The National Committee's preliminary view

Although the National Committee recognised that the courts are aware of the conventional ranking, and that there may be no significant advantage in adopting provisions that stipulate the ranking of applicants in the model legislation, there was some support for the view that it would be useful for the legislation to set out the order in which people were entitled to apply for letters of administration, for the benefit of non-lawyers involved in the administration of a deceased estate. This issue again raised the policy question of the extent to which matters of detail should be included in the model legislation or left to the rules of court in each jurisdiction.

⁸²

See *Administration and Probate Act 1929* (ACT) s 12; *Wills, Probate and Administration Act 1898* (NSW) s 63; *Administration and Probate Act 1935* (Tas) s 13; *Administration Act 1903* (WA) s 25; *Administration and Probate Act* (NT) s 22.

The National Committee considered that it may be difficult to achieve uniformity in relation to the ranking of applicants for letters of administration, given that the intestacy rules of the various jurisdictions are not presently uniform. Other differences in the substantive law of the various jurisdictions were also considered relevant, such as the various definitions of "de facto partners".

While one of the Probate Registrars supported the inclusion of a list of ranking, the National Committee preferred the view that a list of ranking should not be included in the model legislation.

(d) Proposal

The model legislation should not include a provision setting out the order in which people are entitled to apply for letters of administration. Jurisdictions that presently have such a list could move it to, or retain it in, their rules of court (depending on where it is presently located).

6. CAVEATS

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK ⁸³	NZ
O 71 rr 51-64	33-38, O 72 rr 52-55	58,82, O 8	144-146, 148, Pt 78 rr 61-70	26, r 52	63, 64, r 33	44, rr 88.62-88.71	rr 77-82	r 44	60,61

(a) Introduction

A caveat, in the context of the administration of estates, is a procedure whereby a person is able to object to, and delay the appointment of, a particular administrator by the court or object to, and delay the sealing of, probate or letters of administration until such time as the court removes the caveat.

A number of jurisdictions have provisions in their legislation relating to caveats.⁸⁴ The detail included in those provisions varies widely from jurisdiction to jurisdiction. The main difference is in the incorporation of provisions which are procedural in nature. New South Wales, the Australian Capital Territory and Western Australia have included both substantive and procedural provisions in their legislation, whereas Victoria and South Australia have included substantive provisions only. Additionally, all Australian jurisdictions have provisions relating to caveats in their rules of court.⁸⁵

Sections 144 to 146 and 148 of the *Wills, Probate and Administration Act 1898* (NSW) read:

144 Caveat may be lodged

- (1) Any person may lodge in the registry of the Court a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under Division 5, at any time previous to such probate or administration being granted, or to the sealing of any such probate or letters of administration.
- (2) Every such caveat shall set forth the name of the person lodging the same, and an address for service in accordance with the rules.

145 Application may proceed on notice

In every case where a caveat is lodged against an application the applicant may, subject to the giving of such notice to the caveator as the rules may require or the Court may direct, proceed, in accordance with the rules or as the Court may direct, with the application.

146 Court may order application to proceed

The Court, on the application of the caveator, may order that the application for grant or sealing, as the case may be, proceed and may give directions relating thereto.

⁸⁴ For example, ss 63 and 64 of the *Administration Act 1903* (WA) read:

63 Caveat

- (1) Any person may lodge with the Principal Registrar a caveat against any application for probate or administration, or for the sealing of any probate or letters of administration under this Act, at any time previous to such probate or administration being granted or sealed.
- (2) Every such caveat shall set forth the name of the person lodging the same, and an address in accordance with the rules at which notices may be served on him.

64 Court may remove caveat

- (1) In every case in which a caveat is lodged the Court may, upon application by the person applying for probate or administration, or for the sealing of any probate or letters of administration, as the case may be remove the same.
- (2) Every such application shall be served on the caveator by delivering a copy of the same at the address mentioned in his caveat.
- (3) Such application may be heard and order made upon affidavit or oral evidence, or as the Court may direct.

⁸⁵ For example, *The Probate Rules 1998* (SA) r 52.

148 Caveats may be withdrawn

A caveat may be withdrawn at any time with the leave of the Court, subject to such order as to costs or otherwise as it may direct.

(b) Issue considered by the National Committee

The National Committee considered whether it is necessary or appropriate to include a provision relating to caveats in the model legislation, or whether such a provision would be better placed in rules of court.

(c) The National Committee's preliminary view

The National Committee reviewed the subrules set out in rule 52 of *The Probate Rules 1998 (SA)* which are the most recently drafted rules relating to caveats. Subrule 52.01 reads:

Any person who wishes to ensure that no grant is sealed without notice to such person may enter a caveat in the Registry.

The balance of that rule sets out detailed procedural matters relating to the lodgment and effect of caveats.

The National Committee noted that the question of caveats would have to be revisited at a later date in the context of inter-jurisdictional recognition of grants. At that point, a national register of caveats - or at least the possibility of linking all registries for search purposes - may need to be considered.

(d) Proposals

- (1) A provision based on subrule 52.01 of *The Probate Rules 1998 (SA)* should be included in the model legislation.**
- (2) Detailed procedural matters - such as those set out in the balance of rule 52 of *The Probate Rules 1998 (SA)* - should be considered by each jurisdiction for possible inclusion in their rules.**
- (3) Sections 144 to 146 and 148 of the *Wills, Probate and Administration Act 1898 (NSW)* and the Victorian caveat rules should also be considered when each jurisdiction's rules relating to caveats are reviewed.**

CHAPTER 6

TRANSMISSION OF EXECUTORSHIP AND ADMINISTRATION

1. INTRODUCTION

In order to avoid the need for a new grant of probate when an executor dies, in certain cases the law provides a mechanism for transmission of that office.

Lee explains the doctrine of transmission of the office of executor or “executor of executor” or “executor by representation” in the following terms:⁸⁶

Where a sole or sole surviving executor dies, then in certain cases the executorship is transmitted to another person, called an executor by representation, so that the administration of the estate of the original testator can continue without the necessity of taking out another grant.

Some commentators believe the doctrine of executorship by representation originated in case law as far back as the fourteenth century.⁸⁷ However, statutory enactments of the doctrine also date back to 1351.⁸⁸ Lee notes that the law in this area is now encapsulated in legislation which makes some changes to the former law.⁸⁹

In New South Wales, the doctrine of executorship by representation has been extended, to a limited degree, to administrators. New South Wales legislation provides that, if the Public Trustee or a trustee company has been granted probate or letters of administration of the estate of a person who had been granted probate or administration of another estate, on the death of that person the Public Trustee or trustee company becomes the executor or administrator by representation of the other estate.⁹⁰

⁸⁶ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 807. See also *Maddock v Registrar of Titles (Vic)* (1915) 19 CLR 681 per Griffith CJ at 688-689.

⁸⁷ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.2.10.

⁸⁸ *Executors of Executors Act* 25 Edward III St 5 c 5 (1351).

⁸⁹ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 807.

⁹⁰ *Wills, Probate and Administration Act 1898* (NSW) s 44(2). See p 46 of this Discussion Paper.

2. EXECUTOR OF EXECUTOR

QLD	ACT ⁹¹	VIC	NSW	SA	WA	NT	TAS	UK	NZ
47	3, Sch 2 Pt 3	17	44(2), 13 ⁹² 15 ⁹³				10	7	13

Section 47 of the *Succession Act 1981* (Qld) is an example of the legislative embodiment of the doctrine of executorship by representation. Section 47 of the *Succession Act 1981* (Qld) provides:

Executor of executor represents original testator

- (1) Subject to this section an executor of a sole or last surviving executor of a testator is the executor by representation of that testator.
- (1A) Subsection (1) shall not apply to an executor who does not prove the will of his or her testator, and, in the case of an executor who on his or her death leaves surviving the executor some other executor of his or her testator to whom probate of the will of that testator is afterwards granted, it shall cease to apply on such probate being granted.
- (2) So long as the chain of executorial representation is unbroken, the last executor in the chain is the executor of every preceding testator.
- (3) The chain of executorial representation is broken by -
 - (a) an intestacy; or
 - (b) the failure of a testator to appoint an executor; or
 - (c) the failure to obtain probate of the will in Queensland; or
 - (d) the renunciation by the executor of the executorship by representation;
 but it is not broken by a temporary grant of administration if probate is subsequently granted.
- (4) Every person in the chain of executorial representation in relation to a testator -
 - (a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and
 - (b) is, to the extent to which the estate of the testator has come into his or her hands, answerable as if the executor were an original executor.

91 *Imperial Acts (Substituted Provisions) Act 1986* (ACT).

92 *Imperial Acts Application Act 1969* (NSW).

93 *Trustee Companies Act 1964* (NSW).

- (5) An executor may renounce his or her executorship by representation before intermeddling without renouncing the executorship in relation to his or her own testator.

In some jurisdictions the doctrine is not enacted in the main collection of administration and probate legislation, but in another statute, such as Imperial Acts Application legislation. This can cause problems. For example, in *Darrington v Caldbeck*⁹⁴ the existence of the equivalent New South Wales provision in section 13 of the *Imperial Acts Application Act 1969* (NSW) escaped the notice of all involved in the case until the opening of the appeal before Young J. Young J said that it would be a useful and appropriate reform if the provision were moved to the *Wills, Probate and Administration Act 1898* (NSW).

(a) Arguments for and against retention of the doctrine

The main arguments considered by the National Committee for and against retention of the doctrine of transmission of the office of executor are set out below.

(i) Retention of the doctrine

The Queensland Law Reform Commission, in its 1978 Report, considered the doctrine relating to executorship by representation to be a useful one because it allows the administration of the estate to be continued and completed after the death of the sole or sole surviving executor without the need to seek a new grant of administration *de bonis non administratis* (*dbn*).⁹⁵ In this way, it allows a seamless completion of the administration on the death of a sole surviving executor.

The result of abolishing the doctrine would be that, where a sole or sole surviving executor died without having completed the task, an administrator *dbn* would have to be appointed. This is what happens now if a sole or sole surviving executor dies without having completed the task and the chain of representation does not operate.

Other reasons advanced for the retention of the doctrine include:

- its ancient lineage; and
- the fact that the doctrine is generally accepted in Australia, New Zealand and the United Kingdom, so that uniform abolition would be difficult to achieve.

⁹⁴ (1990) 20 NSWLR 212.

⁹⁵ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 31. See Chapter 2 of this Discussion Paper for a discussion of administration *dbn*.

(ii) Abolition of the doctrine⁹⁶

The executor by representation is not the testator's choice, and, arguably, might very well be completely unsuited to the task or unacceptable to the beneficiaries of the first testator. For example, the testator may appoint a sibling to be executor. The sibling takes out probate, but dies before completing the administration. The sibling executor's will appoints a spouse, or friend, or trustee company as executor. That executor would be entitled to administer the estate of the first testator, and the beneficiaries of the first testator would not be able to object effectively. It is partly for this reason that it is a desirable drafting practice to appoint more than one executor in a will.

(b) Retention of the doctrine, but with provision for beneficiary to object

An alternative to either simply retaining the doctrine or abolishing it altogether would be to permit any beneficiary in the estate to object to the operation of the doctrine. If such an objection were made, the court would then be able to appoint any person to administer the estate, including the executor by representation. This would retain the benefits of the doctrine and ameliorate the objections to it.

(c) Renouncing the executorship by representation

Section 47(5) of the *Succession Act 1981* (Qld) allows the executor by representation to renounce the executorship by representation without also renouncing the executorship of his or her own testator. The traditional doctrine does not allow this. The traditional doctrine provides that an executor by representation may not renounce that executorship without also renouncing the executorship of his or her own testator. This restriction would seem to be unnecessarily harsh.

A provision to the effect of section 47(5) of the *Succession Act 1981* (Qld) would address the potential harshness of the doctrine from the viewpoint of the executor. As the Queensland Law Reform Commission noted:⁹⁷

A person may undertake the executorship of a friend without realising that it also entails undertaking the executorship of a total stranger of whom the deceased friend was executor. It may well be convenient if he does undertake both executorships but we are satisfied that he should not be forced to undertake all or none.

⁹⁶ For a criticism of the doctrine of the chain of executors, see Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.2.11.

⁹⁷ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 31.

(d) Issues considered by the National Committee

The National Committee considered whether:

- (1) the doctrine of executorship by representation should generally be retained;
- (2) if so:
 - (i) an executor by representation should be able to renounce that executorship without renouncing the executorship of the estate of his or her own testator;
 - (ii) a beneficiary should be entitled to object to an executor by representation and whether the following would be an appropriate form of words for a statutory provision to that effect:

If any beneficiary of a testator objects to the executor of a sole or last surviving executor of the testator being executor by representation of the testator, the court may appoint any person, including the executor of the sole or last surviving executor of the testator, to administer the estate.

(e) The National Committee's preliminary view

The National Committee recognised that, while the doctrine of executorship by representation has the advantages of simplicity and cost-effectiveness, it could cause hardship. It was generally accepted that the executor of a deceased estate should not be forced, as a result of the doctrine, to accept executorship of an estate of which his or her testator was executor. The Committee also agreed with the suggestion that it would be desirable to provide a mechanism to allow a beneficiary of the original estate to object to the executor by representation.

The following proposed redraft of section 47 of the *Succession Act 1981* (Qld) was considered:

Executor by representation

- (1) This section applies only to executors to whom a grant of probate has been made.
- (2) Subject to this section an executor of a sole or last surviving executor of a testator is the executor by representation of that testator.
- (3) So long as the chain of executorial representation is unbroken, the last executor in the chain is the executor of every preceding testator.
- (4) Every person in the chain of executorial representation in relation to a testator -
 - (a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and

- (b) is, to the extent to which the estate of the testator has come into his or her hands, answerable as if he or she were an original executor.
- (5) An executor by representation may renounce any executorship by representation before intermeddling without renouncing the executorship in relation to his or her own testator and upon such renunciation that executorship by representation ceases and the chain of representation is broken.
- (6) A person may with leave of the court apply for letters of administration of the unadministered portion of a deceased estate which may become or is the subject of an executorship by representation and upon the granting of the letters of administration the executorship by representation ceases and the chain of representation is broken.

The National Committee considered, in relation to an objection by a beneficiary, the effect of a grant of letters of administration *dbn* before the executor by representation was granted probate, and whether letters of administration *dbn* could issue after probate had been granted to the executor by representation. It was noted that the right of objection should be limited to a beneficiary who would be entitled to a grant of administration. Subsection (6) of the redrafted version of section 47 of the *Succession Act 1981* (Qld) was preferred to the suggested form of words under (2)(ii) of Issues considered by the National Committee (above).

(f) Proposals

- (1) **The doctrine of executorship by representation should continue.**
- (2) **It should be possible for an executor of a deceased estate to renounce the executorship of an estate of which his or her testator was executor without thereby renouncing the executorship of the estate of the executor's own testator.**
- (3) **It should be possible for a beneficiary of the original estate to object to the executorship by representation.**

3. ADMINISTRATOR BY REPRESENTATION

With one statutory exception, there is no chain of representation for administrators, because the office of administrator is not transmissible.⁹⁸

⁹⁸

Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration in New South Wales* (1996) para 45.05.

Section 44(2) of the *Wills, Probate and Administration Act 1898* (NSW) creates a new concept, namely, the administrator by representation. However, the concept applies only in limited circumstances. Section 44(2) provides:

Upon the grant, to the Public Trustee or a trustee company, of probate of the will or administration of the estate of a person dying after the commencement of the *Wills, Probate and Administration (Trustee Companies) Amendment Act 1985*, the Public Trustee or the trustee company, as the case may be, shall be:

- (a) the executor, by representation, of any will of which the person had been granted probate, and
- (b) the administrator, by representation, of any estate of which the person had been granted administration.

Section 44(2) of the *Wills Probate and Administration Act 1898* (NSW) was inserted by the *Wills, Probate and Administration (Trustee Companies) Amendment Act 1985* (NSW), which was introduced as part of a package of legislation relating to the operation of trustee companies in the wake of the collapse of the Trustees, Executors and Agency Company Ltd in May 1983. The New South Wales Attorney-General, in the second reading speech, stated that the bills were:⁹⁹

designed to ensure the safety of trust funds administered by trustee companies and the continued financial stability and competitiveness of trustee companies.

The proposed section 44(2) was not specifically raised in the second reading speech. However, the Attorney-General again made a general statement which appears to provide the reason for the enactment of section 44(2):¹⁰⁰

A number of other amendments are included in the bills. These are designed principally to improve the efficiency with which trustee companies transact their business. The purpose of all of the amendments contained in these bills is to ensure the continued viability and efficiency of the New South Wales trustee company industry.

(a) Issues considered by the National Committee

The National Committee considered whether a provision to the effect of section 44(2) of the *Wills, Probate and Administration Act 1898* (NSW) should be included in the model legislation to create the concept of administrator by representation where the second administrator in the chain is the Public Trustee (or equivalent) or a trustee company.

⁹⁹ Legislative Assembly (NSW), *Parliamentary Debates (Hansard)* (16 April 1985) at 6014.

¹⁰⁰ Id at 6016.

(b) The National Committee's preliminary view

The advantage of the proposed provision was identified by the National Committee as being its simplicity and ability to save costs. However, the provision was also seen to give an anti-competitive advantage to the Public Trustee and trustee companies. It was also argued that the Public Trustee or a trustee company would have no interest in the original estate, although it was acknowledged that this argument would probably apply to many chain representations.

(c) Questions for discussion

- 6.1 Should the concept of an administrator by representation be included in the model legislation by the incorporation of a provision to the effect of section 44(2) of the *Wills, Probate and Administration Act 1898 (NSW)*?**
- 6.2 Should it be made clear in whom the property vests after the death of the first administrator and, if so, should this be done in the model legislation or in Public Trustee legislation.¹⁰¹**

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See Chapter 12 of this Discussion Paper for a discussion of the concept of vesting.

CHAPTER 7

CESSATION OF RIGHT TO PROVE WILL AND REVOCAION OF GRANT

1. INTRODUCTION

All jurisdictions reviewed by the National Committee have a legislative provision which enables the executor's right to prove a will to be overridden in certain circumstances.

Jurisdictions differ, however, in the ability of an executor who has renounced probate to withdraw that renunciation.

2. CESSATION OF RIGHT OF EXECUTOR TO PROVE WILL

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
46	20, 20A	16	69	36	32	28, 29	8	5	11

Section 46 of the *Succession Act 1981* (Qld) provides:

Cesser of right of executor to prove

Where a person appointed executor by a will -

- (a) survives the testator but dies without having taken out probate of the will; or
- (b) renounces probate; or
- (c) after being duly cited or summoned fails to apply for probate;

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

This section provides for the devolution of the representation of the estate in the circumstances listed in the section. The effect of the section is that, in the specified circumstances, the testator's estate devolves as if the person had not been appointed executor. Section 46(c) provides a mechanism for removing an executor who does not apply for probate with reasonable diligence.

(a) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 46 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(b) The National Committee's preliminary view

The National Committee noted the similarity between section 46 of the *Succession Act 1981* (Qld) and the equivalent provisions in other jurisdictions and agreed that such provisions are useful. The Registrars of Probate concurred in this view.

(c) Proposal

A provision to the effect of section 46 of the *Succession Act 1981* (Qld) should be included in the model legislation.

3. WITHDRAWAL OF RENUNCIATION OF PROBATE

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
O 71, r 86				r 48.06, 48.07			9, r 67, 68	6	12

Section 46 of the *Succession Act 1981* (Qld) - which the National Committee has recommended be included in the model legislation - provides, in part, that, where a person appointed executor by a will renounces probate, the person's rights in respect of the executorship "shall wholly cease, and the representation of the testator and the administration of the testator's estate shall devolve and be committed in like manner as if that person had not been appointed executor".¹⁰²

Although this wording implies that it is impossible for an executor who has renounced probate to withdraw the renunciation, it appears that a renunciation may be retracted under Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld), which reads:

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

New Zealand legislation, which includes a provision worded in slightly different terms to section 46 of the *Succession Act 1981* (Qld), clearly allows a renunciation of probate to be withdrawn.

Section 12 of the *Administration Act 1969* (NZ) reads:

¹⁰²

Section 46 of the *Succession Act 1981* (Qld) is set out at p 48 of this Discussion Paper.

Withdrawal of renunciation

- (1) Notwithstanding anything to the contrary in section 11 [Cesser of right of executor to prove] of this Act, an executor who has renounced probate, (whether before or after the commencement of this Act) may be permitted by the Court to withdraw the renunciation and prove the will.
- (2) Where an executor who has renounced probate has been permitted (whether before or after the commencement of this Act) to withdraw the renunciation and prove the will, -
 - (a) The probate shall take effect and be deemed always to have taken effect without prejudice to the previous acts and dealings of and notices to any other person to whom [probate or] administration has been granted, and a memorandum of the subsequent probate shall be endorsed on the original grant of [probate or] administration:
 - (b) His rights (if any) in respect of the trusteeship shall revive except so far as the Court otherwise orders.

South Australia and Tasmania have similar provisions in their rules of court. In both jurisdictions, withdrawal of a renunciation is allowed only in "exceptional circumstances". For example, the South Australian provisions read:

- 48.06 An application for leave to retract a renunciation of probate or administration must be made to the Registrar by summons:
Provided that only in exceptional circumstances may leave be given to an executor to retract a renunciation of probate after a grant has been made to some other person entitled in a lower degree.
- 48.07 An application under Rule 48.06 must be supported by an affidavit showing that the retraction of the renunciation is for the benefit of the estate, or of the parties interested.

In South Australia, the Registrar has power to permit renunciations, but in Tasmania the leave of a chamber judge is required. In Tasmania, there is no equivalent to Rule 48.07 of the South Australian rules, which requires a supporting affidavit in certain terms, although an affidavit in support would be required as a matter of practice.

(a) Issues considered by the National Committee

The National Committee considered whether:

- (1) it is desirable to include in the model legislation a specific provision to enable the withdrawal of a renunciation of probate;
- (2) if yes to (1), a provision to the effect of section 12 of the *Administration Act 1969* (NZ) or a provision to the effect of Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld) would be an appropriate model. (The South Australian and Tasmanian provisions were not specifically considered by the National Committee.)

(b) The National Committee's preliminary view

The National Committee noted that the New Zealand provision contemplates that a grant might previously have been made to someone else. It was considered that the New Zealand provision was undesirable as it might be seen as encouraging executors who have renounced probate to seek to withdraw that renunciation notwithstanding that an administrator had been appointed in the meantime. The National Committee considered that Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld) was a simpler and more appropriate provision.

(c) Proposal

Subject to the consideration of submissions, the model legislation should include a provision to the effect of Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld) to enable the withdrawal of a renunciation of probate.

(d) Questions for discussion

- 7.1 Should the model legislation include a provision to the effect of Order 71, rule 86 of the *Rules of the Supreme Court 1900* (Qld) to enable the withdrawal of a renunciation of probate?
- 7.2 If yes to 7.1, is it necessary to codify the circumstances in which the court might permit withdrawal; for example, by including in the model legislation a requirement similar to the South Australian and Tasmanian requirement of exceptional circumstances?
- 7.3 Should the model legislation include a requirement for a supporting affidavit when a withdrawal of renunciation in exceptional circumstances is called for, as provided for in Rule 48.07 of the South Australian Rules?

4. REVOCATION OF GRANT BY COURT

QLD	ACT	VIC	NSW ¹⁰³	SA	WA	NT	TAS	UK	NZ
6(1)	18A(1),32	34	66, Pt 78 rr 38-43		29	26, 41	r 82A		21

(a) Introduction

Circumstances may arise in which, although probate or administration has been granted, it is undesirable or impractical for the personal representative to continue to act.¹⁰⁴ In some jurisdictions, the legislation enables the courts to revoke grants of probate and grants of letters of administration.

Section 6(1) of the *Succession Act 1981* (Qld) expressly gives a wide general power to revoke grants. The adoption of a provision to the effect of section 6(1), which has previously been proposed by the National Committee,¹⁰⁵ may make it unnecessary for the model legislation to include provisions like section 29(1) of the *Administration Act 1903* (WA) or section 26(1) of the *Administration and Probate Act* (NT).

Section 29(1) of the *Administration Act 1903* (WA) reads:

Court may revoke grant; no grant before duty assessed

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.

Section 26(1) of the *Administration and Probate Act* (NT) reads:

Probate or administration may be revoked or further bond required

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.

¹⁰³ The power to revoke grants is also implied by s 42(5) of the *Wills, Probate and Administration Act 1898* (NSW).

¹⁰⁴ The court might revoke the grant if the grant was made in error: for instance, if a later will is found, or a grant is made under a will subsequently found to be invalid. The grant may be a nullity when made: for example, if the grantee is already dead at the time the grant is made. After the grant is made, a defect in operation of the grant may be found: for instance, if the grantee absconds or is inactive or has become incapable. The grantee may wish to be relieved of his or her duties. Revocation may be sought pursuant to a compromise. Cases have decided that grants cannot be revoked because revocation is desired for the convenience of the parties (*Goods of Heslop* (1846) 1 Robb Ecc 457; 163 ER 1100) or because one of the next of kin desires to take up the administration in the place of a creditor-administrator (*Dubois v Trant* (1700) 12 Mod 436; 88 ER 1433; *Estate of Johnston* (1899) 20 LR (NSW) P 1). See Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at para 40D.02ff.

¹⁰⁵ See Chapter 3 of this Discussion Paper.

Section 6(1) of the *Succession Act 1981* (Qld), on the other hand, simply states:

Jurisdiction

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

(b) Issue considered by the National Committee

The National Committee considered whether, in light of the general power to revoke a grant of probate or letters of administration that is conferred by section 6(1) of the *Succession Act 1981* (Qld), it would be necessary to include specific provisions about the revocation of grants based on, for example, section 29(1) of the *Administration Act 1903* (WA) or section 26(1) of the *Administration and Probate Act* (NT).

(c) The National Committee's preliminary view

The National Committee was of the view that a provision to the effect of 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.

(d) Proposal

If a provision to the effect of section 6 of the *Succession Act 1981* (Qld) is included in the model legislation, it is not necessary to include in the model legislation a further provision dealing with the revocation of grants or the removal of executors or administrators.

CHAPTER 8

PERSONAL REPRESENTATIVES

1. INTRODUCTION

As previously discussed,¹⁰⁶ there are two kinds of personal representatives - executors appointed by a will and court appointed administrators. There has been, historically, some difference between the powers and duties of executors and those of administrators.¹⁰⁷

Traditionally executors have been placed in a better position than administrators, the argument being that since the testator himself selects his own executors their authority should be unlimited, whereas since it is the Court which appoints administrators their authority should be more limited.

However, because essentially they perform the same function - to administer the estate of a deceased person - the current trend is to assimilate the positions of executors and administrators to the greatest possible degree.

Personal representatives have certain duties in respect of the administration of a deceased person's estate. These duties have been developed by case law and a number have found expression in legislation, albeit in a variety of forms.

The role of personal representative includes the authority to deal with the deceased estate in certain ways. These powers are expressed in case law as well as by statute - again in no consistent way.

Personal representatives may also have duties and powers imposed upon them more by virtue of their role as trustee of the deceased estate or a portion thereof, than by virtue of their role as executor or administrator of the estate.

This Chapter sets out the proposals of the National Committee for uniform legislation concerning the assimilation of the position of executors and administrators, and the powers and duties which should be attached to the assimilated role. Unless the contrary is indicated, the term "personal representative" is used to include both executors under a will and administrators appointed by the court.

The Registrars of Probate agreed with the views of the National Committee expressed in this Chapter except if otherwise noted.

¹⁰⁶ See Chapter 2 of this Discussion Paper.

¹⁰⁷ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 32.

2. ASSIMILATION OF THE ROLES OF EXECUTOR AND ADMINISTRATOR

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
49	43, 50, 51A, 54	14, 20	48	51, 64	12, 21	60, 80, 81	5, 15, 39, 40, 42, 43	2, 39, 40, 41	28, 29, 30

(a) Assimilation of powers

In a number of jurisdictions, provisions have been enacted recognising the increased similarity between the roles of executor and administrator. In other jurisdictions, the extent of recognition has not been as great, and powers are still expressed to apply to either executors or administrators.

(i) Queensland

Section 49(1) of the *Succession Act 1981* (Qld), is a general provision which has assimilated the roles of executors and administrators. The section reads:

Powers of personal representatives

Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the powers hitherto exercisable by an executor in relation to personal estate and all the powers conferred on personal representatives by the *Trusts Act 1973*.

Section 49(1) does two things:

- (a) It confers on all personal representatives the powers that executors have from the date of death in relation to personal property.
- (b) It confers on all personal representatives the powers that are conferred on personal representatives under the *Trusts Act 1973* (Qld).¹⁰⁸

When the Queensland Law Reform Commission considered this provision in its 1978 Report, it was of the view that administrators could never be entirely assimilated to the position of executors.¹⁰⁹ The Commission noted the following reasons for this view:¹¹⁰

¹⁰⁸ The term "trustee" is defined in s 5 of the *Trusts Act 1973* (Qld) to include, inter alia, "a personal representative".

¹⁰⁹ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 32.

¹¹⁰ Id at 32-33.

- The executor obtains his or her authority from the will, whereas the administrator obtains his or her authority from the grant of letters of administration. Accordingly, an administrator cannot exercise any powers before the grant.
- The administrator will never be in the position of the executor by representation.¹¹¹
- Grants to administrators may be, and often are, limited by the form of the grant (for instance, grants *ad colligenda bona* or *ad litem*, where the grantee is not intended to perform all the functions of a personal representative) or the order of court, while executors have general power (subject to the terms of the will) to administer the estate.¹¹²

Nonetheless, the Commission doubted whether any purpose was served by many of the distinctions made between executors and administrators. Accordingly, it recommended that the positions of executors and administrators should be assimilated as far as possible.¹¹³

(ii) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld) should be included in the model legislation.

(iii) The National Committee's preliminary view

The National Committee agreed that, while it is true that the executor is the testator's choice, and the administrator is appointed by the court (being chosen according to a conventional order that usually favours the largest beneficiary), this does not necessarily mean that the executor is to be trusted more than the appointed administrator. It was considered that there seems to be no good reason why the general powers of an administrator should be different from, or more restricted than, those of an executor. The National Committee further agreed that section 49(1) of the *Succession Act 1981* (Qld) provided a useful template for inclusion in the model legislation.

¹¹¹ See the discussion of the executor by representation in Chapter 6 of this Discussion Paper. In particular, see the discussion of s 44(2) of the *Wills, Probate and Administration Act 1898* (NSW) at pp 45-47 of this Discussion Paper. That section extends the doctrine of administrator by representation to the Public Trustee and trustee companies.

¹¹² See the discussion of the types of grants of letters of administration in Chapter 2 of this Discussion Paper.

¹¹³ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 32.

(iv) Proposal

The model legislation should include a provision to the effect of section 49(1) of the *Succession Act 1981* (Qld).

(b) Assimilation of rights and liabilities

QLD	ACT ¹¹⁴	VIC	NSW ¹¹⁴	SA	WA	NT	TAS	UK	NZ
50	Sch 2 Pt 4	27	14				24	21	41

(i) Queensland

Section 50 of the *Succession Act 1981* (Qld) reads:

Rights and liabilities of administrators

Subject to any provision contained in the grant every person to whom administration of the estate of a deceased person is granted shall have the same rights and liabilities and be accountable in like manner as if the person were the executor of the deceased.

The Queensland Law Reform Commission noted in its 1978 Report in relation to this provision:¹¹⁶

In common with legislation in other jurisdictions this section assimilates the rights and liabilities of administrators with those of executors.

(ii) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 50 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(iii) The National Committee's preliminary view

It was generally seen as desirable to assimilate the rights and liabilities of administrators with those of executors.

¹¹⁴ *Imperial Acts (Substituted Provisions) Act 1986* (ACT).

¹¹⁵ *Imperial Acts Application Act 1969* (NSW).

¹¹⁶ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 33.

(iv) Proposal

A provision to the effect of section 50 of the *Succession Act 1981* (Qld) should be included in the model legislation.

3. DUTIES OF PERSONAL REPRESENTATIVES**(a) Introduction**

When a person assumes the position of executor or administrator of a deceased person's estate, the person becomes subject to a number of duties which have been developed over time by the courts. Attempts have also been made in some jurisdictions to incorporate those duties, to varying degrees, in statute. The duties are primarily to protect the estate and persons who have an interest in the proper administration of the estate.

In Queensland, some of the duties imposed upon a personal representative are set out in section 52 of the *Succession Act 1981* (Qld). However, section 52 is not a complete statement of the duties of a personal representative. Other duties include, for example, disposing of the body of the deceased.¹¹⁷

(b) Specific duties**(i) Duty to pay interest upon general legacies**

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
52(1)(e)	55A		84A	70(3)	143A				39

An objective of the law relating to the administration of estates is that the estate should be administered as soon as possible.¹¹⁸ A provision found in a number of jurisdictions to further that objective relates to interest payable upon outstanding general legacies. The longer it takes to administer the estate the greater the amount of interest payable on general legacies. However, the jurisdictions which specify that interest is to be paid on general legacies are not consistent in their approach.

¹¹⁷ *Rees v Hughes* [1946] KB 517 per Scott LJ at 524.

¹¹⁸ As specified by *Succession Act 1981* (Qld) s 52(1)(d). A similar provision applies to the spouse's statutory legacy under the intestacy rules - *Succession Act 1981* (Qld) Second Schedule, Pt 1.

Some jurisdictions specify the actual rate of interest that personal representatives must pay.¹¹⁹ For example, section 52(1)(e) of the *Succession Act 1981* (Qld) reads:

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.

In other jurisdictions the rate of interest is not fixed in the primary legislation, but is left to be fixed by regulation. For example, section 55A of the *Administration and Probate Act 1929* (ACT) reads:¹²⁰

Interest on legacies

- (1) Subject to subsection (2), where 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, that interest shall, unless the will otherwise provides, or the Court otherwise orders, be payable at such rate as is determined by the Minister for the purposes of this subsection.
- (2) Where an executor or administrator, in accordance with any power conferred on him or her by a will under which a legacy (not being an annuity) is payable, appropriates any property in or towards satisfaction of the legacy, the legatee shall be entitled to the income from the property so appropriated, and interest shall not be payable out of any other part of the estate on so much of the legacy as has been satisfied by the appropriation.
- (3) A determination under subsection (1) is a disallowable instrument for the purposes of section 10 of the *Subordinate Laws Act 1989*.

¹¹⁹ For example, *Administration and Probate Act 1919* (SA) s 70(3); *Administration Act 1903* (WA) s 143A.

¹²⁰ See also, for example, *Wills, Probate and Administration Act 1898* (NSW) s 84A; *Administration Act 1969* (NZ) s 39.

A. Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 52(1)(e) of the *Succession Act 1981* (Qld) - relating to the rate of interest upon general legacies - should be included in the model legislation, or whether it would be preferable to include a provision to the effect of section 55A(2) of the *Administration and Probate Act 1929* (ACT).

B. The National Committee's preliminary view

It was suggested that it was not appropriate for the rate of interest on unpaid legacies to be stipulated in the legislation. It was generally considered that there was a greater likelihood of the interest rate being reviewed and changed when appropriate if it were contained in the rules, rather than in the model legislation itself.

C. Proposal

A provision to the effect of section 52(1)(e) of the *Succession Act 1981* (Qld) should be included in the model legislation. However, the provision should refer to an interest rate set by the rules (as in section 55A of the *Administration and Probate Act 1929* (ACT)), rather than stipulate the interest rate.

(ii) Duty to provide inventory and to pass accounts

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
52(1)(b), O 73 r 1	58	28	81A, 81B, 85	56, 121A	43(1)	89, 90, O 88 r 27	26	25(b)	44

A number of jurisdictions have provisions which impose a duty on personal representatives to provide an inventory and to pass accounts in relation to the deceased estate. For example, section 52(1)(b) of the *Succession Act 1981* (Qld) reads:

The personal representative of a deceased person shall be under a duty to -

...

- (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; ...

However, not all jurisdictions have limited the provision to when the court requires the production of such information. The Tasmanian provision refers to the obligation to provide an inventory and accounts "when lawfully required so to do".¹²¹ Other statutes refer to an obligation to provide this information "in accordance with the rules"¹²² or "as may be prescribed by the rules or as the Court may order."¹²³

A. Issues considered by the National Committee

The National Committee considered whether:

- (1) there should be a provision in the model legislation relating to a duty to produce an inventory and to pass accounts; and
- (2) if yes to (1), that provision should refer to the obligation imposed by the court, by rules of court, or by either.

B. The National Committee's preliminary view

It was suggested that a provision should be included in the model legislation to impose a specific duty on a personal representative to maintain such documents as are necessary to render an account to the court. While it was acknowledged that this was implicit in the obligation set out in section 52(1)(b) of the *Succession Act 1981* (Qld), it was considered that there would be an advantage in making this obligation clear, especially for lay executors and administrators.

¹²¹ *Administration and Probate Act 1935* (Tas) s 26 reads:
The personal representative of a deceased person shall, when lawfully required so to do, exhibit on oath in the Court a true and perfect inventory and account of the real and personal estate of the deceased, and the Court shall have power as heretofore to require personal representatives to bring in inventories. [emphasis added]

See also *Administration and Probate Act 1958* (Vic) s 28.

¹²² *Administration and Probate Act 1919* (SA) s 121A(2) reads:
An executor, administrator or trustee of the estate of a deceased person (being an estate in respect of which probate or administration has been granted or sealed by the Court) shall, in accordance with the rules, disclose to the Court any assets or liabilities of the deceased person (not being assets or liabilities previously disclosed under this section) which come to his knowledge while acting in that capacity. [emphasis added]

¹²³ *Administration Act 1903* (WA) s 43(1)(b) reads:
Every person to whom probate or administration is granted shall be under a duty to -
...
(b) file an inventory of the estate of the deceased, and pass his accounts relating thereto within such time, and from time to time, and in such manner as may be prescribed by the rules or as the Court may order ... [emphasis added]

See also *Administration and Probate Act 1929* (ACT) s 58.

C. Proposal

The model legislation should include a provision imposing a duty on a personal representative or other person administering a deceased estate to maintain such documents as are necessary to render an inventory and/or account to the court.

D. Questions for discussion

- 8.1 Should a provision to the effect of section 52(1)(b) of the *Succession Act 1981* (Qld) be included in the model legislation?
- 8.2 If yes to 8.1, should it extend to any person administering the estate whether or not a personal representative?
- 8.3 If yes to 8.1, should the requirement to provide inventories and accounts only be upon the court's direction?

(iii) Duty of personal representative holding property belonging to person who is not *sui juris* or not resident in the State to pay or deliver the property to the Public Trustee

Section 65 of the *Administration and Probate Act 1919* (SA) requires any personal representative holding property belonging to a person who is not *sui juris* or not resident in the State to pay or deliver the property to the Public Trustee on the expiration of one year from the death of the intestate or testator or within six months after the property has been sold or realised.¹²⁴ However,

¹²⁴

A much more limited provision, where the onus is on the Public Trustee to commence proceedings to take over the administration of an estate, is s 88(1)(e) of the *Administration and Probate Act 1929* (ACT), which reads:

- (1) The Court may, on the application of the Public Trustee, grant to the Public Trustee an order to collect and administer the estate of any deceased person leaving real or personal estate within the jurisdiction in any of the following cases:
- ...
- (e) Where the estate or any portion thereof is liable to waste and the executor, any spouse or the next of kin-
- (i) is absent from the locality of the estate; or
 - (ii) is not known; or
 - (iii) has not been found; or
 - (iv) requests the Public Trustee in writing to apply for the order;
- ...

A similar provision is s 19 of the *Public Trustee Act 1930* (Tas).

section 67 of the *Administration and Probate Act 1919 (SA)* enables a judge to dispense with compliance under section 65 in certain circumstances.

Section 65 reads:

Administrator to pay over money and deliver property to Public Trustee

- (1) Every administrator who is possessed of or entitled to any property within this State, whether personal or real, belonging to any person who
 - (a) is not *sui juris*, or
 - (b) is not resident in this State, and has no duly authorised agent or attorney therein:

shall deliver, convey, or transfer such property to the Public Trustee immediately after the expiration of one year from the date of the death of the intestate or testator, or within six months after such sooner time as the same or such portion thereof as is available for that purpose, has been sold, realised, collected, or got in.

- (2) The Public Trustee shall then administer such property according to law, and in accordance with any will affecting such property.
- (2a) The Public Trustee may, in his discretion, (but subject to the provisions of any will or instrument of trust) realise, or postpone the realisation of, any real or personal property delivered, conveyed or transferred to him under subsection (1) of this section.
- (3) This section shall not apply in any case where the administrator is a limited company registered under the *Companies Act 1962-1968* or any corresponding previous enactment, and is acting as administrator in pursuance of any powers granted to it by any Act.
- (4) This section shall not apply to an administrator acting under any probate or administration not granted by the Supreme Court but sealed with the seal of the Supreme Court in pursuance of the provisions of section 17 of this Act.
- (5) Subject to the provisions of any will or instrument of trust, the Public Trustee may, if he is satisfied that it will be advantageous to the beneficiaries, authorise the sale of any trust property, not exceeding four thousand dollars in value, to the administrator, or to the administrator conjointly with any other person, notwithstanding that the property has not been offered for sale by public auction or otherwise.

Section 67 reads:

Judge may dispense wholly or partially with compliance with section 65

- (1) A Judge may, on being satisfied by affidavit that it is beneficial or expedient so to do, order
 - (a) that any administrator, or proposed administrator, shall not be bound by section 65; or

- (b) that any administrator, or proposed administrator, shall not be bound by the said section 65 until after a certain time to be mentioned in the order.
- (2) The time mentioned in any order made under subdivision (b) of subsection (1) may be extended by a subsequent order.
- (3) Any order under subsection (1) or (2) may be obtained *ex parte* on the application of the administrator or proposed administrator.
- (4) An order under subdivision (a) of subsection (1) may be granted notwithstanding that an order has already been made under subdivision (b) of subsection (1).
- (5) The making of any order under this section shall, if the Court so directs, have the effect of discharging from further responsibility all parties to the bond, if any, given to the Public Trustee upon the granting of the administration.
- (6) The Public Trustee, or any person interested, may issue a summons requiring the administrator, or proposed administrator, to appear before a Judge to show cause why any order made under this section should not be set aside, and the Judge may set aside such order, or vary the same, or make such other order as seems to him best.

A. Issue considered by the National Committee

The National Committee considered whether the model legislation should contain a provision dealing with the payment of money and the delivery of property to the Public Trustee, or whether such a provision would be more appropriately located in Public Trustee legislation.

B. The National Committee's preliminary view

The National Committee was hesitant to recommend that people be forced into dealing with the Public Trustee or trustee companies. It was considered more appropriate to enable the court to make orders to the effect of those available under sections 65 and 67 of the *Administration and Probate Act 1919 (SA)* simply as one of a number of options available to protect persons who are not *sui juris*. This would be in addition to other options such as appointing joint administrators or requiring bonds. Section 65(1)(b) was not considered necessary at all.

C. Proposal

A provision generally to the effect of sections 65 and 67 of the *Administration and Probate Act 1919 (SA)* should be included in the model legislation. However, the provision should not impose a mandatory obligation, but should simply provide for one of a number of possibilities

to protect persons who are not *sui juris*.¹²⁵ The model provision should not refer to property belonging to persons who are not resident within the particular jurisdiction.

(iv) Duty to inquire about ex-nuptial children

Section 92(3) of the *Wills, Probate and Administration Act 1898* (NSW) places an onus on the personal representative of a deceased person to search the Registry of Births, Deaths and Marriages for the existence of any ex-nuptial children of the deceased who may be entitled to share in the estate. The personal representative is liable to any ex-nuptial child whose interests are disregarded when the estate is distributed if the ex-nuptial child could have been discovered. Section 92(3) reads:

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*.

In Western Australia, on the other hand, personal representatives are specifically protected from liability for not inquiring as to the existence of potential claimants who are illegitimate children or people claiming through an illegitimate child.

Section 47A of the *Administration Act 1903* (WA) reads:

Protection of executors, administrators and trustees

(1) Notwithstanding -

- (a) the provisions of section 12A;¹²⁶ or
- (b) the provisions of Part IX of the *Wills Act 1970*,¹²⁷

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

¹²⁵ Other possible protections are referred to in Chapter 9 of this Discussion Paper.

¹²⁶ The effect of s 12A of the *Administration Act 1903* (WA) is that, for the purposes of determining entitlement to a distribution on intestacy, the relationship between a child and his or her father and mother (and other relationships) shall be determined irrespective of whether the child's parents are, or have been, married to each other.

¹²⁷ The effect of Part IX of the *Wills Act 1970* (WA) is that, for the purposes of determining entitlement to a distribution under a will, the relationship between a child and his or her father and mother (and other relationships) shall be determined irrespective of whether the child's parents are, or have been, married to each other.

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]

A similar provision is found in the *Status of Children Act 1978* (Qld). Section 6 of that Act reads:¹²⁸

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 an instrument 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.

A. Issues considered by the National Committee

The National Committee considered whether:

- (1) a provision to the effect of section 92(3) of the *Wills, Probate and Administration Act 1898* (NSW) or section 47A of the *Administration Act 1903* (WA) and section 6 of the *Status of Children Act 1978* (Qld) should be included in the model legislation; or

¹²⁸

See also *Status of Children Act 1974* (Vic) s 6; *Status of Children Act 1974* (Tas) s 6; *Status of Children Act* (NT) s 7 (cf *Family Relationships Act 1975* (SA) s 12).

- (2) such a provision would be better placed in legislation which deals with the status of children.

B. The National Committee's preliminary view

A provision to the effect of section 92(3) of the *Wills, Probate and Administration Act 1898* (NSW) was not considered appropriate for inclusion in the model legislation because it would place an undue burden on personal representatives. The National Committee was of the view that personal representatives should have the protection of a provision to the effect of section 47A of the *Administration Act 1903* (WA), but that such a provision should be located in status of children legislation.

C. Proposal

The model legislation should not include provisions to the effect of section 47A of the *Administration Act 1903* (WA) or section 92(3) of the *Wills, Probate and Administration Act 1898* (NSW).

(c) Expression of duties in a single statutory provision

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
52(1)					43			25	

In Queensland, a number of the personal representatives' duties have been expressed in a single provision namely, section 52(1) of the *Succession Law 1981* (Qld). The Queensland Law Reform Commission explained its decision to recommend legislating in this way:¹²⁹

It seems desirable to set out the duties of personal representatives and a recent precedent has been furnished by the English Administration of Estates Act 1971, which we recommend should be repeated in paragraphs (a), (b) and (c) of subsection (1). We have added paragraph (d) to restore to the law the provision of the Statute of Distributions of 1670 that the personal representative is not under a duty to distribute the estate less than a year after the death of the deceased. ... Paragraph (e) also states in positive terms that interest is payable upon legacies unpaid twelve months after the death of the deceased.

Section 52(1) of the *Succession Act 1981* (Qld) reads:

¹²⁹

Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 36.

The duties of personal representatives

The personal representative of a deceased person shall be under a duty to -

- (a) collect and get in the real and personal estate of the deceased and administer it according to law;
- (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;
- (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court;
- (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be;
- (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.

Section 43 of the *Administration Act 1903* (WA) and section 25 of the *Administration of Estates Act 1925* (UK) include provisions equivalent to sections 52(1)(a), (b), and (c) of the *Succession Act 1981* (Qld).

(i) Issue considered by the National Committee

The National Committee considered whether a provision referring to the general duties of personal representatives should be included in the model legislation.

(ii) The National Committee's preliminary view

The National Committee generally agreed that having a list of general duties set out in one provision in the legislation, whilst not detracting from any further duties derived from case law, would at least put personal representatives on notice about their legal responsibilities.

The National Committee acknowledged the advantage for people working in this area to have set out conveniently and in broad terms the duties of administration imposed on all personal representatives, as appears in section 52(1) of the *Succession Act 1981* (Qld) (and to a lesser extent in section 43 of the *Administration Act 1903* (WA) and section 25 of the *Administration of Estates Act 1925* (UK)).

(iii) Proposal

A provision to the effect of section 52(1) of the *Succession Act 1981 (Qld)* (as modified by the National Committee's recommendations in relation to particular duties) should be included in the model legislation so that the general duties of a personal representative are set out.

(d) The principle of the executor's year not affected

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
52(1A)		49					43	44	

Atherton and Vines note:¹³⁰

As a general guide the representative is allowed the executor's year to complete the administration of the estate. The principle, derived from the Statute of Distributions [1670], is statutory in Queensland, Tasmania and Victoria. [note omitted]

Queensland, Victoria, Tasmania and the United Kingdom have enacted specific provisions which have the effect of preserving the executor's year.¹³¹ The Queensland Law Reform Commission observed in relation to the then proviso to section 52(1), now contained in section 52(1A) of the *Succession Act 1981 (Qld)*.¹³²

[The subsection] ensures that the different drafting approach adopted does not affect rules dependent upon the principle of the executor's year such as apportionments under the rule in *Howe v Dartmouth*.¹³³

Section 52(1A) of the *Succession Act 1981 (Qld)* reads:

Nothing in subsection (1) abrogates any rule or practice deriving from the principle of the executor's year or any rule or practice under which a beneficiary is entitled to receive interest upon any legacy from the date of the testator's death.

The Tasmanian provision goes further and enables the personal representative to approach the court for an extension of time within which to distribute the estate. Section 43 of the *Administration and Probate Act 1935 (Tas)* reads:

¹³⁰ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 18.8.1.

¹³¹ The principle of the executor's year does not create a binding rule, but rather a general principle. Case law already provides that the estate need not necessarily be distributed within one year. See Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at para 48.24.

¹³² Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 36.

¹³³ *Howe v Earl of Dartmouth* (1802) 7 Ves 137; 32 ER 56.

Power to postpone distribution: Executor's year

- (1) Subject to the foregoing provisions of this Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death.
- (2) Upon application as prescribed, a judge may, if he thinks it expedient and prudent so to do, empower the personal representative to -
 - (a) postpone, for such period as the judge may think expedient, the realization of the estate of the deceased or any part thereof,
 - (b) carry on, for such period as the judge may think expedient, the business or affairs of the deceased, and for that purpose use his estate or such part thereof as the judge directs.
- (3) A personal representative acting in pursuance of leave given under this section shall not be answerable for consequent loss, except in case of breach of trust, negligence, or wilful default.

The New South Wales Law Reform Commission questioned whether the concept of the executor's year should be retained given the notice provisions in section 92 of the *Wills, Probate and Administration Act 1898* (NSW).¹³⁴ On the other hand, there is a view that the concept encourages the early administration of estates.

(i) Issues considered by the National Committee

The National Committee considered whether:

- (1) it is desirable to include a provision in the model legislation to the effect of section 52(1A) of the *Succession Act 1981* (Qld) so as not to affect the principle of the executor's year;
- (2) the possibility of an extension of the executor's year as provided for in the Tasmanian provision should be included in the model legislation.

(ii) The National Committee's preliminary view

The National Committee was of the view that no change should be made to the principle of the executor's year.

The National Committee did not reach a conclusion about the Tasmanian provision enabling an extension of the executor's year.

¹³⁴

Section 92 notices are discretionary. See the discussion of s 92 notices at pp 139-141 of this Discussion Paper.

(iii) Proposal

A provision to the effect of section 52(1A) of the *Succession Act 1981 (Qld)* should be included in the model legislation.

(iv) Question for discussion

8.4 Should the provision in the model legislation based on section 52(1A) of the *Succession Act 1981 (Qld)* incorporate a provision to the effect of section 43(2) of the *Administration and Probate Act 1935 (Tas)*?

(e) Liability of personal representative for breach of duty**(i) Neglect of duty**

Although a number of jurisdictions have provisions relating to the failure of the personal representative to fulfil one or another of his or her duties,¹³⁵ only Queensland appears to have a general provision imposing liability on a personal representative for neglect of duty.

Section 52(2) of the *Succession Act 1981 (Qld)* reads:

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.

The Queensland Law Reform Commission noted in relation to section 52(2) of the *Succession Act 1981 (Qld)*:¹³⁶

Subsection (2) derives from the former section 6 of the *Probate Act of 1867*. It is probably unnecessary, apart from the provision for the payment of interest which may be desirable and which should be stated expressly.

¹³⁵ For example, *Wills, Probate and Administration Act 1898 (NSW)* s 75 (neglect to prove will); *Administration and Probate Act 1958 (Vic)* s 15 (neglect to prove, renounce or bring in will); *Administration and Probate Act (NT)* s 91 (neglect to file inventory or pass accounts); *Administration Act 1903 (WA)* s 42 (neglect or refusal to transfer land or to pay legacies etc).

¹³⁶ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 36.

Nevertheless, since the Queensland Law Reform Commission's report, the provision has been judicially considered. In *Re Hill*¹³⁷ a woman appointed her son executor of her estate. In her will the mother left the son the whole of her estate which consisted primarily of her house. Within five weeks of the mother's death the son sought transmission of the house to himself. His sister was thereby prevented from pursuing an effective family provision claim. The court applied section 52(2) of the *Succession Act 1981* (Qld) and held that because "[he] effected distribution of the only assets in the estate well within the six months of death and within three months of his having knowledge of an intended application ... [he] was ... in breach of s 52(1)(a) of the Act and the applicant is entitled to relief under s 52."¹³⁸

A. Issue considered by the National Committee

The National Committee considered whether:

- (1) it is desirable to include a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld) in relation to the liability of a personal representative for neglect of duty;
- (2) a general provision such as section 52(2) should be subject to any contrary provision in the will exempting the executors from liability for, say, negligence.

B. The National Committee's preliminary view

Although the National Committee was of the view that it was desirable to include in the model legislation a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld) in relation to the liability of a personal representative for neglect of duty, the question was raised as to whether the scope of section 52(2) was sufficiently broad. Reference was made to the terminology used in section 43(3) of the *Administration and Probate Act 1935* (Tas), which imposes liability, in certain circumstances, for "breach of trust, negligence or wilful default".¹³⁹

The general view of the National Committee was that the term "neglect" would include the concepts of "breach of trust, negligence, or wilful default".

The National Committee did not consider it appropriate for there to be a provision in the model legislation making the equivalent to section 52(2) of the *Succession Act 1981* (Qld) subject to a contrary intention in the will exempting executors from liability for negligence.

¹³⁷ *Re Hill* (Unreported, Sup Ct of Qld, Carter J, No 1079 of 1987, 6 and 7 June; 17 June 1988).

¹³⁸ *Id* at 7-8.

¹³⁹ The section is set out at p 70 of this Discussion Paper.

C. Proposal

The model legislation should include a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld).

(ii) Liability for waste

QLD	ACT	VIC	NSW ¹⁴⁰	SA	WA	NT	TAS	UK	NZ
52A	19	33(2)	15		26(6)	27	30	29	

Section 52A of the *Succession Act 1981* (Qld) reads:

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.

Equivalent provisions are found in Victoria,¹⁴¹ New South Wales¹⁴² and Tasmania.¹⁴³ Similar provisions in Western Australia, the Australian Capital Territory and the Northern Territory are more limited.¹⁴⁴

Section 52A of the *Succession Act 1981* (Qld) ensures that, where an executor *de son tort* (that is, a person who administers the estate without having been appointed executor in the will or administrator by grant) wastes or converts estate property and dies, the personal representative of the defaulter is liable to the extent of the assets of the defaulter in respect of the waste or conversion.

¹⁴⁰ *Imperial Acts Application Act 1969* (NSW).

¹⁴¹ *Administration and Probate Act 1958* (Vic) s 33(2).

¹⁴² *Imperial Acts Application Act 1969* (NSW) s 15.

¹⁴³ *Administration and Probate Act 1935* (Tas) s 30.

¹⁴⁴ Section 26(6) of the *Administration Act 1903* (WA), s 19 of the *Administration and Probate Act 1929* (ACT) and s 27 of the *Administration and Probate Act* (NT) apply only to court appointed administrators who have been required to provide a surety. Section 26(6) of the *Administration Act 1903* (WA) provides:

If, upon the application of a surety who has given a guarantee as required by subsection (1), it appears to the Court that -

- (a) the estate is being wasted, or is in danger of being wasted;
- (b) the surety is being in any way prejudiced, or is in danger of being prejudiced, by the act or default of the person administering the estate; or
- (c) any surety desires to be relieved from further liability,

the Court may grant such relief as it thinks fit.

The other two sections are in similar terms.

Section 52A and its counterparts in the other jurisdictions originated in English legislation.¹⁴⁵ The New South Wales Law Reform Commission, in recommending the reproduction of these provisions in the *Imperial Acts Application Act 1969* (NSW), merely noted that:¹⁴⁶

These Imperial Acts deal with the liability for waste (to the extent of the assets) of a personal representative whether of an executor or administrator of right or of an executor de son tort (cf. The *Imperial Administration of Estates Act, 1925* section 29).

The following reason has been suggested for the enactment of the original provisions:¹⁴⁷

Formerly, the executor of an executor could not be charged by a devastavit committed by the first executor, although to the prejudice of the king, for it was held to be a tort, and, therefore, to die with the party. But, by the stat. 4 & 5 W & M s 24 s 12 an executor of an executor shall be liable on a devastavit committed by his testator, in the same manner as he would have been if living.

However, since the passing of those statutes in the 17th century, the law relating to the survival of causes of action has been altered.¹⁴⁸ Legislation based on section 1 of the *Law Reform (Miscellaneous Provisions) Act 1934* (Eng) has been enacted in all Australian jurisdictions and now determines which actions survive against, and for the benefit of, the estate of a person.¹⁴⁹

A. Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 52A of the *Succession Act 1981* (Qld) should be included in the model legislation.

B. The National Committee's preliminary view

The National Committee was of the view that section 52A of the *Succession Act 1981* (Qld) was, at most, only declaratory. Given that the question of the survival of causes of action is already dealt with by specific legislation, the National

¹⁴⁵ 30 Charles II c 7 (UK) and 4 William and Mary c 24 (UK) ss 11 and 12 (which enlarged and made perpetual the earlier statute). See now, *Administration of Estates Act 1925* (UK) s 29.

¹⁴⁶ New South Wales Law Reform Commission, Report, *The Application of Imperial Acts* (R 4, 1967) at 39.

¹⁴⁷ Toller S, *The Law of Executors and Administrators* (3rd ed 1814) at 430. The cases cited as authority are *Byon v Gollin* (1788) 2 Bro CC 323; 29 ER 177 and *Sir Brian Tucke's case* 3 Leonard 241; 74 ER 659.

¹⁴⁸ See Chapter 14 of this Discussion Paper in relation to survival of causes of action.

¹⁴⁹ *Succession Act 1981* (Qld) s 66; *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) s 2(1); *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) Part 2; *Administration and Probate Act 1958* (Vic) s 29; *Survival of Causes of Action Act 1940* (SA); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4; *Law Reform (Miscellaneous Provisions) Act* (NT) Part 2; and *Administration and Probate Act 1935* (Tas) s 27.

Committee was of the view that it was not necessary to include a provision to the effect of section 52A of the *Succession Act 1981* (Qld) in the model legislation.

This view is supported by the Law Reform Commission of Western Australia,¹⁵⁰ which cited Lee's opinion that the provision is otiose because of legislation now providing for the survival of causes of action.¹⁵¹

C. Proposal

A provision to the effect of section 52A of the *Succession Act 1981* (Qld) should not be included in the model legislation.

(iii) Neglect or refusal to transfer or convey land or hand over legacies or bequests

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
O 74 r 1			84		42	88			

Section 84 of the *Wills, Probate and Administration Act 1898* (NSW) provides for summary applications to be made for the payment of legacies or conveyances of devised land. That section reads:

Application for legacy etc

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

- (a) sign such acknowledgment;¹⁵² 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,

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

¹⁵⁰ Law Reform Commission of Western Australia, *Report on United Kingdom Statutes in Force in Western Australia* (Project No 75, 1994) at 55 referring to Lee WA, *Manual of Queensland Succession Law* (3rd ed 1991) at para 924, note 67.

¹⁵¹ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 924, note 69.

¹⁵² This refers to s 83 of the *Wills, Probate and Administration Act 1898* (NSW). See pp 93-94 of this Discussion Paper.

Commentators on section 84 of the *Wills, Probate and Administration Act 1898* (NSW) have suggested that its use should be confined to cases where there is no dispute about the devise or legacy:¹⁵³

It seems that the section should be used only where the matter is free from doubt,¹⁵⁴ where there is no conflict of rights of rival demands¹⁵⁵ and there are liquid assets sufficient to meet the legacy or bequest.¹⁵⁶ Section 84 cannot be used as a substitute for an administration suit.¹⁵⁷

Section 88 of the *Administration and Probate Act* (NT) and section 42 of the *Administration Act 1903* (WA) are in the same terms as section 84 of the *Wills, Probate and Administration Act 1898* (NSW), except that paragraph (a) of the New South Wales provision is omitted.

A. Issues considered by the National Committee

The National Committee considered whether:

- (1) the model legislation should include a provision enabling summary applications to be made for the payment of legacies or conveyances of devised land, or whether such a provision would be more appropriately located in rules of court (as it is in Queensland);
- (2) if such a provision should be included in the model legislation, section 88 of the *Administration and Probate Act* (NT) or section 42 of the *Administration Act 1903* (WA) - which do not contain an equivalent to paragraph (a) of section 84 of the *Wills, Probate and Administration Act 1898* (NSW) - should be used as the basis for the model provision.

B. The National Committee's preliminary view

The National Committee was aware of only one application under the Queensland equivalent to section 84 of the *Wills, Probate and Administration Act 1898* (NSW).

¹⁵³ Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at para 84.01.

¹⁵⁴ The authors noted: *Will of Cowell* (1895) 16 LR (NSW) B & P 51; *Re Anderson* (1953) 53 SR (NSW) 520; *Will of Gannon* (1915) 15 SR (NSW) 251 at 255.

¹⁵⁵ The authors noted: *Higstrim v Ray* (1895) 16 LR (NSW) Eq 1; *Re Anderson* (1953) 53 SR (NSW) 520.

¹⁵⁶ The authors noted: *Re Anderson* (1953) 53 SR (NSW) 520.

¹⁵⁷ *Ibid.*

C. Proposal

A provision to the effect of section 84 of the *Wills, Probate and Administration Act 1898* (NSW), if considered necessary by an individual jurisdiction, should be included in that jurisdiction's rules of court and not the model legislation.

4. THE POWERS OF PERSONAL REPRESENTATIVES

Obviously, personal representatives need the authority to fulfil the duties they must undertake. That authority is found in case law and in statute. The legislative provisions are not uniform. The powers raised with the National Committee as issues to be addressed are discussed below.

(a) Power to maintain spouse and issue

Section 49(3) of the *Succession Act 1981* (Qld) confers on personal representatives the power to use the estate, in the period immediately after the death of the deceased, to maintain certain dependants of the deceased. It reads:

The personal representatives may, during and after the period of 30 days after the death of a deceased person, make reasonable provision out of the estate for the maintenance (including hospital and medical expenses) of any spouse or issue of the deceased who would, if the person survived the deceased for a period of 30 days, be entitled to a share in the estate, and any sum so expended shall be deducted from that share; but if any spouse or issue of the deceased for whom any provision has been so made does not survive the deceased for a period of 30 days any sum expended in making such provision shall be treated as an administration expense.

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 49(3) of the *Succession Act 1981* (Qld) should be included in the model legislation.

(ii) The National Committee's preliminary view

The National Committee noted that the substance of section 49(3) of the *Succession Act 1981* (Qld) has been reproduced, in a slightly modified form, in recommendations made by the National Committee in both the wills and family

provision stages of this project.¹⁵⁸ The National Committee was therefore of the view that it should not be considered further in this stage of the project.

(iii) Proposal

The model legislation should not include a provision to the effect of section 49(3) of the *Succession Act 1981 (Qld)*.

(b) Power of delegation before grant to Public Trustee or trustee company

QLD ¹⁵⁸	ACT ¹⁵⁹	VIC ¹⁶¹	NSW	SA ¹⁶²	WA ¹⁶³	NT ¹⁶⁴	TAS ¹⁶⁵	UK	NZ
27A, 29, 31-32	5-8	10, 11	75A	15	12	33	15		

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See cl 53 of the draft model *Wills Bill 1997* (Personal representatives may make maintenance distributions within 30 days) in National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997); New South Wales Law Reform Commission, Report, *Uniform Succession Laws: The law of wills* (R 85, 1998); and the Drafting Instructions for the model *Family Provision Bill* in National Committee for Uniform Succession Laws, *Report on Family Provision* (QLRC MP 28, 1997) Appendix 1 at 22-23 (Protection of distributions).

Clause 53 of the draft *Wills Bill 1997* reads:

Personal representatives may make maintenance distributions within 30 days

- (1) If a surviving person who is wholly or substantially dependent on the testator has an entitlement under a will that does not become absolute until 30 days after the testator's death, the personal representative may make a distribution for the maintenance, support or education of that person within that 30 day period.
- (2) The personal representative is not liable for any such distribution that is made in good faith.
- (3) The personal representative may make such a distribution even though the personal representative knew at the time the distribution was made of a pending application under the [insert the name of the Act of the jurisdiction that deals with family provision].
- (4) Any sum distributed is to be deducted from any share of the estate to which the person receiving the distribution becomes entitled, but if any person to whom any distribution has been made does not survive the testator for 30 days any such distribution is to be treated as an administration expense.

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Public Trustee Act 1978 (Qld).

160

Trustee Company Act 1947 (ACT).

161

Trustee Companies Act 1984 (Vic).

162

Public Trustee Act 1995 (SA).

163

Public Trustee Act 1941 (WA). See also *Trustee Companies Act 1987 (WA)* s 6.

164

Public Trustee Act (NT).

165

Public Trustee Act 1930 (Tas).

Most Australian jurisdictions provide for the delegation of office by the executor to the Public Trustee or to certain trustee companies. New South Wales includes these provisions in its administration of estates legislation. Other jurisdictions include the provisions in their trustee legislation.

Section 75A of the *Wills, Probate and Administration Act 1898* (NSW) makes detailed provision for an executor who has not taken out a grant or who has not renounced to delegate the executorship of the will to the Public Trustee or a trustee company. Section 75A reads, in part:

Delegation

- (1) Any person who has been appointed executor of the will of a deceased person and has not renounced or taken probate thereof may by deed appoint the Public Trustee or a trustee company to be executor of the will in the person's place or stead or as a co-executor with the person or with the continuing executors (including the appointor), as the case may be, and upon the registration and filing by subsections (8) and (9) directed such will shall be construed and take effect in all respects as if the name of the appointee had been originally inserted in such will as the executor or one of the executors thereof in lieu of the person in whose stead it has been appointed or as an additional executor thereof, as the case may be.
- (2) Any executor who has obtained probate or any administrator who has obtained letters of administration notwithstanding that the executor or administrator has acted in the administration of the deceased's estate and notwithstanding the existence of any other executor or administrator may by deed appoint the Public Trustee or a trustee company to be executor or administrator in the executor's or administrator's place or stead or as co-executor ...

...

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 75A of the *Wills, Probate and Administration Act 1898* (NSW) should be included in the model legislation, or whether such a provision would be more appropriately located in Public Trustee legislation or trustee company legislation in each jurisdiction.

(ii) The National Committee's preliminary view

The National Committee considered that it would be more appropriate for such a provision to appear, if at all, in legislation specific to the body to which the delegation is made or which would be able to administer the estate in the circumstances referred to in the New South Wales provision. The National Committee also noted that section 75A of the *Wills, Probate and Administration Act 1898* (NSW) is rarely used. A deterrent to using the provision appears to be the requirement to serve notice on the beneficiaries. The National Committee concluded that the costs and inconvenience involved with the provision may outweigh any benefit it would have.

(iii) Proposal

A provision to the effect of section 75A of the *Wills, Probate and Administration Act 1898* (NSW) should not be included in the model legislation.

(c) Relation back of powers given on grant

Section 49(4) of the *Succession Act 1981* (Qld) ensures that the powers of the personal representative to whom a grant is made relate back to the date of death. This accords with section 45(4) of the *Succession Act 1981* (Qld), which provides that, on grant, the title of the administrator relates back to the date of death.

Section 49(4) reads:

Subject to the grant, the powers of those personal representatives to whom a grant is made shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the grant.

(i) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision to the effect of section 49(4) of the *Succession Act 1981* (Qld).

(ii) The National Committee's preliminary view

The National Committee agreed that, on the making of a grant, the powers of the personal representative should relate back to the death of the deceased.

(iii) Proposal

The model legislation should include a provision to the effect of section 49(4) of the *Succession Act 1981* (Qld).

(d) Personal representatives must exercise powers jointly

Under the general law some powers of executors may be exercised by them severally - that is, by an individual executor acting independently of any of the other executors. This can create difficulties for persons who want to deal with the executors, and can

create conflicts between executors and between an executor and beneficiaries.

Section 49(5) of the *Succession Act 1981* (Qld) requires that, where there is more than one personal representative, they must act together rather than individually. It reads:

The powers of personal representatives shall be exercised by them jointly.

However, the Queensland Law Reform Commission noted in its 1978 Report that the provision does not mean that every act must be performed by every representative. A representative can easily appoint one of the other representatives to be his or her agent.¹⁶⁶

(i) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision to the effect of section 49(5) of the *Succession Act 1981* (Qld).

(ii) The National Committee's preliminary view

The National Committee considered it an advantage of the existing Queensland provision that it assimilates the position of personal representatives to that of trustees, who have to act jointly.

The National Committee could see no advantage in treating personal representatives differently from trustees in this respect. On the contrary, it agreed that uniformity is desirable in the light of the fact that executors are normally appointed testamentary trustees as well. It seems anomalous that the testator's nominees should be able to act severally while they are executors, but that when they become trustees they have to act jointly.

(iii) Proposal

The model legislation should include a provision to the effect of section 49(5) of the *Succession Act 1981* (Qld).

¹⁶⁶

Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 33.

(e) Commission

QLD	ACT	VIC	NSW	SA	WA ¹⁶⁷	NT	TAS	UK	NZ
68	70	65, O 10 r 9	86	70	6 "trust", "personal represent- ative", 98	102	64		

A will might provide that the personal representative is entitled to commission in addition to any professional or other fees associated with the administration of the estate. In other cases the will might be silent as to the payment of commission. If a legacy is made to a personal representative in a will, the question arises whether the personal representative is entitled to commission in addition to the legacy. The weight of authority appears to favour the view that whether or not the personal representative is entitled to both commission and the legacy is to be determined by reference to the intention of the testator as disclosed by the will:¹⁶⁸

It is only if the intention is that the legacy should represent recompense to the executor for his time and trouble that he will not be allowed commission, unless he either rejects the legacy; or if it is so inadequate in amount as to be illusory (*Re Gibbon's Will* (1889) 3 Q.L.J. 120).

In cases where the will is silent in relation to commission, a number of jurisdictions have a provision conferring jurisdiction on the court to allow a payment of remuneration or commission to the personal representative, and to enable the court to attach conditions to the payment.

(i) Queensland

Section 68 of the *Succession Act 1981* (Qld) reads as follows:

Commission

The court may authorise the payment of such remuneration or commission to the personal representative for his or her services as personal representative as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit.

(ii) New South Wales

Section 86 of the *Wills, Administration and Probate Act 1898* (NSW) reads:¹⁶⁹

¹⁶⁷ *Trustees Act 1962* (WA).

¹⁶⁸ *Re Lack* [1983] 2 Qd R 613 per McPherson J at 614.

¹⁶⁹ Section 70 of the *Administration and Probate Act 1929* (ACT) is similar to s 86 of the *Wills, Probate and Administration Act 1898* (NSW), except that, in the Australian Capital Territory, where the court's jurisdiction to allow commission is being exercised by the Registrar, the commission or percentage allowed shall not exceed five per cent. In Tasmania and Victoria a blanket limit of a maximum of 5% is placed on commission: *Administration and Probate Act 1935* (Tas) s 64; *Administration and Probate Act 1958* (Vic) s 65.

Executors etc. may be allowed commission

- (1) The Court may allow out of the assets of any deceased person to the deceased person's executor, administrator, or trustee for the time being, in passing the accounts relating to the deceased person, such commission or percentage for the executor's, administrator's or trustee's pains and trouble as is just and reasonable, and subject to such notices (if any) as the Court may direct.
- (2) No such allowance shall be made to any executor, administrator, or trustee who neglects or omits without good reason to pass the accounts relating to the estate of the deceased person pursuant to the rules or an order of the Court.
- (3) Where any executor, administrator or trustee renounces the executor's, administrator's or trustee's right to such commission in respect of any particular year, the executor, administrator, or trustee shall be entitled to indemnity out of the said assets for the amount of the executor's, administrator's or trustee's solicitor's charges and disbursements, as moderated in accordance with the relevant professional scale, for non-professional work performed in that year, to an amount not exceeding that which the executor, administrator or trustee would have been in the opinion of the Court allowed by way of such commission for that year had the executor, administrator, or trustee not so renounced but had applied therefor.

New South Wales and other jurisdictions (for example, Tasmania and Victoria) empower the court to authorise commission "for the pains and trouble" of the personal representative.¹⁷⁰

(iii) South Australia

Section 70 of the *Administration and Probate Act 1919 (SA)* reads:

Commission may be allowed to executors, administrators or trustees

- (1) The court may allow to any executor, administrator, or trustee, whether of the estate of a deceased person or otherwise, such commission or other remuneration out of the estate or trust property, and either periodically or otherwise, as is just and reasonable.
- (2) No allowance shall be made to any administrator who neglects -
 - (a) to deliver the statement and account required by s 56, as by such section required, or within such reasonable time as is allowed by the Court; or
 - (b) to dispose of any estate with which he is chargeable according to the due course of administration.

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In New South Wales, the Registrar is empowered to exercise this jurisdiction of the court: *Supreme Court Rules 1970 (NSW) Pt 78 r 5*.

(iv) Issues considered by the National Committee

The National Committee considered whether:

- (1) the model legislation should include a provision relating to commission;
- (2) the reference to commission for the trustee (as mentioned in section 86 of the *Wills, Probate and Administration Act 1898* (NSW) and section 70 of the *Administration and Probate Act 1919* (SA)) should be retained in the provision relating to commission in the model legislation, or whether, as is the case in Queensland, the provision should be restricted to personal representatives;
- (3) given that some persons who administer estates professionally have been known to charge both professional fees and commission, all grants of commission should be made by the court on an individual basis (irrespective of any provision in the will referring to commission), generally by the Registrar acting as the court, and the court should be given and be encouraged to use strong powers to moderate and control grants of commission;
- (4) a provision to the effect of section 70(2)(b) of the *Administration and Probate Act 1919* (SA) should be included in the model legislation;
- (5) the words “periodically or otherwise” in section 70(1) of the *Administration and Probate Act 1919* (SA) should be included in the model legislation.

(v) The National Committee’s preliminary view

The National Committee was generally concerned that some solicitors charge both a commission and fees in relation to the administration of estates. The Commission views such conduct as oppressive. It understands that, in some jurisdictions, Law Societies have issued directives to the effect that the charging of commission and professional fees under the same will is unethical.

The National Committee was of the view that the model legislation should include a provision relating to the payment of commission and that the provision should extend to trustees since personal representatives become trustees upon completing their executorial duties.

The National Committee considered that section 86(3) of the *Wills, Probate and Administration Act 1898* (NSW) is useful.¹⁷¹ That provision covers the situation where an executor renounces the right to commission and engages a solicitor to undertake executorial duties of a non-professional nature. The executor is entitled to an indemnity out of the estate for the solicitor’s charges for non-

¹⁷¹ See *Will of Douglas* (1951) 51 SR (NSW) 282.

professional work performed up to the amount the court might have allowed the executor by way of commission. The National Committee believed that such a provision might help to keep under control how much the estate is charged.

The National Committee also considered that the words "for his or her services" in the Queensland provision are sufficient to guide the court as to the basis for the award of commission, in that, like "for the pains and trouble", it shows that commission is to be paid for the actual work of the personal representative to whom commission is being awarded.

The National Committee was of the view that section 70(2)(b) of the *Administration and Probate Act 1919* (SA) is a valuable provision, and should be included in the model legislation. The National Committee was also of the view that the words "periodically or otherwise" in section 70(1) of the *Administration and Probate Act 1919* (SA) could be useful.

(vi) Proposals

- (1) The model legislation should include a provision relating to the payment of commission. The provision should refer to commission for trustees. It should not be restricted to personal representatives.**
- (2) The model legislation should provide that a commission clause in a will must be approved by the court before it can be relied upon. The court should be able to make such orders as it considers appropriate in the circumstances.**
- (3) A provision to the effect of section 86(3) of the *Wills, Probate and Administration Act 1898* (NSW) should be included in the model legislation.**
- (4) Any reference to specific rates of commission should be made in the rules of court, rather than in the model legislation.**
- (5) The model legislation should include a provision to the effect of section 70(2)(b) of the *Administration and Probate Act 1919* (SA).**
- (6) The words "periodically or otherwise" should be included in the commission provision in the model legislation.**

(vii) Questions for discussion

<p>8.5 How would the National Committee's proposals apply to the Public Trustee and trustee companies where the will is administered by them as if there were a grant?¹⁷²</p> <p>8.6 Should a maximum rate of commission be set?</p>

(f) Obtaining the advice or direction of the court

QLD	ACT	VIC ¹⁷²	NSW	SA ¹⁷⁴	WA	NT	TAS	UK	NZ
O 4 r 11-16	51 (re real estate), 97, 97A and 98 (relate specifically to the Public Trustee); O 57 r 1, O 58 r 1, 2	O 54	57 (re real estate); Pt 68 r 2, 8	ss 69, 90, 91	45 O 58 r 2-4 ¹⁷⁵	82 (re real estate); O 54	64; O 65 ¹⁷⁶		

The liberty of personal representatives to approach the court for advice or direction relating to the administration of an estate has a variety of sources:

(i) Case law

In *Re Atkinson (deceased)*,¹⁷⁷ Gillard J described the relevant law as follows:¹⁷⁸

Where an executor or trustee is in doubt as to the course of action it should adopt it is always entitled to take the opinion of the court as to what it should do. If in doubt as to whether or not it should take legal proceedings, then it is entitled to apply to the court for directions on the matter ... If the executor or trustee then followed the direction of the court, it would be protected from any claim by a

¹⁷² See Chapter 11 of this Discussion Paper.

¹⁷³ *General Rules of Procedure in Civil Proceedings 1996 (Vic)*.

¹⁷⁴ *Trustee Act 1936 (SA)*.

¹⁷⁵ *Rules of the Supreme Court 1971 (WA)* O 58 r 1-4.

¹⁷⁶ *Rules of the Supreme Court (Tas)*.

¹⁷⁷ [1971] VR 612.

¹⁷⁸ Id at 615.

beneficiary or creditor arising from its action or inaction in accordance with the court's direction ... In cases of real doubt, the proper course for a personal representative or trustee to adopt is to seek the court's decision as to whether or not action should be brought, otherwise the representative or trustee might find itself paying the costs of any proceedings which a court might subsequently say were not "properly incurred" ...

(ii) Authority to commence administration action

There is case law and statutory authority in a number of jurisdictions for an interested person to commence an administration action. Lee describes the administration action as follows:¹⁷⁹

The duty of representatives is to administer the estate as a whole; and the court has an inherent jurisdiction to order the estate of a deceased person to be administered. Any person having an interest in the administration may commence an administration action. Normally it will be a creditor or beneficiary but it may be one of the personal representatives. ... [A]n administration action may [also] be instituted where ... for instance ... there are merely difficulties of an administrative nature confronting representatives. In other words, an administration action can be "friendly".

Liberty given by legislation to approach the court by way of administration proceedings may be found in rules of court, or in probate and administration legislation. For example, Part 68 rule 2 of the New South Wales *Supreme Court Rules 1970* reads, in part:¹⁸⁰

- (1) Proceedings may be brought for any relief which could be granted in administration proceedings.¹⁸¹
- (2) Proceedings may be brought for the determination of any question which could be determined in administration proceedings, including any question:
 - (a) arising in the administration of an estate or in the execution of a trust;
 - (b) as to the composition of any class of persons having a claim against an estate or a beneficial interest in an estate or in property subject to a trust; or
 - (c) as to the rights or interests of a person claiming to be:
 - (i) a creditor of an estate;

¹⁷⁹ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 929.

¹⁸⁰ Further examples include O 57 r 1 and O 58 rr 1, 2 of the *Supreme Court Rules (ACT)* and s 51 of the *Administration and Probate Act 1929 (ACT)*.

¹⁸¹ "Administration proceedings" is defined in Part 68 r 1 of the *Supreme Court Rules 1970 (NSW)* as "... proceedings for the administration of an estate or the execution of a trust under the direction of the Court".

- (ii) entitled under the will or on the intestacy of a deceased person; or
- (iii) beneficially entitled under a trust. [note added]

...

(iii) Trustee legislation

In most jurisdictions trustee legislation permits trustees to approach the court.¹⁸² The trustee legislation extends the definition of "trustee" to include personal representatives,¹⁸³ so that this avenue is also available to personal representatives.

(iv) Administration and probate legislation

In some jurisdictions, the relevant administration and probate legislation allows the court to give directions, as in an administration suit. For example, section 57 of the *Wills, Probate and Administration Act 1898* (NSW) reads:

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.

¹⁸² *Trusts Act 1973* (Qld) s 96 (s 97 protects the trustee or personal representative when acting under the direction or advice); *Trustee Act 1925* (NSW) s 63; *Trustee Act 1925* (ACT) s 63; *Administration and Probate Act 1919* (SA) s 69; *Trustee Act 1936* (SA) ss 90, 91; *Trustees Act 1962* (WA) s 92; *Public Trustee Act 1930* (Tas) s 74.

¹⁸³ *Trusts Act 1973* (Qld) s 5; *Trustee Act 1925* (NSW) s 5; *Trustee Act 1925* (ACT) s 5; *Trustee Act 1936* (SA) s 4; *Trustees Act 1962* (WA) s 6. The *Trustee Act 1898* (Tas) s 4 defines "trustee" to include "(a) any person seized or possessed of or entitled to any property subject to any trust as aforesaid; ... (e) any representative in any way possessed of or entitled to any property subject to any trust express or implied"; "trust" is defined in s 4 to include "the duties incident to the office of representative of a deceased person"; "representative" is defined in s 4 so as to include "the devisee or devisees, or the executor or executors, administrator or administrators, or the curator of the intestate estate of any deceased person".

(v) Issues considered by the National Committee

The National Committee considered whether:

- (1) a provision enabling personal representatives to seek advice or directions from the court in relation to the administration of an estate should be included in the model legislation or whether such a provision would be more appropriately located in rules of court;
- (2) if such a provision should be included in the model legislation, it would suffice for the legislation to contain a broad power enabling an application for advice and directions to be made;
- (3) some provisions presently in rules of court should be included in the model legislation;
- (4) section 57 of the *Wills, Probate and Administration Act 1898* (NSW) is an appropriate provision to include in the model legislation, in addition to the broad provision suggested in (2) above.

(vi) The National Committee's preliminary view

The National Committee noted that, although trustee legislation may give a similar power to the court, such legislation will not enable advice or directions to be given in contested cases and that succession legislation would have to be resorted to in those situations.

The National Committee did not come to a preliminary decision on the issues raised, and agreed to seek further input on these issues.

(vii) Questions for discussion

- 8.7** Should the model legislation include a provision to enable personal representatives to seek advice or directions from the court in relation to the administration of an estate, or should such a provision be in rules of court?
- 8.8** If such a provision should be in the model legislation, should it be expressed in broad terms - simply enabling an application to be made for advice and directions?
- 8.9** Would a provision based on section 57 of the *Wills, Probate and Administration Act 1898* (NSW) be appropriate to include in the model legislation?

(g) Assent by personal representative

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
		41	94 ¹⁸⁴			98 ¹⁸⁵	36(4)	36	

During the period of the administration of a deceased estate, beneficiaries have no proprietary rights in the assets left to them by the deceased. However, as Lee explains:¹⁸⁶

... there comes a point when it becomes clear to the representative that a particular beneficiary is entitled to the benefit left to her or him, the duties of administration having been completed, or those remaining having no bearing on that particular beneficiary's entitlement.

At that point, an executor can by "assent" indicate that assets in the estate are no longer needed for the purposes of administration, and that the assets concerned can therefore pass to the beneficiaries.¹⁸⁷

Lee explains the ramifications of the executor's assent:¹⁸⁸

The representative then becomes trustee of any specific asset,¹⁸⁹ or debtor of any money payable and the remedies appropriate to the obligations of trustees and debtors become available to the beneficiary.¹⁹⁰ Even if the representative merely indicates to the beneficiary that the asset or sum of money is transferable, the same consequences will follow, such indication being called an assent. An assent may be inferred from conduct.¹⁹¹

Atherton and Vines note that assent could be given effectively only by an executor, and not by an administrator. Further, it could be given only in respect of personal property, and not in respect of real property.¹⁹²

¹⁸⁴ In relation to leases and agreements for leases.

¹⁸⁵ Ibid.

¹⁸⁶ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1009.

¹⁸⁷ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 18.8.3.

¹⁸⁸ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1009.

¹⁸⁹ Lee refers to *Dix v Burford* (1854) 19 Beav 409; 52 ER 408.

¹⁹⁰ Lee refers to *Sloper v Cottrell* (1856) 6 E & B 497; 119 ER 950; *Harvell v Foster* [1954] 2 QB 367.

¹⁹¹ Lee refers to *Attenborough v Solomon* [1913] AC 76.

¹⁹² Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 18.8.3.

Queensland retains the doctrine of assent, although it is impliedly extended by section 49(1) of the *Succession Act 1981* (Qld) to administrators as well as executors, and to real as well as personal property.¹⁹³

Section 36 of the *Administration of Estates Act 1925* (UK) extended the principle of assent from executors to administrators, and to real, as well as personal, property. Section 41 of the *Administration and Probate Act 1958* (Vic) and section 36 of the *Administration and Probate Act 1935* (Tas) followed the United Kingdom approach although, for real property, the Tasmanian provision requires that the assent must be in the "proper form".

Section 36 of the *Administration and Probate Act 1935* (Tas) reads:

Effect of assent or conveyance by personal representative

- (1) A personal representative may -
 - (a) in relation to real estate that is not subject to the *Land Titles Act 1980*, assent, in the form set out in Schedule IV; and
 - (b) in relation to real estate that is subject to that Act, assent in the prescribed form -

to the vesting in any person who, whether by devise, bequest, devolution, or appropriation, may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in real estate to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, and which devolved upon the personal representative.
- (2) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased.
- (3) The statement in an assent that a person assents as personal representative shall have the like effect as regards implied covenants as would follow from the like statement in a deed of conveyance.
- (4) An assent to the vesting of any estate or interest shall be in writing, signed by the personal representative, and shall name the person in whose favour it is given, and shall operate to vest in that person the estate to which it relates.
- (5) An assent to the vesting in a named person of a partial interest in property shall operate as an assent in favour of the remaindermen.
- (5A) An assent by a personal representative in respect of a legal estate shall, in favour of a purchaser from the person in whose favour the assent is made or his

¹⁹³

Section 49(1) of the *Succession Act 1981* (Qld) reads:

Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the powers hitherto exercisable by an executor in relation to personal estate and all powers conferred on personal representatives by the *Trusts Act 1973*.

Section 50 of the *Succession Act 1981* (Qld) would extend the power to administrators, but only in respect of personal property.

successor in title, be taken as sufficient evidence that that person is entitled to have the legal estate vested in him, and upon the proper trusts, if any, but shall not otherwise prejudicially affect the claim of any person rightfully entitled to the estate vested or any charge thereon.

- (5B) Subsection (5A) applies whether the assent was made before or after the commencement of that subsection.
 - (5C) Nothing in subsection (5A) prejudices the rights of any person under the *Registration of Deeds Act 1935* in priority to the conveyance to a purchaser.
 - (6) A conveyance of an estate or interest by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have been discharged or provided for.
 - (7) An assent or conveyance given or made by a personal representative shall not, except in favour of a purchaser of an estate or interest, prejudice the right of the personal representative or any other person to recover the estate or interest to which the assent or conveyance relates, or to be indemnified out of such estate or interest against any duty, debt, or liability to which such estate or interest would have been subject if there had not been any assent or conveyance.
 - (8) A personal representative may, as a condition of giving an assent or making a conveyance, require security for the discharge of any such duty, debt, or liability, but shall not be entitled to postpone the giving of an assent merely by reason of the subsistence of any such duty, debt, or liability, if reasonable arrangements can be made for discharging the same; and an assent may be given subject to any estate or charge by way of mortgage.
 - (9) In this section “purchaser” means a purchaser for money or money’s worth.
 - (10) No stamp duty shall be payable in respect of an assent given as provided by subsection (1).
- (i) **Issues considered by the National Committee**

The National Committee considered whether:

- (1) the model legislation should specifically extend the doctrine of assent, so that assent may be given by administrators as well as by executors, and given in respect of real as well as personal property;
- (2) if yes to (1), assent in relation to real property should be required to be in a prescribed form;
- (3) section 36 of the *Administration and Probate Act 1935* (Tas) would be an appropriate basis for a model provision.

(ii) The National Committee's preliminary view

The National Committee was of the view that there is no longer any need for assent provisions. It was also of the view that it is difficult to apply the principles of assent in practice.

(iii) Proposal

The model legislation should not include a provision relating to assent.

(iv) Questions for discussion

- 8.10 How often, and in what circumstances, is the process of assent used in particular Australian jurisdictions?**
- 8.11 Should the model legislation abolish the doctrine of assent?**
- 8.12 If assent should be retained in the model legislation, should it be extended to administrators?**
- 8.13 If assent should be retained in the model legislation, should it be extended to apply to real property?**

(h) Executor may sign acknowledgment in lieu of conveyance

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
	56		83, see also 46E						

Legislation in the Australian Capital Territory and New South Wales provides that an executor or administrator may, instead of executing a conveyance of old system land, simply sign an acknowledgment in the form provided for in the Rules. Section 83 of the *Wills, Probate and Administration Act 1898* (NSW) reads:

Executor may sign acknowledgment in lieu of conveyance

- (1) When any real estate not under the provisions of the *Real Property Act 1900* is devised to any person by a will duly proved under the provisions of this Part, the executor of the will or the administrator with the will annexed may, as such executor or administrator, instead of executing a conveyance to such person,

sign an acknowledgment in the form prescribed by the rules that the devisee is entitled to such real estate for the estate for which the same is devised for the devisee.

- (2) Such acknowledgment may be registered under the Acts in force regulating the registration of deeds; and upon registration thereof such real estate shall vest in the devisee for such estate as aforesaid in the same way and subject to the same trusts and liabilities as if the executor or administrator had executed a conveyance of the same.

(i) Issues considered by the National Committee

The National Committee considered whether:

- (1) as section 83 of the *Wills, Probate and Administration Act 1898 (NSW)* deals with old system land, it would be appropriate for each jurisdiction to make its own arrangements in this regard, rather than to include a provision to that effect in the model legislation;
- (2) if a provision to the effect of section 83 of the *Wills, Probate and Administration Act 1898 (NSW)* is included in the model legislation, the equivalent to section 46E(2)(a) of the *Wills, Probate and Administration Act 1898 (NSW)* should also be included. That section reads:

Real estate mentioned in section 83 shall not, as against a purchaser in good faith from an executor or administrator, be held to have been divested from the executor or administrator and vested in another person entitled thereto, except by a registered conveyance or by an acknowledgment operating under that section.

(ii) The National Committee's preliminary view

The National Committee was of the view that there is no need for a provision to the effect of section 83 of the *Wills, Probate and Administration Act 1898 (NSW)* in the model legislation. Rather, each jurisdiction should consider its relevance in the context of its legislation relating to old system land.

(iii) Proposal

A provision to the effect of section 83 of the *Wills, Probate and Administration Act 1898 (NSW)* should not be included in the model legislation.

(i) Professional charges

Section 71 of the *Administration and Probate Act 1929* (ACT) prescribes a scale of charges for solicitors' professional services rendered in connection with the obtaining of a grant of probate or administration.

In other jurisdictions the charging of fees for professional services related to the administration of the estate is covered by the rules of court, such as Order 9 of the *Supreme Court (Administration and Probate) Rules 1994* (Vic) or by more general legislative provisions such as, in Queensland, section 101(2) of the *Trusts Act 1973* (Qld).

Order 9, rule 1 of the *Supreme Court (Administration and Probate) Rules 1994* (Vic) reads:¹⁹⁴

Subject to this Order, the professional charges which may be paid and allowed out of the estate of a deceased person to a solicitor in obtaining a grant of representation or the re-sealing in Victoria of a grant made in another jurisdiction shall be as set out in Appendix 3-A.¹⁹⁵ [note added]

Section 101(2) of the *Trusts Act 1973* (Qld) reads:

In the absence of a direction to the contrary in the instrument creating the trust,¹⁹⁶ a trustee,¹⁹⁷ being a person engaged in any profession or business for whom no benefit or remuneration is provided in the instrument, is entitled to charge and be paid out of the trust property all usual professional or business charges for business transacted, time expended, and acts done by the person or the person's firm in connection with the trust, including acts which a trustee not being in any profession or business could have done personally; and, on any application to the court for remuneration under subsection (1), the court may take into account any charges that have been paid out of the trust property under this subsection. ... [notes added]

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 71 of the *Administration and Probate Act 1929* (ACT) should be included in the model legislation, or whether rules of court are a more appropriate place for such a provision.

¹⁹⁴ See also, for example, *Probate Rules 1935* (Tas) r 95 and Part II of the Appendix; *Non-Contentious Probate Rules 1967* (WA) s 43B and the Second Schedule.

¹⁹⁵ The *Supreme Court (Administration and Probate) Rules 1994* (Vic) Appendix 3A provides a table of the remuneration that is chargeable where the gross value of the estate does not exceed \$10,000 through to estates of unlimited value.

¹⁹⁶ In the *Trusts Act 1973* (Qld) the phrase "instrument creating the trust" is defined in s 5 to include any will and "trust" is defined to include "the duties incidental to the office of a personal representative".

¹⁹⁷ In the *Trusts Act 1973* (Qld) the term "trustee" is defined in s 5 to include "a personal representative" and the term "personal representative" is defined to mean "the executor, original or by representation, or the administrator for the time being of the estate of a deceased person".

(ii) The National Committee's preliminary view

The National Committee was of the view that such matters are better placed in the rules of court than in the model legislation.

(iii) Proposal

A provision to the effect of section 71 of the *Administration and Probate Act 1929 (ACT)* should not be included in the model legislation. If that provision is considered appropriate for any jurisdiction, it should be included in that jurisdiction's rules of court.

(j) Additional powers

It is important for the due and proper administration of an estate that the personal representatives have all the powers necessary and convenient for that purpose. As *Jeune P* said in *Goods of Loveday*:¹⁹⁸

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

Section 49(6) of the *Succession Act 1981 (Qld)* provides that the court may confer additional powers on personal representatives:

The court may confer on a personal representative such further powers in the administration of the estate as may be convenient.

(i) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision to the effect of section 49(6) of the *Succession Act 1981 (Qld)*.

(ii) The National Committee's preliminary view

The National Committee considered that it may be useful to express in the model legislation the principle that the court may confer further powers on the personal representative as may be convenient in the administration of the estate,

¹⁹⁸

[1900] P 154 at 156.

as found in section 49(6) of the *Succession Act 1981* (Qld).¹⁹⁹

(iii) Proposal

The model legislation should include a provision to the effect of section 49(6) of the *Succession Act 1981* (Qld).

(k) Relinquishing grant

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
	53		59		20	85			

In a number of jurisdictions administration and probate legislation provides that a personal representative cannot be forced to continue as trustee by managing property during an "enforced suspension of sale". During the suspension the personal representative can relinquish his or her trust to such person as the court may order. The Australian Capital Territory, New South Wales and Northern Territory provisions are in similar terms. Section 59 of the *Wills, Probate and Administration Act 1898* (NSW) reads:

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.

¹⁹⁹

The National Committee's attention was drawn in this regard to s 64 of the *Administration and Probate Act 1935* (Tas), which reads:

Power of Court to make orders for due administration of estate of deceased person
The Court may make all such orders as may be necessary for the due administration of the real and personal estate and effects of any deceased person, and also for the payment out of such real and personal estate and effects to the persons administering the same of any costs, charges, and expenses which may have been lawfully incurred by them, and also such commission or percentage, not exceeding 5 per cent, for their pains and trouble therein as shall be just and reasonable; and if any executor or administrator shall neglect to pass his accounts, or dispose of the real and personal estate and effects of any deceased person, at the time and in the manner directed, it shall be lawful for the Court, on the application of any person aggrieved by such neglect, to order and direct that such executor or administrator shall pay interest at a rate not exceeding 8 per cent per annum for such sums of money as from time to time shall have been in his hands, and the costs occasioned by the application.

The purpose of the provision is not clear. The provision was described in *Re Keenan*²⁰⁰ in the following terms:²⁰¹

Sect. 59 (which also comes from Lang's Act) 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. But I may say that, whatever the section may mean, it does not in my opinion mean, by a casual and unexplained allusion to "an enforced suspension of sale" and "to such suspension being ordered", to effect a far-reaching alteration in the law and give to the Court such a free hand as is suggested.

The Western Australian provision is in more general terms than section 59 of the *Wills, Probate and Administration Act 1898* (NSW). Section 20 of the *Administration Act 1903* (WA) reads:

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.

This provision does not appear to add to the general powers that the court has under the proposed model legislation and, in particular, the provision to be based on section 6 of the *Succession Act 1981* (Qld).

(i) Issues considered by the National Committee

The National Committee considered whether:

- (1) there is any reason for including a provision to the effect of either section 59 of the *Wills, Probate and Administration Act 1898* (NSW) or section 20 of the *Administration Act 1903* (WA) in the model legislation;
- (2) if such a provision is desirable, it would be more appropriately placed in trustee legislation.

(ii) The National Committee's preliminary view

The New South Wales, Australian Capital Territory and Northern Territory provisions apply only in the case of "enforced suspension of sale". However, it is unclear what that phrase means. The Western Australian provision refers to the personal representative "relinquishing his trust". Again, it is unclear what that means.

²⁰⁰ (1899) 20 LR (NSW) B & P 10.

²⁰¹ Id at 15.

The National Committee considered that these provisions enable personal representatives to retire from their role, even though they were in the middle of the process of administering the deceased estate. However, the National Committee did not believe that it should be easy for a personal representative to relinquish a grant, and was of the view that the appropriate time to avoid the responsibilities involved in being a personal representative was when deciding whether or not to take up the duties in the first place. On the other hand, it was suggested that it is never a good thing to "lock a personal representative in", as he or she may tend to "slacken off" in his or her responsibilities.

In any event, provisions already exist to enable a personal representative to retire before completion of the administration of the estate. For example, Order 71, rule 84 of the *Supreme Court Rules 1900 (Qld)* reads:

- (1) The Court may revoke a grant of probate or administration upon motion, without action brought, or may make a limited grant to such person and on such terms as it may think fit, in any of the following cases -
 - (a) if it appears that the executor or administrator is no longer capable of acting in the administration, or cannot be found;
 - (b) if the administrator is desirous of retiring from the administration;
 - (c) if it appears that the grant was made upon a mistake of fact or of law.
- (2) Upon the hearing of the motion the Court may direct that an action shall be brought for revocation of the grant.

A similar provision is found in section 34 of the *Administration and Probate Act 1958 (Vic)*, which reads:

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.

(iii) Proposal

A provision to the effect of section 59 of the *Wills, Probate and Administration Act 1898 (NSW)* or section 20 of the *Administration Act 1903 (WA)* should not be included in the model legislation. Rather, a provision to the effect of section 34 of the *Administration and Probate Act 1958 (Vic)* (which is to the same effect as Order 71, rule 84 of the *Rules of the Supreme Court 1900 (Qld)*) should be included in the model legislation.

5. LIMITS TO EXERCISE OF POWERS OF PERSONAL REPRESENTATIVE ONCE A GRANT IS MADE

(a) Introduction

Section 49(2) of the *Succession Act 1981 (Qld)* provides that, once a grant has been made, only personal representatives to whom the grant has been made are empowered to act in the estate unless the court otherwise orders. This means that an executor to whom the right to prove has been reserved is not empowered to act in the estate until he or she comes to court and proves the will. Section 49(2) of the *Succession Act 1981 (Qld)* provides:

Upon the making of a grant and subject thereto, the powers of personal representatives may be exercised from time to time only by those personal representatives to whom the grant is made; and no other person shall have power to bring actions or otherwise act as personal representative without the consent of the court.

(b) Relationship between sections 49 and 54

Section 49(2) of the *Succession Act 1981* (Qld) may arguably affect the protection given to informal administrators by section 54 of that Act.²⁰² Section 54 is expressed to apply to "any person, not being a person to whom a grant is made" who acts in the administration of an estate. By providing that, once a grant has been made, the powers of a personal representative may be exercised only by personal representatives with a grant and that no other person may act as a personal representative, section 49(2) may prevent the application of section 54 in a situation where a grant, which has not been revoked, has been made to a person who is still alive.

By way of example, a grant may be made to a member of the family of the deceased person, who becomes incapable of proceeding with the administration. The work is carried on by another member of the family without getting the original grant revoked and a new grant issued. Assuming that the person acting informally does the work properly, and debts are paid and assets sold or distributed in the same way that a properly authorised personal representative would have done them, the question arises, whether these acts should be deprived of validity and effectiveness, as would appear to be the effect of section 49(2).

If it is decided that a person acting informally when a grant has already been made has no power to act in relation to the estate because of the wording in section 49(2), then it follows that such a person cannot effectively "make any payment which might properly be made by a personal representative to whom a grant is made" as provided for under section 54. It could be argued that section 49(2) prevents section 54 from protecting such a person.

(c) Issues considered by the National Committee

The National Committee considered whether:

- (1) once a grant has been made, there should be a limit on the powers of persons other than those to whom the grant was made who act as personal representatives;
- (2) if yes to (1), whether a provision to the effect of section 49(2) of the *Succession Act 1981* (Qld) should be included in the model legislation;
- (3) if yes to (2), the provision based on section 49(2) of the *Succession Act 1981* (Qld) should be expressed to be subject to the equivalent of section 54(1) of the *Succession Act 1981* (Qld) (assuming that such a provision is also included in the model legislation).

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Section 54(1) is set out at p 149 of this Discussion Paper. Section 54(2) is set out at p 154 of this Discussion Paper. Section 54(3) is set out at p 155 of this Discussion Paper.

(d) **Questions for discussion**

- 8.14 Once a grant has been made, should there be a limit on the powers of persons other than those to whom the grant was made who act as personal representatives?
- 8.15 If yes to 8.14, should a provision to the effect of section 49(2) of the *Succession Act 1981 (Qld)* be included in the model legislation?
- 8.16 If yes to 8.15, should that provision be subject to the equivalent of section 54(1) of the *Succession Act 1981 (Qld)* if the later provision is adopted?

6. PERSONAL REPRESENTATIVES AS TRUSTEES

(a) **Introduction**

Administration of estates legislation appears to have become a repository for many provisions which would be more appropriately placed in other legislation or in rules. For example, there are a number of provisions currently in administration and probate legislation which refer to personal representatives in their capacity as trustee. Some of those provisions may be better placed in trustee legislation - particularly if their primary focus is concerned with the role of trustee and not with the role of executor or administrator of an estate. A policy adopted by the National Committee in other contexts during this project has been that provisions should be located in the legislation that is most relevant to the focus of those provisions, and that procedural matters should be found in rules - not the primary statute.

(b) **Relationship between personal representatives and trustees**

The role and duties of personal representatives are, in a number of respects, significantly distinct from those of trustees, yet in other respects they are similar. This may cause confusion about whether the law which governs certain situations should be trust law or succession law. For example, where an estate has been completely administered (that is, assets called in and debts paid out) but the personal representative is simply holding property for the purpose of transferring it to a beneficiary, the personal representative is regarded at law as a trustee and not as a personal representative.

A personal representative may also be in the position of being a trustee for some purposes and an executor for others - such as in the situation where a personal representative is appointed trustee of specific trusts under the will.

In the case of an intestacy, the personal representative is trustee for any beneficiaries who are not *sui juris*. Also, statute provides in the case of a partial intestacy arising under provisions of a will that the executor is to hold the residuary estate on trust for the persons entitled to it.²⁰³

Lee observes that it is quite normal for the duties of the trustee to "overtake and displace the duties of the personal representative, and whether this has occurred is a question of fact to be determined by reference to the particular asset with which one is concerned".²⁰⁴ Lee explains:²⁰⁵

... it may be clear to the personal representative that he or she will have no need of a certain asset, left by the testator on specific trusts, for the payment of the debts of the estate, and he or she may accordingly appropriate that asset for the trust of which he or she has been appointed trustee by the will and deal with it accordingly. The position as personal representative in relation to that asset is displaced by the position as trustee.

Whether a person is a personal representative or trustee in relation to deceased property may be significant. For example, Lee observes:²⁰⁶

The powers which the law allows personal representatives cannot be limited by the deceased's will; whereas, although in Queensland many of the powers conferred by the *Trusts Act* upon trustees override the provisions of the trust instrument,²⁰⁷ the settlor does have large powers of control over the trustee in many respects.

There are also restrictions on the ability of a personal representative to withdraw from the administration of an estate,²⁰⁸ whereas a trustee can retire at any time. Lee notes:²⁰⁹

A representative can never be made personally liable for debts or liabilities incurred by the deceased. If the debts of the estate exceed its assets, the estate will be wound up in bankruptcy. A representative is, however, personally liable for debts or liabilities incurred in the administration of a deceased estate, although he or she has a priority right of recourse against the assets of the estate. A trustee is always personally liable for debts and liabilities incurred, although he or she, too, has rights of recourse against the trust estate. But while there is a concept of the bankrupt deceased estate, there is no concept of a bankrupt trust.

203 — For example, *Succession Act 1981* (Qld) s 38.

204 Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 901.

205 Ibid.

206 Ibid.

207 Lee refers to Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at para 12010.

208 See the discussion of personal representatives relinquishing grants at pp 97-100 of this Discussion Paper.

209 Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 901.

A further complicating factor is that trustee legislation may apply to both personal representatives and trustees.²¹⁰

... so specific provisions which provide relief from liability to 'trustees' may extend to representatives. This is a statutory jurisdiction and may apply whether the initial liability be considered one at law or in equity.

(c) Appropriation of estate to beneficiaries by personal representative

QLD ²¹¹	ACT ²¹²	VIC ²¹³	NSW ²¹⁴	SA	WA ²¹⁵	NT	TAS	UK	NZ ²¹⁶
33(1)(l), (m)	46	31	46		30(1)(k)	81	40	41	15(1)(j)

A beneficiary entitled to an aliquot share of a deceased estate may prefer to receive a particular asset of the deceased estate rather than a sum of money. Ford and Lee explain the law in this situation:²¹⁷

The principle upon which trustees have power to appropriate any specific part of a residuary estate towards satisfying a legacy or share of residue is that they have power to sell the particular asset to the legatee, and to set off the purchase money against the legacy.²¹⁸

Thus, appropriation may be made:²¹⁹

... where the trustee may sell an asset to that beneficiary without breach of trust and the beneficiary is entitled to demand immediate payment or appropriation of a sum equal to the purchase money.

It is necessary for consent to be obtained from the beneficiary.

²¹⁰ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 18.9.2.

²¹¹ *Trusts Act 1973* (Qld).

²¹² *Trustee Act 1925* (NSW) in its application to the Territory by virtue of s 8 of the *Trustee Act 1957* (ACT) whereby the provisions of the *Trustee Act 1925* (NSW) apply in the Australian Capital Territory.

²¹³ *Trustee Act 1958* (Vic) s 31.

²¹⁴ *Trustee Act 1925* (NSW).

²¹⁵ *Trustees Act 1962* (WA).

²¹⁶ *Trustee Act 1956* (NZ).

²¹⁷ Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at para 16200.

²¹⁸ Ford and Lee refer to *Re Beverly* [1901] 1 Ch 681 and *Wigley v Grozier* (1909) 9 CLR 425 at 438.

²¹⁹ Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at para 16200.

Ford and Lee also note that trustees have the power to:²²⁰

... appropriate specific investments to any settled share, for instance a share settled upon a life tenant, without making any corresponding appropriation to other shares; but where the appropriated fund is to be held in trust it must take the form of authorised trustee securities. [notes omitted]

Because a power of appropriation is a fiduciary power, it must not be exercised so as to prejudice the interests of other beneficiaries. However, it is not incumbent upon the trustees to obtain the consent of other beneficiaries, at least where the property is personalty and has a market value.

All States and Territories except South Australia²²¹ have enacted legislation empowering personal representatives to make appropriations of assets to beneficiaries. Queensland, New South Wales, Western Australia and the Australian Capital Territory do this in their trustee legislation.

By way of example, section 33(1)(l) and (m) of the *Trusts Act 1973* (Qld) reads:

Miscellaneous powers in respect of property

(1) Every trustee, in respect of any trust property, may -

...

(l) appropriate any part of the property in or towards satisfaction of any legacy payable thereout or in or towards satisfaction of any share of the trust property (whether settled, contingent or absolute) to which any person is entitled, and for that purpose value the whole or any part of the property in accordance with section 51; but -

(i) the appropriation shall not be made so as to affect adversely any specific gift; and

(ii) before any such appropriation is effectual, notice thereof shall be given to all persons not under a disability who are interested in the appropriation, and to the parent or guardian of any infant who is interested in the appropriation, and to the person having the care and management of the estate of any person who is not of full mental capacity, and any such person may within 1 month after receipt of the notice or, upon the person's application to the court within that month, within such extended period as the court may allow, apply to the court to vary the appropriation, and the appropriation shall be conclusive save as varied by the court; and

(m) where provision is made in any instrument creating a trust for payment of an annuity or other periodic payment, and notwithstanding that the annuity or payment may by the instrument be charged upon the trust

220 Ibid.

221 See *Re Pearce* [1936] SASR 137.

property or upon any part thereof - set aside and appropriate out of property available for payment of the annuity and invest a sum sufficient in the opinion of the trustee at the time of appropriation to provide out of the income thereof the amount required to pay the annuity or periodic payment, and so that after the appropriation shall have been made -

- (i) the annuitant shall have the same right of recourse to the capital and income of the appropriated sum as the annuitant would have had against the trust property if no appropriation had been made; and
- (ii) the trustee may forthwith distribute the residue of the trust property and the income thereof (which residue and income shall no longer be liable for the annuity) in accordance with the trusts declared of and concerning the same; ...

Ford and Lee note that all the statutes:²²²

- (a) enable the trustee to appropriate any part of the trust property in or towards satisfaction of a legacy or of any share of the trust property;
- (b) require the trustee, in making an appropriation, to have regard to the rights of other beneficiaries;
- (c) enable the trustee to appropriate, to satisfy an annuity, property sufficient at the time of the appropriation to provide out of the income thereof the annuity given; and
- (d) enable the trustee to make valuations of the trust property for the purpose of making the appropriation.

(i) Issue considered by the National Committee

The National Committee considered whether provisions dealing with appropriation should be included in the model legislation, or whether they would be more appropriately located in each jurisdiction's trustee legislation.

(ii) The National Committee's preliminary view

The National Committee considered that the rules allowing appropriation should be common to both trustees and personal representatives. Already, most of the provisions relating to personal representatives are in the trustee legislation, there being many provisions in that legislation that relate both to trustees and to personal representatives. There would be nothing unexpected in having appropriation provisions there too. On the other hand, it would be most unusual to place legislation common to trustees and personal representatives in administration and probate legislation, where trustees would not expect it to be located.

²²²

Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at para 16220.

The National Committee was of the view that such a provision would be more appropriately located in each jurisdiction's trustee legislation.

(iii) Proposal

The model legislation should not include a provision dealing with the appropriation of assets by trustees to beneficiaries.

(d) Power to appoint trustees of minor's property

QLD	ACT	VIC	NSW ²²³	SA	WA	NT	TAS	UK	NZ
		47	151(d)		17A		41	42	

The statutory powers of appropriation referred to in (c) above,²²⁴ would enable trustees to appropriate in favour of all beneficiaries - whether they are minors or adults. Other statutory provisions enable trust property to be distributed upon trust for minor beneficiaries. For example, in New South Wales, Victoria, Tasmania, Western Australia and the United Kingdom, there are provisions enabling the personal representative to appoint a trust company or a number of individuals (at least two but no more than four) to be trustee or trustees of the legacy or devise to a minor. Ford and Lee note:²²⁵

The appointment of the trustees and the transfer of the devise or legacy to them effectively discharges the personal representative's liability in relation to the legacy. [note omitted]

Ford and Lee suggest that such provisions are merely declaratory of the law.²²⁶

The Western Australian provision is typical. Section 17A of the *Administration Act 1903* (WA) reads:

²²³ *Conveyancing Act 1919* (NSW).

²²⁴ See pp 104-107 of this Discussion Paper.

²²⁵ Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at para 16240.

²²⁶ *Ibid.*

Power to appoint trustees of infant's property

- (1) Subject to subsection (5), where an infant is absolutely entitled under the will or on the intestacy of a person (in this section called "the deceased") to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and that devise, legacy, residue or share is not, under the will (if any) of the deceased, devised or bequeathed to trustees for the infant, the personal representatives of the deceased may appoint a trustee corporation (including the Public Trustee) or 2 or more individuals not exceeding 4 (whether or not including the personal representatives or one or more of them) to be the trustee or trustees of that devise, legacy, residue or share for the infant, and may execute or do any assurance, act or thing requisite for vesting that devise, legacy, residue or share in the trustee or trustees so appointed.
- (2) On the vesting of the devise, legacy, residue or share mentioned in subsection (1) in the trustee or trustees appointed under this section, the personal representatives as such are discharged from all further liability in respect of that devise, legacy, residue or share.
- (3) Trustees appointed under this section may retain any property transferred to them pursuant to the provisions of this section in its existing condition or state of investment, or may convert it into money, and upon conversion shall invest the money as trust funds may be invested under Part III of the *Trustees Act 1962*.
- (4) Where a personal representative has, before 1 January 1963, retained or sold any such devise, legacy, residue or share as is mentioned in subsection (1), and has invested it or the proceeds thereof (as the case may be) in any investments in which he was authorized to invest money subject to the trust, then, subject to any order of the Court made before that date, he shall be deemed not to have incurred any liability on that account or by reason of not having paid or transferred the money or property into Court.
- (5) The power of appointing trustees conferred upon personal representatives by this section is subject to any direction or restriction contained in the will of the deceased.

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 17A of the *Administration Act 1903 (WA)* should be included in the model legislation or whether such a provision would be more appropriately located in Public Trustee legislation.

(ii) The National Committee's preliminary view

The National Committee noted that section 17A of the *Administration Act 1903 (WA)* has only limited application as it applies only where the minor is absolutely entitled and where the will does not leave the property to trustees for the minor.

However, the National Committee considered whether it would be appropriate to refer to trustee powers in administration and probate legislation. The National Committee was of the view that it would be helpful to at least cross-refer to the relevant provisions of trustee legislation in the administration and probate

legislation to lessen the confusion between the administration powers and the trustee powers of personal representatives.

(iii) Proposal

A provision to the general effect of section 17A of the *Administration Act 1903 (WA)* should be included in the model legislation. However, rather than set out the trustee powers referred to in that section, the model legislation should cross-refer to the relevant powers in the trustee legislation of the particular jurisdiction.

(e) Court may order sale of minor's property

Section 63 of the *Administration and Probate Act 1919 (SA)* enables the personal representative to seek an order from the court to sell property held on behalf of a minor, if the court considers the sale to be for the infant's benefit. Section 63 reads:

Court may order sale of infant's property

The Court may, on the application by petition, summons, or otherwise of any executor, administrator, or trustee in whom any real or personal property, whether specifically devised or bequeathed or not, belonging to any infant is vested, or on the like application of the guardian of the estate or the next friend of any infant beneficially entitled to any real or personal property, whether specifically devised, or bequeathed or not, order that such property, or any part thereof, be sold in any case in which the Court considers it for the benefit of the infant that such sale should be effected.

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 63 of the *Administration and Probate Act 1919 (SA)* should be included in the model legislation, or whether such a provision would be more appropriately located in trustee legislation.

(ii) The National Committee's preliminary view

The National Committee noted that a personal representative who has completed the administration of an estate and is holding property for the benefit of a minor is trustee of that property and is subject to the powers and responsibilities of a trustee under trustee legislation. A minor's property held on trust in Queensland can already be sold under section 32(1) of the *Trusts Act 1973 (Qld)* which reads:

Subject to the provisions of this section, every trustee, in respect of any trust property, may -

- (a) sell the property or any part of the property; ...

However, in other Australian jurisdictions, unless there is a power of sale expressed in the will or trust instrument, it is expected that the trustee will seek the court's authority to sell,²²⁷ particularly if there are minor beneficiaries.²²⁸

(iii) Proposal

A provision to the general effect of section 63 of the *Administration and Probate Act 1919 (SA)* should be included in the model legislation. However, rather than set out the trustee powers referred to in that section, the model legislation should cross-refer to the relevant powers in the trustee legislation of the particular jurisdiction.

(f) Investment of minor's property

A provision relating to the investment of a minor's property being held on trust by a personal representative appears in the Tasmanian administration and probate legislation. Section 33(3) of the *Administration and Probate Act 1935 (Tas)* reads:

During the minority of any beneficiary or the subsistence of any life interest, and pending the distribution of the whole or any part of the estate of the deceased, the personal representatives may invest the residue of the said money, or so much thereof as may not have been distributed, in any investments for the time being authorized by law for the investment of trust money, with power at the discretion of the personal representatives, to change such investments for others of a like nature.

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 33(3) of the *Administration and Probate Act 1935 (Tas)* should be included in the model legislation.

²²⁷ See *Trustee Act 1925 (NSW)* s 81; *Trustee Act 1958 (Vic)* s 63; *Trustees Act 1936 (SA)* s 59B; *Trustees Act 1962 (WA)* s 89; *Trustee Act 1898 (Tas)* s 47; *Trustee Act (NT)* s 50A. See also the general power in the court to authorise the sale of property under s 94 of the *Trusts Act 1973 (Qld)*.

²²⁸ Beneficiaries of full age and capacity can authorise the trustee to sell without further authority: Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at para 12270.

(ii) The National Committee's preliminary view

Trustees already have a general duty to invest trust funds so as to make them productive. In all Australian jurisdictions except Queensland and the Australian Capital Territory, trustees are no longer limited to statutorily authorised investments.²²⁹ For example, section 5 of the *Trustee Act 1958* (Vic) reads:

Investments of trust funds

A trustee may, unless expressly prohibited by the instrument creating the trust -

- (a) invest trust funds in any form of investment; and
- (b) at any time, vary an investment.

Commenting on the broad investment powers, Ford and Lee note that:²³⁰

Investment decisions are now the exclusive responsibility of the trustees, observing the strictures of the prudent person rule.

(iii) Proposal

A provision to the general effect of section 33(3) of the *Administration and Probate Act 1935* (Tas) should be included in the model legislation. However, rather than set out the trustee powers referred to in that section, the model legislation should cross-refer to the relevant powers in the trustee legislation of the particular jurisdiction.

(g) Court may authorise payments for maintenance of minors

A provision in the Western Australian administration and probate legislation enables the court to distribute payments to minors for their "maintenance, advancement and education". Section 17 of the *Administration Act 1903* (WA) reads:

²²⁹ *Trustee Act 1925* (NSW) s 14; *Trustee Act 1898* (Tas) s 6; *Trustee Act 1958* (Vic) s 5; *Trustees Act 1936* (SA) s 6; *Trustees Act 1962* (WA) s 17; *Trustee Act 1980* (NT) s 5; *Trustee Act 1956* (NZ) s 13A. In Queensland, the *Trusts (Investments) Amendment Bill 1999* (Qld) was introduced on 8 June 1999. The Bill proposes the repeal and replacement of Part 3 of the *Trusts Act 1973* (Qld) (Investments). If the Bill is passed, the statutory list approach to trustee investments will be replaced by the "prudent person rule".

²³⁰ Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at para 10070.

Court may deal with interest of infants in certain cases

- (1) Where a person dies leaving infant issue and the value of the share of the real and personal property of the deceased person to which an infant is entitled in distribution does not exceed \$10 000 the Court may, on the application of any such infant, or of any person on his behalf, authorize the executor or administrator to expend the whole or any part of the share of such infant in his maintenance, advancement, or education.
- (3) The power or authority that the Court may confer under this section on an executor or administrator is in addition to any other power or authority, statutory or otherwise, that the executor or administrator may have to pay or apply capital money or assets, or the income thereof, to or on behalf of an infant.

(i) Issue considered by the National Committee

The National Committee considered whether, given the powers of advancement found in trustee legislation²³¹ and the fact that section 53 of the model uniform *Wills Bill 1997*²³² would permit a distribution for the maintenance of a dependant who had an entitlement under a will, it would be necessary to include a provision to the effect of section 17 of the *Administration Act 1903* (WA) in the model legislation.

(ii) The National Committee's preliminary view

Under the legislation in the various Australian jurisdictions, including Western Australia, trustees already have the power to advance capital sums to beneficiaries, including minors.²³³ Most trustee legislation permits the trustee to advance up to half of the capital to the beneficiary minor. For example, section 62(1) of the *Trusts Act 1973* (Qld) reads:

Power to apply capital for advancement etc.

Where under a trust a person is entitled to the capital of the trust property or any share thereof, the trustee, in such manner as the trustee in the trustee's absolute discretion thinks fit, may from time to time out of that capital pay or apply for the maintenance, education (including past maintenance or education), advancement or benefit of that person, an amount not exceeding in all \$2 000 or one-half that capital (whichever is the greater) or with the consent of the court an amount greater than that amount.

²³¹ See, for example, *Trusts Act 1973* (Qld) s 61 (Power to apply income for maintenance etc and to accumulate surplus income during a minority) and s 62 (Power to apply capital for advancement etc). Section 62 permits a trustee to apply capital not exceeding in all \$2000 or one-half of the capital (whichever is the greater) or, with the consent of the court, a greater amount.

²³² National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997) at 19, 115-117; New South Wales Law Reform Commission, Report, *Uniform Succession Laws: The law of wills* (R 85, 1998) at 186-190, 219.

²³³ *Trustee Act 1925* (NSW) s 44(1), (2); *Trustee Act 1958* (Vic) s 38(2); *Trusts Act 1973* (Qld) s 62(2),(3); *Trustee Act 1936* (SA) s 33A(2); *Trustees Act 1962* (WA) s 59; *Trustee Act 1898* (Tas) s 29(1).

(iii) Proposal

A provision to the general effect of section 17 of the *Administration Act 1903 (WA)* should be included in the model legislation. However, rather than set out the trustee powers referred to in that section, the model legislation should cross-refer to the relevant powers in the trustee legislation of the particular jurisdiction.

(h) Application of income of settled residuary real or personal estate

QLD ²³⁴	ACT	VIC ²³⁵	NSW	SA	WA ²³⁶	NT	TAS	UK	NZ
78	41D	74	46D		105	58			

The effect of these provisions is to abolish the rule in *Allhusen v Whittell*.²³⁷ The rule has been abolished in all Australian jurisdictions except South Australia and Tasmania. In the Australian Capital Territory, New South Wales and the Northern Territory the rule has been abolished by a provision in the administration and probate legislation; in other jurisdictions it has been abolished by trustee legislation.²³⁸

Section 46D of the *Wills, Probate and Administration Act 1898 (NSW)* reads:

Application of income of settled residuary real or personal estate

- (1) Where, under the provisions of the will of a person dying after the commencement of the *Conveyancing (Amendment) Act 1930* (in this section called "the deceased"), any real or personal estate included (either by specific or general description) in a residuary gift is settled by way of succession, no part of the income of that property shall be applicable in or towards the payment of the funeral, testamentary, and administrative expenses, debts, and liabilities, or of the interest (if any) thereon up to the date of the death of the deceased, or of any legacies bequeathed by such will.
- (2) The income of the settled property shall be applicable in priority to any other assets in payment of the interest (if any) accruing due on the funeral, testamentary, and administrative expenses, debts, liabilities and legacies, after

²³⁴ *Trusts Act 1973 (Qld)*.

²³⁵ *Trustee Act 1958 (Vic)*.

²³⁶ *Trustees Act 1962 (WA)*.

²³⁷ (1867) LR 4 Eq 295.

²³⁸ For further information see Rowland CJ and Tamsitt GM, *Hutley's Australian Wills Precedents* (5th ed 1994) at para 2614; Ford HAJ and Lee WA, *Principles of the Law of Trusts* (supplemented book) at paras 11060-11100.

the date of the death of the deceased and up to the payment thereof, and the balance of such income shall be payable to the person for the time being entitled to the income of the property.

- (3) Where, after the death of the deceased, income of assets which are ultimately applied in or towards payment of the funeral, testamentary, and administrative expenses, debts, liabilities and legacies arises pending such application, that income shall, for the purposes of this section, be deemed income of the residuary estate of the deceased.
- (4) This section shall only affect the rights of beneficiaries under the will as between themselves, and shall not affect the rights of creditors of the deceased.
- (5) This section shall have effect, subject to the provisions (if any) to the contrary contained in the will and to the provisions of any Act as to charges on property of the deceased.

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 46D of the *Wills, Probate and Administration Act 1898 (NSW)* - which abolishes the rule in *Allhusen v Whittell* - should be included in the model legislation, or whether such a provision would be more appropriately located in trustee legislation.

(ii) The National Committee's preliminary view

The National Committee recognised that this is old law which possibly should be replaced by legislation requiring, but also conferring a discretion on, the trustee to maintain fairness between capital and income accounts. In jurisdictions which still maintain the distinction between trusts for sale and settled land it is arguable that this belongs in administration legislation. However, the most suitable place for this type of provision is in trustee legislation where it is located in most jurisdictions.

(iii) Proposal

A provision to the effect of section 46D of the *Wills, Probate and Administration Act 1898 (NSW)* should not be included in the model legislation.

(i) Public Trustees to be able to remit assets to public trustees outside the jurisdiction, and to receive assets remitted to them

Section 142 of the *Administration Act 1903 (WA)* reads:

Payment of balance of estate to Curator or Public Trustee of State or Colony where deceased was domiciled. Public Trustee may receive any part of estate from outside the State

- (1) Where the Public Trustee of Western Australia is administering the estate of any person who at the time of his death was domiciled in any other part of the Commonwealth or in New Zealand, and whose estate is being administered by the Curator or Public Trustee of the State or Colony in which the deceased was domiciled, the balance of the estate, after payment of local creditors, commission fees, and expenses, may be paid over to such last named Curator or Public Trustee.
- (2) Where any part of the estate of a deceased person, whose estate is being administered by the Public Trustee of Western Australia, is situated outside the limits of Western Australia, such Public Trustee may receive any part of such estate so situated, and, when received, the same shall be dealt with according to the law of Western Australia.

(i) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 142 of the *Administration Act 1903 (WA)* should be included in the model legislation, or whether such a provision would be more appropriately located in Public Trustee legislation, given that it deals only with estates being administered by the Public Trustee.

(ii) The National Committee's preliminary view

The National Committee noted that the next part of the Administration of Estates stage of the Uniform Succession Laws Project will be the recognition of interstate and foreign grants of probate and reseals and that this provision might be better discussed in the context of that part of the project.

(iii) Proposal

This matter should be considered in that part of the Uniform Succession Laws Project dealing with the recognition of interstate and foreign grants of probate and reseals.

(j) Retiring as trustee

The National Committee considered the need for a provision to deal with the situation where a personal representative who has completed the duties of administration and become a trustee of any of the deceased's property remaining in his or her hands wishes to be relieved of his or her responsibilities. There may well be trusts affecting such property, perhaps created by will, or imposed because a beneficiary is incapacitated.

(i) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision requiring the court's consent before personal representatives who have completed administration of the estate but remain trustees of estate assets may relinquish their trust duties.

(ii) The National Committee's preliminary view

In the view of the National Committee, the personal representative, as trustee, has the same powers to "relinquish" the trusteeship as has any other trustee, for instance, by appointing another person or persons as new trustees. In the view of the National Committee there is no reason to insist on the court's consent. To do so would be inconsistent with trustee legislation.

(iii) Proposal

The model legislation should not include a provision requiring personal representatives to obtain court authority before relinquishing their trustee duties.

7. THE NUMBER OF PERSONAL REPRESENTATIVES

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK ²³⁹	NZ
48							14	114(1)	

(a) Limiting the number of personal representatives to whom a grant can be made

In most jurisdictions reviewed by the National Committee, there is no restriction on the number of personal representatives to whom a grant may be made. However, in Queensland, Tasmania and the United Kingdom, a grant of probate or administration may be made to no more than four persons.

In the United Kingdom there is a further requirement that there be a minimum number of personal representatives appointed where there is a minority or life interest under a will.

Section 48 of the *Succession Act 1981* (Qld) reads:

Provisions as to the number of personal representatives

- (1) A grant shall not be made to more than 4 persons at any one time and where a testator appoints more than 4 persons as executors the order of their entitlement to a grant shall be the order in which they are named.
- (2) This section shall apply to grants made after the commencement of this Act whether the testator or intestate died before or after such commencement.

It may be desirable, where the persons to be named as executors are natural persons, to appoint more than one in order to avoid the need for the operation of the chain of representation.²⁴⁰ However, when recommending the introduction of a provision to the effect of section 48 of the *Succession Act 1981* (Qld), the Queensland Law Reform Commission suggested, in its 1978 Report, that the likelihood of disagreement or failure of communication is increased if there is a large number of executors acting together in the administration of a deceased estate.²⁴¹

An additional reason given by the Queensland Law Reform Commission in its 1978 Report for limiting the number of executors to four is that that number corresponded to the maximum number of trustees permitted in the case of a private trust.²⁴² A number of other Australian jurisdictions also limit the number of trustees to a maximum of four.²⁴³

(i) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision to the effect of section 48 of the *Succession Act 1981* (Qld)

²⁴⁰ See Chapter 6 of this Discussion Paper in relation to the chain of representation.

²⁴¹ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 31.

²⁴² Ibid.

²⁴³ See, for example, *Trustee Act 1925* (NSW) ss 6(5)(b), (c) and 7(5); *Trustee Act 1958* (Vic) s 40; and *Trustees Act 1962* (WA) s 7(2), (5).

so that a grant may not be made to more than four persons and, if a testator appoints more than four persons as executors, they should be entitled to a grant in the order in which they are named.

(ii) The National Committee's preliminary view

Although the general feeling of the Registrars of Probate was that applications for multiple grants were rare and, in practice, did not present a problem, the National Committee was of the view that there should be a limit on the number of executors who should be allowed to prove a will or on the number of persons who should be able to be granted letters of administration.

Elsewhere in this Discussion Paper,²⁴⁴ the National Committee has recommended that a provision in terms similar to section 49(5) of the *Succession Act 1981* (Qld) be included in the model legislation. That provision reads:

The powers of personal representatives shall be exercised by them jointly.

If a provision to the effect of section 49(5) of the *Succession Act 1981* (Qld) is adopted as the National Committee has recommended,²⁴⁵ personal representatives will be required to act jointly and it may be still more important to limit the number of executors acting in the estate.

(iii) Proposal

A provision to the effect of section 48 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(b) Number of personal representatives where minority interest

In section 14 of the *Administration and Probate Act 1935* (Tas) and section 114(1) of the *Supreme Court Act 1981* (UK) at least two persons or a trustee company are required to be appointed where there is a minority or life interest arising under the will or intestacy.²⁴⁶

²⁴⁴ See p 81 of this Discussion Paper.

²⁴⁵ Ibid.

²⁴⁶ That requirement was expressly rejected by the Queensland Law Reform Commission in its 1978 Report. See Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 31, 32.

(i) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision requiring a minimum of two personal representatives where there is a minority interest arising under a will or on intestacy.

(ii) The National Committee's preliminary view

The National Committee acknowledged that minority interests were vulnerable to being neglected or ignored. There was, however, concern as to how protection of such interests could best be achieved.

The view was expressed that, in some cases, there would not be two people available for appointment. Even if there were, it would not guarantee that the personal representatives would act appropriately.

It was suggested that a range of other measures, such as a discretion as to the imposition of certain conditions on the administration of the deceased estate, may need to be available to the court to ensure that each case is dealt with in an appropriate manner.

(iii) Proposal

The model legislation should include a provision to the effect that, where there is a minority interest, the court may make such order as to the protection of that interest as it considers appropriate. It should be possible for the court to require bonds, sureties, the passing of accounts, or the appointment of multiple personal representatives.

8. LIABILITY OF ATTORNEY OF PERSONAL REPRESENTATIVE

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
		86				32			42

(a) Introduction

Victoria and New Zealand have enacted provisions to deal with the liability of a local attorney - administrator for a foreign principal.²⁴⁷

Section 86 of the *Administration and Probate Act 1958* (Vic) reads:

Administrator under power of attorney

Notwithstanding anything contained in this Act a person duly authorised 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;
- (b) has paid all charges duties and fees under the *Probate Duty Act 1962*;
- (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.

The section provides that the local attorney may remit to the foreign principal, and in so doing, is not bound to see to the application of the remitted assets.

The section also provides that, in distributing among persons locally entitled, the local attorney must, in order to enjoy the advantage of the section - that is, to be able to remit the remaining assets to the donor of the power without incurring personal liability - pay all charges and fees under the Act, and must satisfy or provide for the debts and claims of all persons living within the local jurisdiction.

²⁴⁷

Prior to the enactment of statutory provisions in Victoria, the law was exemplified by the case of *Permezel v Hollingworth* [1905] VLR 321 (see also *Re Ralston* [1906] VLR 689). The Court in that case decided that an attorney who had a reseal was under a duty not to remit the assets to the donor of the power (who will often but not always be the foreign personal representative) but to distribute them directly to the persons beneficially entitled to those assets.

Sundberg notes that the Victorian provision raises some questions of its own.²⁴⁸ In particular, does the word “claims” in the section include the claim of a person to family provision, or the right of a spouse of an intestate to preferential treatment in relation to the intestate’s interest in the matrimonial home?

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

Liability of agent of administrator

No person appointed 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 anyone 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.

The rules laid down in the two jurisdictions differ markedly. The New Zealand provision does not attempt to follow the case law, and is much less complicated than the Victorian provision.²⁴⁹

Further, the Victorian provision is limited to reseals, and does not apply to the primary grant. It is a safeguard for the attorney.

The Victorian Registrar of Probates has informed the National Committee that he is not aware of the provision ever having been used. There is an argument that inaccessible law is poor law, particularly where it is rarely used.

(b) Issue considered by the National Committee

The National Committee considered whether there would be any benefit in including in the model legislation a provision along the lines of either the New Zealand or Victorian provision in relation to both a grant and a reseal of a grant.

(c) The National Committee’s preliminary view

The National Committee did not reach a conclusion on this issue, but agreed to seek submissions on the matter.

²⁴⁸ Sundberg RA, *Griffith’s Probate Law and Practice in Victoria* (3rd ed 1983) at 138.

²⁴⁹ *Id* at 137-138. The author gives the history of the section and notes that it was enacted to deal with problems with the case law. The author criticises the section, suggesting that it leaves questions unanswered.

(d) Question for discussion

8.17 Should the model legislation include a provision to the effect of either the New Zealand or Victorian provisions set out above in relation to both a grant and a reseal of a grant?

9. GRANTS TO PUBLIC TRUSTEES IN OTHER JURISDICTIONS**(a) Introduction**

Legislation in the Northern Territory provides that, where a deceased person has named a Public Trustee in another jurisdiction as executor, the local court may grant probate to that Public Trustee. Section 20 of the *Administration and Probate Act (NT)* reads:

Court may grant probate to public trustee named as executor

Where a deceased person has named the public trustee of a State or Territory of the Commonwealth as an executor of his will, the Court may grant probate of the will to that public trustee.

(b) Issues considered by the National Committee

The National Committee considered whether:

- (1) the model legislation should include a provision to the effect of section 20 of the *Administration and Probate Act (NT)* allowing the court to grant probate to a Public Trustee in another jurisdiction who has been named as executor in the will of a deceased person;
- (2) the definition of "personal representative" should include reference to the Public Trustee or equivalent position in the particular jurisdiction.

(c) The National Committee's preliminary view

The National Committee was of the view that it was not necessary to include a provision to the effect of section 20 of the *Administration and Probate Act (NT)* in the model legislation. This is because section 6 of the *Succession Act 1981 (Qld)*, the adoption of which has already been proposed by the National Committee²⁵⁰ and which gives the

²⁵⁰

See p 18 of this Discussion Paper.

court power to make grants, is wide enough to allow the court to make a grant of this kind.

Furthermore, for the same reasons expressed in the discussion of trustee corporations,²⁵¹ the National Committee is of the view that the term "personal representative" should not be defined to include Public Trustees.

(d) Proposal

In light of the National Committee's earlier proposal that a provision to the effect of section 6 of the *Succession Act 1981 (Qld)* should be included in the model legislation, it is not necessary to include a provision to the effect of section 20 of the *Administration and Probate Act (NT)*. The term "personal representative" should not be defined to include Public Trustees.

(e) Questions for discussion

8.18 Given that Public Trustees can administer deceased estates other than by being appointed executor by a will or administrator by the court, is it necessary for the term "personal representative" to be defined to cover Public Trustees acting in that capacity? (An appropriate definition might include words such as: "and includes any other person who by statute has the powers and functions of an executor or administrator".)

8.19 Should a provision to this effect be in Public Trustee legislation rather than in administration and probate legislation?

CHAPTER 9

ADMINISTERING AN ESTATE PURSUANT TO A GRANT

1. PERSONS WITH AN INTEREST IN THE ADMINISTRATION OF AN ESTATE

Different people have different interests in the administration of an estate. The main interests may be described as follows:

(a) Beneficiaries

Beneficiaries have an interest in knowing that all the assets have been disclosed. Residuary beneficiaries, in particular, have an interest in inexpensive procedures being adopted in the administration of the estate so that their shares of the estate are not unnecessarily diminished.

(b) Creditors

Creditors have an obvious interest in being paid what is owed to them from the deceased's estate.

(c) Family provision claimants

Family provision claimants, both present and potential, have an interest in the recognition of their claims and in the preservation of the estate to provide for those claims.

(d) Personal representatives

A personal representative has an interest in the simplicity of the administration. A personal representative also has an interest in being protected from liability to other interested parties as a result of claims arising from administration of the estate.

2. BALANCING THE VARIOUS INTERESTS

In any system of administration there is a need to balance these sometimes competing interests. For example, family provision claimants must be given a reasonable time to make their claims, but not so long as to delay unduly the administration of an estate to the prejudice of beneficiaries. Personal representatives must also be able to distribute the estate at a certain point, without fear of personal liability for further claims that might be made on the estate by either creditors or family provision claimants.

A number of jurisdictions impose obligations on personal representatives acting pursuant to a grant to protect the interests of persons who may be affected by the administration of the estate. The main obligations currently imposed are the filing of inventories, the filing of accounts and, in relation to administrators, the provision of an administration bond and sureties.

In this Chapter, the National Committee examines these obligations, as well as the liability of personal representatives in respect of dispositions or payments made while acting under a grant.

3. INVENTORIES²⁵²

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
			81A, 81B	44, 121A		O 88 r 27			

(a) Nature and function of an inventory

An inventory of the assets of an estate enables persons interested in its administration to see whether it is worth bringing a family provision application. It also discourages the hiding of assets and promotes honesty.²⁵³ To be effective, an inventory should include foreign assets.²⁵⁴ An inventory can be quite informal. Precise valuations are not generally needed. Assets discovered after the inventory has been filed can be disclosed in supplementary inventories from time to time.

An inventory may assist in identifying assets, even many years after the death. One situation where this might be useful could occur if, as occasionally happens, a succession of deceased estates has not been properly administered, and records of assets have been misplaced or lost.²⁵⁵

Every person administering an estate is obliged to keep accounts.²⁵⁶ It is arguable that requiring an inventory helps to ensure that the person administering the estate complies with this obligation, because the inventory forms the basis of the accounts.

²⁵² See also the discussion of the personal representative's duty to provide an inventory at pp 60-62 of this Discussion Paper.

²⁵³ The inventory can also be a useful historical document for people tracing family histories, though this consideration cannot be given much weight as a reason for requiring a personal representative to file an inventory.

²⁵⁴ However, foreign assets should not be used to inflate the value of the estate for the purposes of calculating fees; the value of foreign assets should be excluded for the purpose of calculating fees.

²⁵⁵ The case of *Cameron v Murdoch* [1983] WAR 321 provides a graphic illustration of the difficulties that this can cause.

²⁵⁶ See pp 60-61 of this Discussion Paper.

(b) Current statutory requirements for an inventory

There are special inventory and disclosure requirements in New South Wales and South Australia.

Section 81A of the *Wills, Probate and Administration Act 1898* (NSW) requires an applicant for a grant of probate or administration to disclose to the court the assets and liabilities of the deceased. Section 81B deals with the consequences of non-disclosure. Section 81A reads:

Disclosure of assets and liabilities of deceased

- (1) A person who applies for a grant of probate or administration in respect of the estate of a person who dies on or after 31st December 1981 shall, in accordance with the rules of Court, disclose to the Court the assets and liabilities of the deceased.
- (2) An executor, administrator or trustee of the estate of a person who dies on or after 31st December 1981 shall, in accordance with the rules of Court, disclose to the Court any assets and liabilities of the deceased which have not previously been disclosed to the Court.

Section 81B reads:

Power to deal with assets etc.

- (1) Nothing in this Part enables an executor, administrator or trustee of the estate of a person who dies on or after 31st December 1981 to complete the disposition of, and such an executor, administrator or trustee shall not complete the disposition of, any property of the deceased vested in the deceased which has not been disclosed to the Court pursuant to section 81A(1) or (2).
- (2) Nothing in subsection (1) prevents an executor or administrator from effecting an appointment pursuant to section 75A.
- (3) Nothing in subsection (1) affects any interest in any property acquired from an executor, administrator or trustee referred to in that subsection by a person where the interest was acquired in good faith, for valuable consideration and without notice that the property had not been disclosed to the Court pursuant to section 81A (1) or (2).

Sections 81A and 81B were introduced as a consequence of the abolition of stamp duty on deceased estates. When stamp duties had to be paid, the stamp duty legislation required disclosure of assets so that the duty could be assessed. With the abolition of stamp duty on deceased estates the duty of disclosure ceased. Sections 81A and 81B were enacted to fill this gap.

Section 81B(1), read with section 81A(1), seems not only to make the inventory mandatory, but also to make it mandatory to take out a grant in every case. However, section 81B(3) protects a person who acquires the property in good faith, for valuable consideration and without knowledge of its non-disclosure in an inventory.

Legislation in South Australia also requires disclosure of the assets of an estate. Section 44 of the *Administration and Probate Act 1919 (SA)* reads:

Obligation of person dealing with asset to ensure that it has been properly disclosed

- (1) A person who deals with an asset of the estate of a deceased person that is required to be disclosed under section 121A must satisfy himself by examination of the Registrar's certificate, or on the basis of some other reliable evidence, that the asset has in fact been so disclosed.
- (2) A person who fails to comply with subsection (1) shall be guilty of a summary offence and liable to a penalty not exceeding two thousand dollars.
- (3) This section does not apply to an asset of the estate of a deceased person who died before the day on which section 121A came into operation.

Section 121A of the South Australian Act is in similar, but even stronger, terms to sections 81A and 81B of the *Wills, Probate and Administration Act 1898 (NSW)*. Unlike the New South Wales provisions, section 121A of the South Australian Act contains a sanction for a failure to disclose assets. Section 121A reads:

Statement of assets and liabilities to be provided with application for probate or administration

- (1) A person who applies -
 - (a) for probate or administration; or
 - (b) for the sealing of any probate or administration granted by a foreign court,

in respect of the estate of a deceased person shall, in accordance with the rules, disclose to the Court the assets and liabilities of the deceased person known to him at the time of making the application.
- (2) An executor, administrator or trustee of the estate of a deceased person (being an estate in respect of which probate or administration has been granted or sealed by the Court) shall, in accordance with the rules, disclose to the Court any assets or liabilities of the deceased person (not being assets or liabilities previously disclosed under this section) which come to his knowledge while acting in that capacity.
- (3) An executor, administrator or trustee of an estate shall not dispose of an asset of the estate in respect of which disclosure has not been made to the Court pursuant to this section.
- (4) Nothing in subsection (3) affects the interests of a person who acquires an asset of an estate in good faith for valuable consideration and without knowing that the asset has not been disclosed to the Court pursuant to this section.
- (5) An executor, administrator or trustee who contravenes or fails to comply with a provision of this section is guilty of a summary offence and liable to a penalty not exceeding two thousand dollars.

- (6) This section does not apply in respect of an estate of a deceased person who died before the commencement of this section.
- (7) A reference in this section to the assets and liabilities of a deceased person is a reference to -
- (a) assets and liabilities of the deceased at the date of his death; and
 - (b) assets falling into the estate after the death of the deceased not being an accretion to the estate arising out of an asset existing at the date of his death,
- but does not include a reference to any asset or liability prescribed by the rules.
- (8) In this section -
- “administration”** includes an order under section 79 authorising the Public Trustee to administer the estate of a deceased person.

(c) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision requiring an applicant for a grant of probate or letters of administration to disclose to the court the assets and liabilities of the deceased.

(d) The National Committee's preliminary view

The National Committee was of the view that the requirement to file an inventory was of assistance in ensuring that a personal representative keeps proper accounts. It was considered that, if an inventory were required, it should include assets within and outside the jurisdiction, and should also include liabilities.

However, the National Committee considered that provisions to the effect of sections 81A and 81B of the *Wills, Probate and Administration Act 1898* (NSW), which prevent a personal representative disposing of an asset without a grant of probate or administration, would unduly hinder the efficient informal administration of small estates. The National Committee was therefore of the view that, if the provisions were to be included in the model legislation, the obligation to file an inventory should be limited to personal representatives who apply for a grant.

The National Committee was also of the view that sections 44(1) and 121A of the *Administration and Probate Act 1919* (SA) were clearer than the New South Wales provisions. However, the National Committee did not decide whether the model legislation should impose a criminal sanction in the event that the personal representative deals with the assets of the estate without first disclosing them.

(e) Proposal

Provisions to the general effect of sections 44(1) and 121A of the *Administration and Probate Act 1919 (SA)*, requiring a personal representative who applies for a grant of probate or administration to file an inventory, should be included in the model legislation.

(f) Questions for discussion

9.1 If a provision to the effect of section 52(1) of the *Succession Act 1981 (Qld)* (see Chapter 8 of this Discussion Paper) is adopted by the model legislation, would a provision to the general effect of sections 44(1) and 121A of the *Administration and Probate Act 1919 (SA)* still be necessary?

9.2 Should the model legislation impose a criminal sanction on a personal representative who deals with assets of an estate without first disclosing them?

4. ADMINISTRATION BONDS AND SURETIES

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
51	14, 17, 18, 18A, 19	35, 57	64-68	18, 31-33, 57	26, 143B	23, 26, 27	25, rr 31-36		68

(a) Introduction

In the context of the administration of estates, a bond is an undertaking on oath on the part of the administrator to perform the obligations of the administrator and to make good any default in the administration of the estate by the administrator. A surety is a person or corporation who undertakes to guarantee to satisfy the obligations undertaken by the administrator. The bond affords creditors or beneficiaries a remedy against the surety in the event of default by the administrator.

Legislation in most jurisdictions requires an administrator to whom letters of administration are granted to enter into an administration bond. An administration bond repeats the obligations of the administrator. It also contains an undertaking to the court

by the administrator and the sureties, if any, to make good any default in the administration of the estate by the administrator.²⁵⁷

If an administrator defaults in the administration of an estate, an aggrieved person may, after applying to the court to have the bond assigned to him or her, sue on the bond as if it had originally been given to the aggrieved person.²⁵⁸ The English Law Commission, which has reviewed the requirement for bonds, was of the view that it was rare for an action to be taken on a bond, as it was not necessary to do so in order to sue the administrator. This step was usually taken only to provide a remedy against the surety.²⁵⁹ This would be especially useful if an administrator caused loss to an estate, and then disappeared or became bankrupt.²⁶⁰

(b) Present requirements for administration bonds and sureties

The requirements in relation to bonds and sureties are not uniform. For example, in the Australian Capital Territory, an administrator must enter into a bond with an insurance company as surety.²⁶¹ In Tasmania, it is necessary to provide a surety only if the Registrar requires it, and there is no requirement that the surety must be an insurance company.²⁶² The surety may therefore be a private individual.

In Queensland, the requirement to furnish an administration bond or a surety in support of such a bond has been abolished.²⁶³ Section 51 of the *Succession Act 1981* (Qld) reads:

Abolition of administration bond and sureties

As from the commencement of this Act neither an administration bond nor sureties in support of an administration bond shall be required of any administrator.

Previously, in Queensland, an administrator, being appointed by the court rather than by the testator, was in principle required to furnish a bond supported by two sureties as security against loss caused by improper administration of the estate.

²⁵⁷ The Law Commission (UK), Report, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters* (Law Com No 31, 1970) at 2.

²⁵⁸ Ibid.

²⁵⁹ Id at 2-3.

²⁶⁰ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 33-34.

²⁶¹ *Administration and Probate Act 1929* (ACT) s 14.

²⁶² *Probate Rules 1936* (Tas) r 35.

²⁶³ *Succession Act 1981* (Qld) s 51. This section applies whether the death occurred before the commencement of that Act (1 January 1982) or after that day: *Re Jensen* [1982] Qd R 304.

There has been a legislative trend away from administration bonds in other jurisdictions.²⁶⁴ Three States have opted not to make the provision of a bond a requirement for obtaining a grant. Victoria,²⁶⁵ South Australia,²⁶⁶ and Western Australia²⁶⁷ give the court a discretion to require a bond as a condition of granting administration. New South Wales,²⁶⁸ by contrast, makes the provision of a bond a requirement for obtaining a grant (subject to exceptions relating to the Public Trustee and trustee companies).

An example of a discretionary provision encompassing bonds and sureties is section 57 of the *Administration and Probate Act 1958* (Vic), which reads:

Administration guarantees

- (1) As a condition of granting administration to any person the Court or the registrar may require one or more sureties to guarantee that they will make good, in an amount not exceeding the amount at which the property of the deceased is sworn, any loss which any person interested in the administration of the estate of a deceased may suffer in consequence of a breach by the administrator of his duties as such.
- (2) A guarantee shall enure for the benefit of every person interested in the administration of the estate of the deceased as if contained in a contract under seal made by the surety or sureties with every such person and, where there are two or more sureties, as if they had bound themselves jointly or severally.
- (3) No proceeding shall be brought on any such guarantee without the leave of the Court.
- (4) This section does not apply where administration is granted to a person for the use or benefit of Her Majesty or to the State Trustees or to any person body corporate or holder of an office specially exempted by any Act.

Administration bonds have been abolished in the United Kingdom.²⁶⁹ Instead, the High Court may require sureties for loss caused by an administrator's breach of his or her duties.²⁷⁰ The Law Reform Commission of Western Australia has recommended that

²⁶⁴ See, further, Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 33-36 and New South Wales Law Reform Commission, Working Paper, *Administration Bonds* (WP 18, 1978).

²⁶⁵ *Administration and Probate (Amendment) Act 1977* (Vic) s 4 enacted a new s 57 of the *Administration and Probate Act 1958* (Vic).

²⁶⁶ *Administration and Probate Act Amendment Act 1978* (SA) s 5 enacted a new s 31 of the *Administration and Probate Act 1919* (SA).

²⁶⁷ *Administration Act Amendment Act 1976* (WA) s 14 repealed and re-enacted s 62 of the *Administration Act 1903* (WA).

²⁶⁸ *Wills, Probate and Administration Act 1898* (NSW) s 64(1).

²⁶⁹ Administration bonds were abolished from 1981 by the *Supreme Court Act 1981* (UK) which repealed s 8 of the *Administration of Estates Act 1971* (UK).

²⁷⁰ See now *Supreme Court Act 1981* (UK) s 120.

administration bonds be abolished.²⁷¹ That Commission was of the opinion that it is possible to provide adequate protection without retaining the artificiality of a bond, by means of a guarantee by sureties in appropriate cases.²⁷² The New South Wales Law Reform Commission has also recommended the abolition of administration bonds.²⁷³

(c) Arguments in favour of abolishing administration bonds and sureties

The following arguments may be advanced in favour of abolishing administration bonds and sureties:

(i) Only administrators affected

Only administrators are required to furnish a bond; there is no such requirement for executors. This situation is anomalous. There is no reason to believe that administrators are less trustworthy than executors or that the testator's choice (the executor) is more reliable than the administrator appointed by the court.

The Queensland Law Reform Commission, in its 1978 Report suggested that, if administration bonds were not necessary for trustees or executors, they could hardly be necessary for administrators.²⁷⁴

(ii) Expense

The Queensland Law Reform Commission, in its 1978 Report, suggested:²⁷⁵

[T]he very considerable cost to the community, estate by estate, of the retention of this system simply does not justify the protection that it may extraordinarily provide for persons who have been defrauded.

When obtained from an insurance company, an administration bond can be expensive. The cost for the premium is taken from the estate in cases where the bond is to cover unpaid unsecured debts, or from the share of non-consenting beneficiaries where appropriate. This will therefore always affect beneficiaries who are minors.²⁷⁶

271 -- Law Reform Commission of Western Australia, Report, *Administration Bonds and Sureties* (Project 34, Part II, 1976) at para 14.

272 Ibid.

273 New South Wales Law Reform Commission, Working Paper, *Administration Bonds* (WP 18, 1978) at paras 23 and 41.

274 Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 36.

275 Ibid.

276 Id at 34.

However, at least in New South Wales, it is more common for administrators to file a bond supported by two sureties when called upon. The sureties are usually family members or friends of the deceased who file affidavits of justification deposing to their assets. This is done at no cost to the estate. It is also possible for the Court to dispense with one or more surety or reduce the amount of the bond. In most estates where the question of a bond is an issue, there is a significant reason for it, for example, a family dispute or the protection of the interests of minors. Where the bond is required in respect of unsecured debts, there are the options of either paying the debts or providing consents of the creditors.

The provision of a bond supported by a private surety, where that is permitted, does not involve the expense occasioned by a corporate surety. However, not all administrators have family or friends who are willing, or more importantly, have the financial resources, to be able to act as a surety.

(iii) Infrequency of recourse to the surety

It seems to be rare for the sureties to an administration bond to be required to pay out for the defalcation of an administrator. In its 1978 Report, the Queensland Law Reform Commission noted that the then Registrar of the Queensland Supreme Court could not remember a single instance of a bond having been assigned by the court (the first step taken where a bond is to be enforced).²⁷⁷ The English Law Commission's report on administration bonds²⁷⁸ also quoted only one case that had been drawn to its attention where the surety was held liable - where an estate had been wrongly distributed to beneficiaries.²⁷⁹ The Queensland Law Reform Commission made the further observation in relation to the extent to which sureties were called upon:²⁸⁰

An enquiry of the State Government Insurance Office as to the number of occasions on which they had been required to pay out a surety bond elicited the response that that company had never, in fact, been obliged to meet any claim.

On the other hand, the National Committee has been informed that, in New South Wales, there have been several recent suits where corporate sureties have been required to pay out on the bond. These were for quite substantial sums. Anecdotal evidence suggests that there have been other claims against sureties, but no firm details are known. However, the indemnities required by

²⁷⁷ Id at 35.

²⁷⁸ The Law Commission (UK), Report, *Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters* (Law Com No 31, 1970).

²⁷⁹ Id at para 4.

²⁸⁰ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 35.

corporate sureties are so expansive as to effectively preclude recourse to the bond until all personal assets of the administrator have been exhausted. There is no known recent case in New South Wales involving a private surety.²⁸¹

Geddes, Rowland and Studdert cite a number of 18th and 19th century cases dealing with breaches of bond conditions, assignment, extent of liability and defences.²⁸² However, there are very few 20th century cases cited.²⁸³

(iv) Imposition of liability on the innocent

The bond system was criticised in *Re Egen (deceased)*,²⁸⁴ where it was suggested there should be a better way of ensuring proper administration than "casting a liability on innocent and helpless sureties".²⁸⁵

(d) Issues considered by the National Committee

The National Committee considered whether:

- (1) the requirement for administration bonds and sureties should be abolished; and
- (2) if so, a provision to the effect of section 51 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(e) The National Committee's preliminary view

Concerns were expressed at the limited number of insurers prepared to issue administration bonds, the lack of competition and the lack of a rational basis for setting premiums. However, it was noted that in some jurisdictions most sureties were provided privately - for example, by a family member for very little up front cost.

281 Information kindly provided by the New South Wales Registrar of Probates.

282 Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at paras 67.04-67.08.

283 The cases cited are: *Holden v Black* (1904) 2 CLR 768; *Estate of Douglas* (1908) 8 SR (NSW) 146; *Cope v Bennett* [1911] 2 Ch 488; *Re Doolette* (1933) 36 WALR 1; *Re Whitmore* [1929] NZGLR 51, 137; *Harvell v Foster* [1954] 2 QB 367. The paucity of case law on the assignment of administration bonds appears to be because the procedure is so rare. What case law there is, tends to be unsatisfactory and confusing: *Harvell v Foster* [1954] 2 QB 367 was criticised by the Queensland Law Reform Commission in its Report, *The Law Relating to Succession* (R 22, 1978) at 35; *Attorney-General v Eyles* (1889) 6 WN (NSW) 87 is criticised in Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at para 67.04.

284 [1951] NZLR 323.

285 *Id* at 324.

The National Committee did not consider that the disadvantages of bonds and sureties were such that they should be abolished in all cases. In particular, the National Committee noted that there was some opposition among the Registrars of Probate to the total abolition of administration bonds. The National Committee did, however, recognise that sufficient protection could be provided by giving the court a discretionary power to impose some kind of security, in an appropriate case, through means such as a bond, surety, joint administration or accounting procedures. This might be useful where, for example, the interests of a minor beneficiary were involved.

(f) Proposal

The provision of bonds and sureties should not be mandatory, but should simply be among the options for security that may be ordered by the Court in an appropriate case.

(g) Questions for discussion

- 9.3 How frequently are sureties required in those jurisdictions where a bond must be supported by a surety only if required by the Court or the Registrar?**
- 9.4 How frequently are sureties sued pursuant to an administration bond?**
- 9.5 Should the provision of bonds and sureties be restricted to where an estate is being administered by an administrator, or should the court also be able to order their provision where an estate is being administered by an executor?**
- 9.6 Should there be provision for private sureties?**

5. THE PASSING OF ACCOUNTS

(a) Introduction

The National Committee has not considered whether the passing of accounts should be a condition which may be imposed on the making of a grant. Section 85 and, in particular, section 85(1AA)(e) of the *Wills, Probate and Administration Act 1898* (NSW)

could be a precedent for the possibility of the passing of accounts being a condition of the grant. Section 85 reads:

Executor, administrator or trustee to pass accounts

- (1) In respect of the estate of a person who died before 31 December 1981 every person to whom probate or administration has been or is granted shall file an inventory of the estate of the deceased and file or file and pass the person's accounts relating thereto within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.
- (1AA) In respect of the estate of a person who dies on or after 31 December 1981 every person to whom probate or administration has been or is granted and who is:
- (a) a creditor of the estate of the deceased,
 - (b) the guardian of a minor who is a beneficiary of the estate of the deceased,
 - (c) the executor or administrator of the estate where the whole, or a part which, in the opinion of the Court, is a substantial part, of the estate passes to one or more charities or public benevolent institutions,
 - (d) a person, not being a beneficiary, or, in the opinion of the Court, a substantial beneficiary, of the estate, selected at random by the Court, or
 - (e) a person otherwise required to do so by the Court,

shall verify and file or verify, file and pass the person's accounts relating to the estate within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

- (1A) Every trustee of the estate of a deceased person shall verify and file or verify, file and pass the trustee's accounts relating thereto within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

Nothing in this subsection affects the operation of section 35A of the Public Trustee Act 1913.

- (1B) In respect of the estate of a person who dies on or after 31 December 1981 every person to whom probate or administration has been or is granted and who is not a person to whom subsection (1AA) applies may verify and file or verify, file and pass the person's accounts relating to the estate within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.
- (2) Every such person shall be subject to any order that the Court may on the application of any person interested make as to the production and verification of the accounts concerned.

- (3) The order of the Court allowing any such account shall be prima facie evidence of the correctness of the same, and shall, after the expiration of three years from the date of such order, operate as a release to the person filing the same, excepting so far as it is shown by some person interested therein that an error or omission or fraudulent entry has been made in such account.
- (4) Where the Court, in passing any such accounts, disallows in whole or in part the amount of any disbursement, the Court may order the executor, administrator or trustee to refund the amount disallowed to the estate of the deceased.

Nothing in this subsection alters or diminishes the right of any person to proceed in equity in the same way as if this subsection had not been enacted.
- (5) Every executor, administrator or trustee of the estate of a deceased person shall verify and file an inventory of the estate of the deceased within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

(b) Question for discussion

9.7 Should the passing of accounts be a condition which the Registrar or the Court may impose on the making of a grant?

6. PROTECTION OF PERSONAL REPRESENTATIVE IN RESPECT OF ACTS DONE PURSUANT TO A GRANT

A personal representative is obliged to distribute the estate in accordance with the law, and will generally be liable if he or she distributes the estate otherwise than in accordance with the law. For example, to the extent to which the creditors of an estate could be paid from the estate, a personal representative would be liable if he or she distributed the estate without first paying the estate's creditors.

However, administering an estate pursuant to a grant may protect a personal representative from liability in respect of certain payments or distributions made out of the estate. There are two situations, in particular, where this is especially significant:

- if it is found that, after the estate has been distributed, the distribution was made according to a will that was not the last valid will of the deceased person and the grant of probate in respect of the first will is revoked; and
- if a personal representative is not aware of all the creditors of the estate and distributes the estate without first discharging all its debts.

(a) Protection afforded to a personal representative in the event of subsequent revocation of the grant

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
53(1)	63	9, 10, 31	40D, 91	43	47	43, 95	28	27	45
53(2)	62(2)		90		46	94	28(2)	27(2)	
53(3)		42					37	37	
53(4)									
53(5)							32(2)		
53(6)	31	23	81	42	41	40	20	17	

Section 53 of the *Succession Act 1981* (Qld) protects a personal representative who has obtained a grant in the event that the grant is subsequently revoked. The section reads:

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.
- (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.

The Queensland Law Reform Commission in its 1978 Report explained the significance of this provision in the following way:²⁸⁶

Subsections (4) and (5) make a substantial change in favour of the personal representative whose grant has been revoked. 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. 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. 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. [original emphasis]

(b) Notices of intended distribution

QLD ²⁸⁷	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
67	64		92			96			

In some cases, it may be difficult for a personal representative to identify all the persons who might have claims on an estate. It would be undesirable for the administration of an estate to be unduly delayed while the personal representative made onerously extensive inquiries. It would also be undesirable, in terms of attracting people to fulfil the role of personal representative, if a personal representative were to be liable to a claimant of whose claim the personal representative could not reasonably have become aware.

A number of jurisdictions have enacted provisions to protect a personal representative from liability to various persons who may have a claim against the estate, provided that the personal representative complies with the procedures set out in the relevant provision. Although there are variations between jurisdictions, the main feature of these provisions is that they permit a personal representative to advertise an intention to

²⁸⁶ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 37.

²⁸⁷ *Trusts Act 1973* (Qld).

distribute the estate and to distribute after a certain time with reference only to claims of which the personal representative is aware. For example, section 67 of the *Trusts Act 1973 (Qld)* reads:²⁸⁸

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) the gazette; and
 - (b) a newspaper published in Brisbane, Rockhampton or Townsville; and
 - (c) a newspaper circulating in the district in which is situate any land to which the notices relates; and
 - (d) in the case of the administration of the estate of a deceased person - a newspaper circulating in the district where the deceased resided and, if the deceased carried on a business, in the district in which the deceased carried on that business;

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 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 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.

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See also the discussion of s 67 of the *Trusts Act 1973 (Qld)* in relation to persons acting without a grant at pp 153-154 of this Discussion Paper.

Section 67 corrects the hardship that occurred in *Re Diplock*.²⁸⁹ However, the protection conferred by section 67 is available only where the proper notices have been issued.

Where a personal representative has fulfilled the notice requirements, has waited for the time stated in the notices to pass, and then distributes the estate having regard only to the claims of which he or she has notice at the time of distribution, the personal representative is protected against claims by any person of whose claim the personal representative had no notice at the time of distribution.

A similar provision is found in section 92 of the *Wills, Probate and Administration Act 1898* (NSW). Section 92 reads:

Distribution of assets after notice given by executor or administrator

- (1) Where the executor or administrator of the estate of a testator or an intestate has published notices in or to the effect of the form prescribed by rules of the Court requiring the claims of beneficiaries (including children conceived but not yet born at the death of the testator or intestate), creditors and other persons in respect of the assets of the estate of the testator or intestate to be submitted to the executor or administrator by or on behalf of those beneficiaries, creditors or other persons, the executor or administrator may, at the expiration of the period for submitting those claims specified in the notices or, as the case may be, specified in the last of the notices, distribute the assets, or any part of the assets, of that estate, among the persons entitled, having regard to the claims of which the executor or administrator has notice at the time of the distribution.
- (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.
- (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*.

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[1948] Ch 465. In that case, personal representatives distributed the deceased estate to a number of charitable institutions in the belief that they were following the testator's directions in his will to apply his residuary estate "for such charitable institutions or other charitable or benevolent object or objects in England" as they should in their absolute discretion decide. Following a challenge to the distribution by the next of kin of the deceased, the House of Lords held that the bequest was invalidated by the use of the disjunctive "or benevolent". Subsequently, in determining a related matter, the Court of Appeal held that a claim by an unpaid beneficiary to property wrongly distributed to another is subject to the qualification that, since the wrong payment was due to the mistake of the personal representative, the beneficiary's primary claim is against the personal representative, and the direct claim against those overpaid or wrongly paid must be limited to the amount irrecoverable for any reason from the party responsible.

(c) Barring of claims

QLD ²⁹⁰	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
68	65		93			97			

A number of jurisdictions have a provision, as a corollary to the provision about the giving of notices of intended distribution, whereby a personal representative who receives notice of a claim and wishes to reject it, may serve the claimant with notice calling upon the claimant to institute legal proceedings to enforce the claim within a specified period. A claimant who does not comply with such a notice may be barred from pursuing the claim. For example, section 68 of the *Trusts Act 1973* (Qld) reads:

Barring of claims

- (1) Where a trustee²⁹¹ 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 by 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

²⁹⁰ *Trusts Act 1973* (Qld).

²⁹¹ Section 5 of the *Trusts Act 1973* (Qld) defines "trustee" to include a personal representative.

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 *Succession Act 1867*, part 5 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]

(d) Issues considered by the National Committee

The National Committee considered whether:

- (1) the model legislation should include a provision to the effect of section 53 of the *Succession Act 1981* (Qld);
- (2) it should be mandatory for a personal representative who has obtained a grant to give various notices before distributing the estate, or whether the model legislation should simply provide for a personal representative to be protected from liability to certain claimants if the prescribed notices have been given.

(e) The National Committee's preliminary view

The National Committee was of the view that a provision to the effect of section 53 of the *Succession Act 1981* (Qld) should be included in the model legislation.

The Registrars of Probate agreed with this view.

The National Committee was also of the view that the model legislation should include a procedure to enable a personal representative to advertise his or her intention to

distribute an estate and, if the procedure is complied with, to be protected from liability to a claimant of whose claim the personal representative was unaware.

The National Committee did not, however, decide whether it should be mandatory for a personal representative, before distributing an estate, to advertise his or her intention to do so, or whether the model legislation should simply protect a personal representative from liability to certain claimants if the personal representative had distributed the estate after complying with the prescribed procedure.

The National Committee did not consider whether a provision relating to the barring of claims such as section 68 of the *Trusts Act 1973* (Qld) should be included in the model legislation.

(f) Proposals

- (1) A provision to the effect of section 53 of the *Succession Act 1981* (Qld) should be included in the model legislation so that a personal representative is protected from liability in respect of various acts done in reliance on a grant that is subsequently revoked.**
- (2) Subject to resolving the issue of whether or not the provision should be mandatory (see question 9.8 below) a provision to the effect of section 67 of the *Trusts Act 1973* (Qld) and section 92 of the *Wills, Probate and Administration Act 1898* (NSW) should be included in the model legislation, 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.**

(g) Questions for discussion

- 9.8 Should it be mandatory for a personal representative who has obtained a grant to give various notices before distributing the estate, or should the model legislation simply provide for a personal representative to be protected from liability to certain claimants only if the prescribed notices have been given?**
- 9.9 What should be the requirements of the prescribed notices?**

9.10 Should the model legislation include a provision to the effect of section 68 of the *Trusts Act 1973* (Qld) relating to the barring of claims?

9.11 If yes to 9.10, where in the model legislation should such a provision be located?

CHAPTER 10

ADMINISTERING AN ESTATE WITHOUT A GRANT

1. INTRODUCTION

In some jurisdictions it may be possible for a person to administer an estate - or some parts of it - without a formal grant of representation. If a person administers an estate without having obtained a grant of probate of the will or letters of administration, the administration is sometimes referred to as an "informal administration". During an informal administration, the person administering the estate may simply collect the assets, pay the debts and distribute the balance of the assets, without taking out a grant, without giving or publishing the usual notices or filing an inventory and without giving any statutory declarations, affidavits or indemnities except those required by the persons or institutions releasing or transferring funds at the request of the person administering the estate.

In some cases it may be necessary to obtain a grant because, apart from any other reasons, the person releasing money or other property to the person purporting to administer the estate is willing to release it only to a person who is authorised to give a valid discharge.

A grant is usually required in order to deal with real property. The exception is in Queensland, where real property that forms part of the estate of a deceased person may, in certain circumstances, be transferred without the need to first produce a grant.

2. EXECUTOR *DE SON TORT*

In Chapter 2 of this Discussion Paper, the National Committee discussed the ways in which a person may acquire the authority to administer an estate. A person who has no authority to act as a personal representative, but who nevertheless performs acts properly belonging to a personal representative, is referred to as an executor *de son tort*. In such a case the person is regarded at law as having held himself or herself out as the duly appointed representative and is held liable as if he or she were so appointed.²⁹² A person acting in such a capacity is said to "intermeddle" in the deceased's estate.

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See Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 806 and Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.4.11.

3. POTENTIAL LIABILITY OF A PERSON ADMINISTERING AN ESTATE WITHOUT A GRANT

A person administering an estate - whether or not pursuant to a grant - could incur liability if he or she makes an incorrect distribution of the estate. Such a mistake could occur for a number of reasons, for example:

- it may be found that, after the estate has been distributed, the distribution was made according to a will that was not the last valid will of the deceased person; or
- a personal representative may not be aware of all the creditors of the estate and may distribute the estate without first discharging all its debts.

One of the significant differences between the liability of a personal representative who has obtained a grant and that of a person administering an estate without a grant is that, for the former, there are a number of provisions that confer protection from liability for acts done in the administration of the estate that are not available to a person administering an estate without a grant.

For example, section 53 of the *Succession Act 1981* (Qld) protects a personal representative who has obtained a grant in respect of certain acts done pursuant to a grant that is subsequently revoked. It does not, however, apply to a person who has not obtained a grant and who distributes an estate in accordance with a will that is later found to be invalid.

Many jurisdictions also have provisions that require or permit a personal representative to advertise his or her intention to distribute an estate by a certain date, and to distribute the estate after that time having regard only to the claims of which he or she is aware.²⁹³

On the other hand, an executor *de son tort* is protected from liability only to the extent that he or she administers an estate correctly.

If a person proposing to administer an estate is concerned about the testator's capacity when making a will or is concerned that a particular will may not be the testator's last will, the only way for that person to avoid liability in respect of distributions wrongly made because they were made in accordance with an invalid will is to take out a grant. Similarly, if a person proposing to administer an estate is concerned that there may be claims of which he or she is unaware, the appropriate course would be to obtain a grant and comply with the procedures for advertising the proposed distribution of the estate.

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See the discussion of s 67 of the *Trusts Act 1973* (Qld) and s 92 of the *Wills, Probate and Administration Act 1898* (NSW) at pp 139-141 of this Discussion Paper.

4. RECOGNITION OF PERSONS ADMINISTERING AN ESTATE WITHOUT A GRANT

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
54(1)		33					29, 30	28, 29	52

(a) Introduction

The National Committee considered whether the model legislation should, having regard to the frequency with which estates are administered without a grant being obtained, recognise and address the occurrence of informal administrations.²⁹⁴

Factors that might affect the decision whether to obtain a grant or to administer the estate informally include the following:

- whether the person proposing to administer the estate is aware of facts relating to the existence, or validity, of any will;
- the size and nature of the assets and liabilities of the estate;
- whether there are persons who might have a claim for family provision;
- whether the time for making a claim for family provision has expired;
- whether the assets and liabilities in the estate are known to all interested persons;
- whether all persons interested in the estate are prepared to allow the person administering the estate to administer the estate informally;
- whether the person administering the estate is prepared to accept personal liability for loss caused by incorrect administration or distribution; and
- whether a person releasing money or other property to the person administering the estate is prepared to do so without receiving a discharge from a personal representative acting under a grant.

The Queensland Law Reform Commission made the following observation about an executor *de son tort* in its 1978 Report:²⁹⁵

²⁹⁴ Any person beneficially interested in an estate can require the person administering the estate to take out a grant. See, for example, Gowers J, Rowe RB, Yeldham RF, Downs MJ, *Tristram and Coote's Probate Practice* (27th ed 1989) at 520-521, and, in Queensland, s 70 of the *Succession Act 1981* (Qld).

²⁹⁵ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 37.

Since 1601 ... provision has been made to protect persons who act informally, but properly, in the administration of a deceased estate. In these days, when some time may elapse between the death and the grant of probate or letters of administration, protection for those who act in the meantime is essential, whether the person to be protected is an executor, intending administrator, or even an *executor de son tort*. Provided such person does what a duly constituted personal representative should properly do the estate will not be harmed.

The *Succession Act 1981* (Qld) contains a provision that deals with the situation of a person who administers an estate without first obtaining a grant. Section 54(1) reads:

Protection of persons acting informally

Where any person, not being a person to whom a grant is made, obtains, receives or holds the estate or any part of the estate of a deceased person otherwise than for full and valuable consideration, or effects the release of any debt or liability due to the estate of the deceased, the person shall be charged as executor in the person's own wrong to the extent of the estate received or coming into the person's hands, or the debt or liability released, after deducting any payment made by the person which might properly be made by a personal representative to whom a grant is made. [emphasis added]

The extent of the protection is indicated by the highlighted words in section 54(1).

Section 54 affords to a person who is administering an estate without a grant the protection given by the decided cases to an *executor de son tort*. The person administering the estate is protected only to the extent that the estate is administered in accordance with the law. This level of protection may, depending on the circumstances of the case, be considered to be sufficient by the person intending to administer the estate without a grant.

(b) Terminology

The terms "*executor de son tort*" (or "executor in the person's own wrong") and "intermeddler" used in some legislative provisions suggest that the people described by these terms are acting improperly. This is not necessarily the case. An "*executor de son tort*" or "intermeddler" may administer an estate quite correctly; if he or she does so, no liability will be incurred.

(c) Arguments in favour of administering an estate without a grant

A large proportion of estates, particularly small or uncomplicated estates, are administered informally. It is arguable that the ability to administer an estate informally makes it easier for a lay person to administer an estate. It is also a cost saving for the estate, given that the costs of obtaining a grant would usually be paid out of the estate. Although the services of a professional person, such as a solicitor, may sometimes be sought, fees payable to solicitors or other professionals are lower or non-existent if a lay person, very likely a residuary beneficiary or the sole beneficiary, administers the estate. Further, there are no court filing fees.

The informal administration of the estate may also be completed more quickly if there is no need to wait for the grant.

The supervision and control involved in the administration of estates with a grant impose costs in terms of money and inconvenience on a large number of people in the community; they also impose a cost on the taxpayer to pay for the public service administration. It is important to balance the benefits that a regime of supervision and control confers on a comparatively small number of people in the community against the costs that such a system imposes on the large number of people who would otherwise not need to take out a grant.

(d) Arguments against administering an estate without a grant

A system that requires a person who administers an estate to obtain a grant gives the court (through the Registrar of Probate) a power to supervise and control the administration of the estate. The requirements associated with obtaining a grant may help to protect the interests of some potential beneficiaries or other persons with an interest in the estate.

(i) Lack of scrutiny by the court

The Registrar of Probate is not involved when a grant is not obtained and the estate is administered informally. There is no supervision by the court of the administration of the estate.

However, depending on the assets to be transferred, a third party - such as the Registrar of Motor Vehicles, a bank, a company (where it is transferring shares)²⁹⁶ or a financial institution - may provide some control.²⁹⁷ It is common for Registrars of Motor Vehicles, companies, banks and other financial institutions to require:

- a copy of the will if any;
- a copy of the death certificate; and
- a statutory declaration from the person applying for the release or transfer of the funds to the effect that the person believes that he or she is the person entitled to administer the estate, that the will is valid and effective, that no grant has been issued in relation to the estate, and that the applicant does not intend to seek a grant and that he or she indemnifies the person releasing the funds or making the transfer for any losses caused by incorrect payment, release or transfer.

²⁹⁶ Acting under s 1091(2)-(7) of the *Corporations Law* (Cth).

²⁹⁷ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 804.

(ii) Prejudice to potential family provision applicants

A person administering an estate could ignore or marginalise beneficiaries and potential family provision applicants. In particular, if no inventory is required to be filed, a potential claimant for family provision may not otherwise know that assets exist, or that they warrant bringing an application.

(e) Issues considered by the National Committee

The National Committee considered whether:

- (1) a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld) should be included in the model legislation;
- (2) if so, to what extent a person administering an estate without a grant should be protected from liability in respect of acts done in the course of the administration;
- (3) if a provision to the effect of section 54(1) is to be included, it is possible to avoid the use of the term "executor in the person's own wrong".

(f) The National Committee's preliminary views

(i) Protection afforded by section 54(1) of the *Succession Act 1981* (Qld)

The National Committee acknowledged that, in all jurisdictions, a significant number of estates were administered informally. This practice was facilitated by factors such as joint ownership of property, and the willingness of organisations such as banks to release funds up to specified amounts without requiring a grant of probate or letters of administration. The National Committee also acknowledged that section 54(1) of the *Succession Act 1981* (Qld), which protects only those informal administrators who act properly, does not change the law, but is merely declaratory of it.

Some of the Registrars of Probate expressed some concern that recognition of the practice of informal administration could lead to an erosion of the need for a grant. In particular, they thought that the model legislation should be seen to be supporting correct procedures. They also disagreed that the procedure for obtaining a grant of probate or letters of administration was expensive or caused delays and inconvenience. On the other hand, the Registrar of the Supreme Court of Queensland, who has twenty years of experience with the system of informal administration in operation in that State, found no difficulty with recognising the practice of informal administration in the model legislation.

The National Committee was of the view that, given the acknowledged high level of incidence of informal administration in all jurisdictions, it would be unrealistic

for the model legislation simply to ignore the extent to which informal administration was presently occurring, and that to exclude it from the legislation would give the impression that a matter of considerable significance had been overlooked.

The National Committee also considered that to include the protection presently afforded to a person acting without a grant in the model legislation, rather than leaving it to case law, would make the law more accessible to non-lawyers.

Consequently, the National Committee was of the view that a provision to the effect of section 54(1) of the *Succession Act 1981* (Qld) should be included in the model legislation.

Despite their initial reservations, a majority of the Registrars of Probate agreed with this approach.

The National Committee considered, but did not reach a decision on, the following redraft of section 54(1) of the *Succession Act 1981* (Qld):

Persons acting informally

- (1) Any person who obtains, receives or holds any property forming part of the estate of a deceased person must fully account for that property to -
 - (a) an executor appointed by the will of the deceased; or if there is no executor or no executor able and willing to act or any person entitled to share in the residuary estate [query: entitled to apply for letters of administration] of the deceased, whether under a will or upon the intestacy of the deceased; and
 - (b) if required to account by the Court, to the Court.
- (2) A person who obtains, receives or holds any property forming part of the estate of a deceased person is permitted to use any such property for the purpose of paying any debt owed or meeting any liability incurred by the deceased being a debt or liability which an executor or administrator would have to pay or meet in the due course of the administration of the estate [or distributing any entitlement or benefit].

Example

A friend may use cash found in the deceased's house to pay the deceased's credit card bill so saving a perhaps considerable interest bill.

(ii) Additional protection

The National Committee was of the view that the protection afforded by section 53 of the *Succession Act 1981* (Qld)²⁹⁸ and by equivalent provisions in other jurisdictions, should be available only when a grant had initially been obtained.

²⁹⁸

This provision is discussed at pp 138-139 of this Discussion Paper.

The National Committee did, however, query whether the provisions that enable personal representatives to advertise their intention to distribute and to distribute having regard only to claims of which they are aware should be available to persons acting without a grant.²⁹⁹ Section 67 of the *Trusts Act 1973 (Qld)*³⁰⁰ protects a personal representative, whether acting pursuant to a grant or not, provided the proper notices have been issued, the proper time has been allowed to elapse between giving the notice and making the distribution, and the personal representative has regard to claims of which he or she has notice at the time of distribution.

The National Committee considered it inconsistent with the concept of informal administration to impose various obligations on a person administering an estate without a grant. However, it saw some merit in enabling a person administering an estate without a grant to be protected from claims of which he or she was unaware if he or she had complied with the procedure for advertising an intention to distribute the estate. It is arguably in the interests of all parties for a person administering an estate - whether or not pursuant to a grant - to be able to "draw out" claims against the estate, 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.

The National Committee did not reach a conclusion on this issue, but, instead, agreed to seek submissions.

(g) Proposal

A provision to the effect of section 54(1) of the *Succession Act 1981 (Qld)* should be included in the model legislation.

(h) Questions for discussion

10.1 What terminology could be used instead of "executor *de son tort*" and "in the person's own wrong"?

²⁹⁹ See Chapter 9 of this Discussion Paper for a discussion of provisions dealing with the giving of notices of intended distribution and the protection that is afforded by the giving of such notices.

³⁰⁰ Section 67 of the *Trusts Act 1973 (Qld)* is set out at p 140 of this Discussion Paper. Section 67 refers to "personal representative", which is defined in s 5 of the *Trusts Act 1973 (Qld)* to mean "the executor, original or by representation, or the administrator". It would seem that this would include an executor without a grant.

- 10.2** Should a person who is administering an estate without a grant 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 was not, as of the date of distributing the estate, aware?
- 10.3** If yes to 10.2, should the availability of this protection depend on whether or not the person was appointed by will as the executor of the estate?

5. RENUNCIATION OF EXECUTORSHIP

(a) Introduction

The decided cases establish that an executor who has commenced administration of an estate without having first obtained a grant will not be allowed to renounce his or her executorship unless the court is satisfied that creditors and beneficiaries will not be prejudiced.³⁰¹

The Queensland Law Reform Commission observed in its 1978 Report:³⁰²

This may, in some cases, be rather harsh, particularly where a person who happens to be nominated executor performs acts of administration in the emergency following a death without any intention of taking up his executorship.

The Queensland Law Reform Commission therefore recommended that it should be made clearer that an executor may renounce despite having acted in the administration of the estate.³⁰³

Section 54(2) of the *Succession Act 1981* (Qld) reads:

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

Lee notes in relation to the law prior to the insertion of this subsection into the Queensland legislation:³⁰⁴

It has always been the law that a personal representative may choose not to act. If so choosing, it is desirable that he or she execute a written renunciation making manifest

³⁰¹ *Will of Lyndon* [1960] VR 112.

³⁰² Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 37.

³⁰³ *Ibid.*

³⁰⁴ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 810.

this intention, so that others entitled to seek a grant and able and willing to do so may easily prove the renunciation. The former law was that performance by an executor of executorial acts amounted to an acceptance of the office, and precluded subsequent renunciation.

No other Australian jurisdiction has a provision equivalent to section 54(2) of the *Succession Act 1981* (Qld).

(b) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 54(2) of the *Succession Act 1981* (Qld) should be included in the model legislation and, if so, whether an executor who has acted in the administration of the estate, but who has not taken out a grant of probate or letters of administration, should require the leave of the court before he or she can renounce the executorship. This is not presently required by section 54(2) of the *Succession Act 1981* (Qld).

(c) The National Committee's preliminary view

The National Committee was of the view that an executor should have to obtain the leave of the court before he or she may renounce his or her executorship if he or she has started to administer the estate without having first obtained a grant of probate or letters of administration.

(d) Proposal

A provision to the general effect of section 54(2) of the *Succession Act 1981* (Qld) should be included in the model legislation. However, the words "with the leave of the court" should be inserted in the model provision, so that the leave of the court is required before an executor who has acted in the administration of the estate without a grant may renounce his or her executorship.

6. RATIFICATION OF ACTS DONE WITHOUT A GRANT

(a) Introduction

Section 54(3) of the *Succession Act 1981* (Qld) reads:

A personal representative may ratify and adopt any act done on behalf of the estate by another if the act was one which the personal representative might properly have done himself or herself.

No other Australian jurisdiction has a provision equivalent to section 54(3) of the *Succession Act 1981* (Qld).

(b) The National Committee's preliminary view

The National Committee was of the view that a provision to the effect of section 54(3) of the *Succession Act 1981* (Qld) should be included in the model legislation to enable a personal representative to ratify acts done by a person acting without a grant if the acts were otherwise done properly.

(c) Proposal

A provision to the effect of section 54(3) of the *Succession Act 1981* (Qld) should be included in the model legislation.

7. REAL PROPERTY

(a) Introduction

In all jurisdictions in Australia except Queensland, real property cannot be administered without a grant. In Queensland, however, real property can, in certain circumstances, be administered informally. Section 111 of the *Land Title Act 1994* (Qld) provides for real property to be registered in the name of a person as personal representative both where the registered proprietor died leaving a will and where the registered proprietor died intestate. Section 112 of the *Land Title Act 1994* (Qld) allows a beneficiary under a will to be registered as proprietor of an interest in real property.

Sections 111 and 112 of the *Land Title Act 1994* (Qld) read:³⁰⁵

111. Registering personal representative

- (1) A person may lodge an application to be registered as personal representative for a registered proprietor of a lot or an interest in a lot who has died.
- (2) The registrar may register the lot or the interest in the lot in the name of the person as personal representative only if:
 - (a) if the person has obtained a grant of representation, or the resealing of a grant of representation, in Queensland - the grant or resealing, or an

³⁰⁵

In Queensland, certain other interests may be transferred without the production of a grant. See ss 377(2)(c), (3) and 379 of the *Land Act 1994* (Qld).

- office copy of the grant or resealing issued by the Supreme Court, is deposited; or
- (b) if paragraph (a) does not apply and the registered proprietor died without a will:
 - (i) letters of administration of the deceased person's estate have not been granted in Queensland within 6 months after the death; and
 - (ii) the gross value of the deceased person's Queensland estate at the date of death was no more than the amount prescribed by regulation or, if no amount is prescribed, \$150 000; and
 - (iii) the registrar is of the opinion that the person would succeed in an application for a grant of representation; or
 - (c) if paragraph (a) does not apply and the registered proprietor died leaving a will - the registrar is of the opinion that the person would succeed in an application for a grant of representation.
- (3) A person registered under this section without a grant of representation has the same rights, powers and liabilities as if a grant of representation had been made to the person.
 - (4) The validity of an act done or payment made in good faith by a person registered under this section is not affected by a later grant of representation.
 - (5) If the grantee of a grant of representation is different from the person registered under subsection (2), the person registered must -
 - (a) account to the grantee for all property of the deceased person controlled by the person before the grant; and
 - (b) take all action necessary to divest from the person and vest in the grantee all property of the deceased person remaining under the person's control.

112. Registering beneficiary

- (1) A person who is beneficially entitled under a will to a lot or an interest in a lot of a deceased registered proprietor may apply to the registrar to be registered as proprietor of the lot.
- (2) However, the registrar may register the person only if:
 - (a) written consent is given by:
 - (i) the deceased's personal representative; or
 - (ii) a person who, in the registrar's opinion, would succeed in an application for a grant of representation; and
 - (b) the person satisfies the registrar that the person is beneficially entitled to the lot.

The practical effect of these provisions and of the requirements adopted by the Offices of the Land Registry in Queensland (which includes, for example, lodgment of the original will) is likely to have been that the registration officers in Queensland have skills relating to the application of wills and the laws of intestacy not shared by their counterparts in other jurisdictions.

Section 45(7) of the *Succession Act 1981* (Qld) provides that:

Nothing in this section [relating to vesting] affects the operation of an Act providing for the registration or recording of any person as entitled to an estate or interest in land in consequence of the death of any person notwithstanding that there has been no grant in the estate of the deceased person.

(b) Issue considered by the National Committee

The National Committee considered whether the Queensland practice of allowing the registered title to real property in a deceased estate to be transferred without the need for a grant should be included in the model legislation.

(c) The National Committee's preliminary view

The Registrars of Probate were generally of the view that the Queensland position of allowing real property to be transferred without the production of a grant was anomalous. Despite that view, the National Committee considered that the issue required further consideration and that submissions should be sought before any decision was made on this issue. In particular, the National Committee noted that the system had been working in Queensland for many years without any apparent difficulties.

(d) Questions for discussion

10.4 Should it be possible in some circumstances to transfer real property without producing a grant?

10.5 If yes to 10.4, what restrictions, if any, should be imposed?

10.6 If such a mechanism is considered desirable, should it be located in administration and probate legislation, or would it be more appropriate to locate it in real property legislation?

8. PAYMENTS BY THIRD PARTIES WITHOUT PRODUCTION OF GRANT

(a) Introduction

In the absence of a statutory exception, only a personal representative who has obtained a grant of probate or letters of administration is able to give a valid discharge to a debtor of a deceased estate. Some jurisdictions have enacted provisions to enable a person appearing to act on behalf of a deceased estate to give a valid discharge when certain types of debts are paid by a person owing money to a deceased estate or holding money or other property belonging to a deceased estate.

(b) Payments by employers

Victoria and South Australia make specific provision for certain outstanding wage payments owing to employees to be made by employers to appropriate persons.

Section 32 of the *Administration and Probate Act 1958* (Vic) reads:

Payment or transfer by employer of moneys etc. held on account of deceased employee

- (1) Where -
 - (a) an employee has died (whether before or after the commencement of this Act) and his employer holds moneys or other personal property on account of the employee; and
 - (b) the employer is satisfied by statutory declaration that the value of the estate of the employee after payment of debts and testamentary expenses (if any) will not exceed \$25000 -

the employer may, without requiring the production of probate or letters of administration, pay or transfer, to the widow widower or child of the deceased employee or to any other person appearing to be entitled to the property of the deceased employee, such moneys or personal property to an amount not exceeding in the aggregate \$12500.

- (2) A receipt signed by any person above the age of sixteen years to whom money or property is paid or transferred by an employer in the bona fide exercise of the powers conferred by this section shall be a complete discharge to the employer of all liability in respect of moneys or property so paid or transferred.
- (3) Nothing in this section shall prejudice or affect any right or remedy of any person entitled under the will of the deceased employee or under the law relating to the disposition of estates of deceased persons to recover any money or property paid or transferred from the person to whom it was paid or transferred by the employer under the powers conferred by this section.

Section 71(1) of the *Administration and Probate Act 1919* (SA) gives the Treasurer a discretion to pay an amount not exceeding \$2,000 owed to a person who was,

immediately before his or her death, an employee of the Government, to the surviving spouse of that person or to another person. The Act provides that a person may not claim against the Crown, the Treasurer or any other person representing the Crown in respect of that payment.³⁰⁶

(c) Other payments

Where a patient in a Government hospital dies and immediately before his or her death money or other property (not exceeding \$2,000) was held on the patient's behalf by the hospital, the South Australian Act allows the Treasurer to pay small amounts owed to the patient to the person's surviving spouse or to another person.³⁰⁷

Legislation in South Australia and Western Australia allows small amounts to be paid by banks without the production of a grant.³⁰⁸

(d) The National Committee's preliminary view

The National Committee considered that provisions of this kind could be a useful adjunct to the informal administration of an estate, but queried whether they should be extended beyond employers, for example, to banks and superannuation funds. It was also of the view that the present monetary limits on the operation of the current provisions could detract from their usefulness.

The National Committee formed the preliminary view that it would be more appropriate for provisions of this kind to be located in the legislation to which they directly relate, rather than be included in the model legislation.

(e) Proposal

Provisions to the effect of section 32 of the *Administration and Probate Act 1958* (Vic) and section 71(1) of the *Administration and Probate Act 1919* (SA) should not be included in the model legislation. Jurisdictions that consider them desirable should include them in the substantive legislation to which they relate.

³⁰⁶ *Administration and Probate Act 1919* (SA) s 71(3).

³⁰⁷ *Administration and Probate Act 1919* (SA) s 71(1a).

³⁰⁸ See *Administration and Probate Act 1919* (SA) s 72; *Administration Act 1903* (WA) s 139.

CHAPTER 11

STATUTORY PROVISIONS ENABLING ADMINISTRATION OF AN ESTATE WITHOUT A GRANT

1. INTRODUCTION

In all jurisdictions reviewed by the National Committee there are statutory provisions that enable estates to be administered by specified bodies in certain limited circumstances without a grant, but with all the benefits of a grant.

2. ELECTION TO ADMINISTER AN ESTATE WITHOUT A GRANT

QLD ³⁰⁹	ACT	VIC	NSW ³¹⁰	SA	WA ³¹¹	NT ³¹²	TAS ³¹³	UK	NZ
30	87C	79	18A		10(4), 14	53-55	20		
QLD ³¹⁴	ACT	VIC ³¹⁵	NSW ³¹⁶	SA	WA ³¹⁷	NT	TAS ³¹⁸	UK	NZ
12, 13, 14, 15, 16		11A	15A		10		10A		

Legislation in most jurisdictions considered by the National Committee has introduced the concept of "elections" as a method of administering certain deceased estates without the need first to obtain a grant of probate or letters of administration. Subject to the restrictions imposed by the relevant legislative provisions, administration by way of election is a type of informal administration.

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- 309 *Public Trustee Act 1978 (Qld).*
- 310 *Public Trustee Act 1913 (NSW).*
- 311 *Public Trustee Act 1941 (WA).*
- 312 *Public Trustee Act (NT).*
- 313 *Public Trustee Act 1930 (Tas).*
- 314 *Trustee Companies Act 1968 (Qld).*
- 315 *Trustee Companies Act 1984 (Vic).*
- 316 *Trustee Companies Act 1964 (NSW).*
- 317 *Trustee Companies Act 1987 (WA).*
- 318 *Trustee Companies Act 1953 (Tas).*

However, the ability to “elect” to administer deceased estates in this way is restricted to the Public Trustee and/or trustee companies. Even in a very small estate, a person with a genuine interest in the administration of the estate is not able to administer the estate by way of an election.

The effect of an election is that the Public Trustee or the trustee company that administers the estate does so as if it were an executor of the will or an administrator of the estate, in like manner and to the same extent in all respects as if the administration had been duly granted.³¹⁹ The protections provided to executors who have been granted probate or to administrators who have been granted letters of administration³²⁰ are automatically acquired by the body that has made the election.

One of the primary rationales for enabling estates to be administered by way of an election is that it should contain the costs of administering small estates. Even though the procedures involved in making an election include the filing of documents with the court, the costs associated with such a process are likely to be less than the fees and professional charges associated with obtaining a grant of probate or letters of administration.

(a) Queensland

An example of an election provision in public trustee legislation is section 30 of the *Public Trustee Act 1978* (Qld), which reads:

Election to administer estates under \$100 000 without grant of administration

- (1) Where any person dies (whether before or after the commencement of this Act) domiciled in Queensland or leaving property situated in Queensland, and the gross value of the person's property in Queensland which would pass to the person's personal representative is estimated by the public trustee at the time of the election hereinafter mentioned not to exceed \$100 000, and there is no grant of administration in force in Queensland, the public trustee may, in all cases where the public trustee is entitled to obtain an order to administer, in lieu thereof file in the court an election, in a form approved by the public trustee, to administer the estate with the will or on intestacy as may be the case.
- (2) Where a grant of administration has been made in respect of the estate of a deceased person and the person to whom such grant was made has died, whether before or after the commencement of this Act, leaving part of the estate unadministered in Queensland, and the gross value of such part of the estate so left unadministered in Queensland is estimated by the public trustee at the time of the election hereinafter in this subsection mentioned not to exceed the sum of \$100 000, and no person has since the death of the last executor or administrator obtained a grant of administration *de bonis non* in respect of the estate, the public trustee may, in all cases where the public trustee would be

³¹⁹ See, for example, *Public Trustee Act 1978* (Qld) s 32 for the effect of an order relating to elections to administer.

³²⁰ See Chapter 9 of this Discussion Paper.

entitled to obtain an order to administer, in lieu thereof, file in the court an election, in the form approved by the public trustee, to administer the estate so left unadministered.

Sections 12 and 13 of the *Trustee Companies Act 1968* (Qld) are in similar terms to section 30 of the *Public Trustee Act 1978* (Qld); they enable trustee companies to elect to administer certain deceased estates. However, trustee companies that elect to administer an estate must comply with a number of requirements that are not imposed on the Public Trustee by the *Public Trustee Act 1978* (Qld). For example, the legislation requires a solicitor to endorse on the election that he or she is satisfied that the court would, on application duly made, grant to the trustee company probate of the will to which the election relates, or letters of administration with the will to which the election relates annexed, or letters of administration of the estate of the deceased person without a will annexed.³²¹

(b) Other jurisdictions

There is little uniformity between the jurisdictions considered by the National Committee in the legislation enabling public trustees and/or trustee companies to elect to administer deceased estates. For example, the value of the estate which can be the subject of an election by the Public Trustee or trustee companies differs between jurisdictions as do the formalities attached to the election process. Under section 11A of the *Trustee Companies Act 1984* (Vic), for instance, trustee companies in Victoria are able to make an election in estates not exceeding \$50,000 in value. In Tasmania the figure is \$20,000 under both section 10A of the *Trustee Companies Act 1953* (Tas) and section 20 of the *Public Trustee Act 1930* (Tas). In the Northern Territory the figure is \$75,000 as prescribed under section 7, Schedule 3 of the *Public Trustee Regulations* for the purposes of section 53(1) of the *Public Trustee Act* (NT). In New South Wales, the figure is prescribed by regulation under section 18A of the *Public Trustee Act 1913* and by section 15A of the *Trustee Companies Act 1964* (NSW), which applies the election provisions of *Public Trustee Act 1913* (NSW) to trustee companies.

(c) Issue considered by the National Committee

The National Committee considered whether public trustees and trustee companies should be able to continue to elect to administer estates without obtaining a grant.

(d) The National Committee's preliminary view

The National Committee considered that an election results in what is, in effect, a deemed grant, but without the safeguards of the court's scrutiny and directions. The Registrars of Probate informed the National Committee that they have observed a

³²¹

Trustee Companies Act 1968 (Qld) s 12(5).

number of mistakes in relation to elections. Further, although the concept of an election was developed as a cheaper and quicker way of administering a small estate, that has not been the universal result.

The National Committee formed the preliminary view that elections should be abolished. If an estate cannot be effectively administered informally, a grant, with its inherent protections and safeguards for those interested in the administration of the deceased estate, should be sought.

The National Committee decided not to make a proposal, but to seek submissions on this issue.

(e) Questions for discussion

- 11.1 What, if any, problems have been experienced with elections?**
- 11.2 Should the value of the deceased estate be the sole factor in determining whether some estates can be administered by way of election?**
- 11.3 What are the reasons for retaining the concept of elections?**

3. ADMINISTRATION OF SMALL ESTATES OTHER THAN BY ELECTION OR BY GRANT

QLD ³²²	ACT	VIC	NSW ³²³	SA	WA	NT ³²⁴	TAS ³²⁵	UK	NZ
35	87B		34A			35	20A		

(a) Introduction

In a number of jurisdictions, the Public Trustee is given legislative authority to administer certain small estates without the need to make an election and without the need to apply for a grant.

³²² *Public Trustee Act 1978 (Qld).*

³²³ *Public Trustee Act 1913 (NSW).*

³²⁴ *Public Trustee Act (NT).*

³²⁵ *Public Trustee Act 1930 (Tas).*

For example, section 20A of the *Public Trustee Act 1930* (Tas) reads, in part:

Administration of small estates

- (1) Where any person who has property in this State has died, or dies, and the net value of his estate of which the Public Trustee has knowledge does not, in the estimation of the Public Trustee, exceed \$2 000, the Public Trustee may, subject to subsection (2) of this section -
- (a) receive, call in, convert into money, the property of the estate of that deceased person;
 - (b) pay the debts and other liabilities of that person, of which he has notice; and
 - (c) deal with the residue in all respects as if the probate of the will or letters of administration of the estate of the deceased person had been granted to him.
- ...
- (4) When complying with subsection (1) of this section the Public Trustee is deemed to be the executor or administrator, as the case may be, of the estate of the deceased person in all respects as if probate or letters of administration had been granted to him by the court.

A similar provision is section 35 of the *Public Trustee Act* (NT). Under that provision, the relevant monetary limit is \$20,000, there is a duty to advertise and any will that exists must be deposited with the Registrar of Probates.

The National Committee seeks submissions on whether a provision to similar effect should be included in the model legislation.

(b) Questions for discussion

11.4 Should the model legislation or Public Trustee legislation include a provision to enable the Public Trustee (or equivalent body) to administer a small estate without having to file an election in court and without having to apply for a grant?

11.5 If yes to 11.4, what powers and protections should be conferred on the Public Trustee?

4. ADMINISTRATION OF ESTATES PENDING GRANT

QLD	ACT	VIC	NSW	SA ³²⁶	WA ³²⁷	NT ³²⁸	TAS ³²⁹	UK	NZ
45(4A), 36 ³³⁰		19		12	9, 49	46, 72	21		

A number of jurisdictions provide that, pending a grant being made, the property of the deceased estate vests in the Public Trustee (or equivalent body),³³¹ which is given legislative authority to administer the deceased person's estate, albeit in a limited manner. When a grant is made, the property is divested from the Public Trustee and is vested in the personal representative.

For example, section 36 of the *Public Trustee Act 1978* (Qld) reads, in part:

Powers of public trustee pending grant

- (1) When any person dies or has heretofore died, whether testate or intestate, and whether the public trustee is entitled to a grant of an order to administer or some person other than the public trustee is appointed executor or is entitled to letters of administration, the public trustee may, until administration is granted, exercise with respect to the estate of the deceased person all such powers and authorities and do all such acts and things, other than the distribution of any part of the estate to the person beneficially entitled, as the public trustee would have or could exercise or do if the deceased had died intestate and the public trustee had obtained an order to administer.
- ...
- (7) When the public trustee is acting under this section -
- (a) the public trustee shall in no wise be deemed to be or be liable as an executor *de son tort*,
- ...

326 *Public Trustee Act 1995* (SA).

327 *Public Trustee Act 1941* (WA).

328 *Public Trustee Act* (NT).

329 *Public Trustee Act 1930* (Tas).

330 *Public Trustee Act 1978* (Qld).

331 See Chapter 12 of this Discussion Paper in relation to the vesting of property.

A provision to the effect of section 45 of the *Succession Act 1981* (Qld), which has similar effect to section 36 of the *Public Trustee Act 1978* (Qld), has been recommended for inclusion in the model legislation in Chapter 12 (vesting) of this Discussion Paper.

CHAPTER 12

VESTING OF PROPERTY

1. INTRODUCTION

When a person dies, his or her property immediately vests in another person. The term “vest” refers to the transfer of ownership. The principle of immediate vesting on the death of the owner of property ensures that at no point is the property of the deceased left without an owner. The significance of this is that there will always be someone able to make decisions about the property and that there will always be someone with a proprietary interest in the property.

Both the decided cases and administration and probate legislation have developed rules for the vesting of property on the death of the owner. However, the rules have not developed consistently in the all jurisdictions reviewed.³³²

2. DEVOLUTION OF PROPERTY ON DEATH

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
45	38A, 39, 40, 41B, 42	13(1), 19	44, 45, 46B, 47, 61	45, 46	8, 9, 11 9 ³³³	51, 52, 53, 56, 59	4, 12, 33	1, 9, 33	22, 24, 25

Prior to the enactment of administration and probate legislation, real property vested on the testator’s death in the devisee if there was a will, or in the heir if there was no will. Personal property of the testator vested in the executor on the testator’s death.³³⁴ If there was no executor, personal property vested on death in the Ordinary of the Ecclesiastical Court, later the President of the Probate Division. By a fiction, where an administrator was appointed, the personal estate was treated as having vested, for some purposes, in the administrator as from the death. This is known as the doctrine of “relation back”.

Atherton and Vines describe the present law in Australia as “a mixture of this old common law and statute”.³³⁵

³³² For a concise definition of “vesting” see Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 105.

³³³ *Public Trustee Act 1941 (WA)*.

³³⁴ *Meyappa Chetty v Supramanian Chetty* [1916] 1 AC 603 at 608.

³³⁵ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.4.2.

3. SUMMARY OF AUSTRALIAN JURISDICTIONS

The following table summarises the position with respect to the vesting of property in the various Australian jurisdictions. In most jurisdictions, the situation will vary depending on whether the deceased person died testate or intestate and whether the property concerned is real or personal property. Where the legislation is silent as to a particular form of property, Atherton and Vines suggest that case law fills the gaps.³³⁶

	TESTATE ESTATE	INTESTATE ESTATE
QLD	On death: Executor or - if no executor able and willing to act - the Public Trustee	On death: Public Trustee
	On grant: Person to whom grant is made ³³⁷	
NSW ³³⁸	Death to grant: Public Trustee (both real and personal property)	
ACT	On grant: Executor or administrator ³³⁹	
NT ³⁴⁰		
WA		
VIC	(Legislation silent as to vesting between death and grant.)	Death to grant: State Trustee
	On grant: Executor or administrator (both real and personal property) ³⁴¹	
SA	On death: Real property vests in the executor or administrator	Death to grant: Public Trustee
	(Legislation silent as to vesting of personalty.)	
TAS	On death: Real property vests in the executor or administrator	Death to grant: Chief Justice ³⁴²
	(Legislation silent as to vesting of personalty.)	

³³⁶ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.4.4.

³³⁷ Section 45(4) of the *Succession Act 1981* (Qld) provides for the relation back of the title of the administrator to any property to the date of death of the deceased.

³³⁸ Property passing by general power of appointment vests in personal representatives. See the discussion of s 46B of the *Wills, Probate and Administration Act 1898* (NSW) at p 175 of this Discussion Paper.

³³⁹ In New South Wales, the Northern Territory and Western Australia, upon the grant the property is vested in the executor or administrator as from the date of death of the deceased: *Wills, Probate and Administration Act 1898* (NSW) s 44(1); *Administration and Probate Act* (NT) s 52; *Administration Act 1903* (WA) s 8.

³⁴⁰ Section 56 of the *Administration and Probate Act* (NT) provides that property passing by general power of appointment vests in personal representatives. See note 338 of this Discussion Paper.

³⁴¹ Upon the grant the property is vested in the executor or administrator as from the date of death of the deceased: *Administration and Probate Act 1958* (Vic) s 13(1). There is no statutory provision for the vesting of property from the date of death until the grant.

³⁴² Section 12 of the *Administration and Probate Act 1935* (Tas) refers to "the Chief Justice or in case there may not be a Chief Justice at any time, then in the senior puisne judge, in the same manner and to the same extent as formerly in the case of personal estate it vested in the Ordinary in England".

4. QUEENSLAND: FULL VESTING IN EXECUTOR/PUBLIC TRUSTEE ON DEATH IN TESTATE ESTATES; PUBLIC TRUSTEE IN INTESTATE ESTATES

In Queensland, the transfer of the property is to the deceased person's executor (where there is an executor willing and able to act) or to the Public Trustee. Section 45 of the *Succession Act 1981* (Qld) provides:

Devolution of property on death

- (1) The property to which a deceased person was entitled for an interest not ceasing on his or her death (other than property of which the deceased person was trustee) shall on his or her death and notwithstanding any testamentary disposition devolve to and vest in his or her executor and if more than 1 as joint tenants, or, if there is no executor or no executor able and willing to act, the public trustee.
- (2) Upon the court granting probate of the will or letters of administration of the estate of any deceased person the property vested in his or her executor or in the public trustee under the provisions of subsection (1) shall devolve to and vest in the person to whom the grant is made and if more than 1 as joint tenants.
- (3) Where at any time a grant is recalled or revoked or otherwise determined the property of the deceased vested at that time in the person to whom the grant was made shall be divested from the person and shall devolve to and vest in the person to whom a subsequent grant is made; and during any interval of time between the recall, revocation or other determination of a grant and the making of a subsequent grant the property of the deceased shall devolve to and vest in the public trustee.
- (4) The title of any administrator appointed under this Act to any property which devolves to and vests in the administrator shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment.
- (4A) However, all acts lawfully done by to or in regard to the public trustee before the appointment of an administrator shall be as valid and effectual as if they had been done by to or in regard to the administrator.³⁴³
- (5) For the purposes of this section, and notwithstanding the provisions of the *Trusts Act 1973*, section 16,³⁴⁴ an executor includes an executor by representation under the provisions of section 47 of this Act.
- (6) While the property of a deceased person is vested in the public trustee under this section, the public trustee shall not be required to act in the administration of the estate of the deceased person or in any trusts created by the will of the deceased person, or exercise any discretions, powers, or authorities of a personal representative, trustee or devisee, merely because of the provisions of this section.

³⁴³ See Chapter 11 of this Discussion Paper for a discussion of the administration of deceased estates by the Public Trustee before a grant is made.

³⁴⁴ Section 16 of the *Trusts Act 1973* (Qld) deals with the devolution of trust assets and trust powers upon death.

- (7) Nothing in this section affects the operation of an Act providing for the registration or recording of any person as entitled to any estate or interest in land in consequence of the death of any person notwithstanding that there has been no grant in the estate of the deceased person. [notes added]

Unlike many other Australian jurisdictions,³⁴⁵ in Queensland property vests in the Public Trustee only as a last resort. The reason for this was partly because the principle that estate property vests in the executor is an ancient one that has caused no trouble, and partly in order to maintain the policy favouring private administration of estates.³⁴⁶ Property of which the deceased was trustee is excepted in order to keep property beneficially owned entirely separate from property held as trustee.³⁴⁷

Section 45(2) ensures that on grant the property vests in the grantee - in particular, the administrator where there is no will or where the will does not appoint an executor who is able and willing to act.

Section 45(3) provides for vesting of the property if the grant is revoked.

Section 45(4) provides for "relation back" of the title of the administrator; section 45(4A) preserves the validity of acts done by the Public Trustee before an administrator is appointed and the doctrine of "relation back" applies.³⁴⁸

Subsections (4A) and (6) of section 45 addresses problems in relation to the role of the Public Trustee raised by the New South Wales legislation. In relation to those problems, Wood and Certoma say:³⁴⁹

Section 45[(4A) and] (6) of the *Succession Act 1981* (Qld) conveniently summarise[s] the position which appears from the oceans of litigation produced by s 61 of the *Wills, Probate and Administration Act 1898* (N.S.W.).

Section 45(5) provides that the provisions of the section apply to an executor by representation.³⁵⁰

Section 45(7) is one of a group of provisions in the Queensland legislation that favour the policy of allowing informal private administration of estates even where the estate contains land.³⁵¹

³⁴⁵ See p 169 of this Discussion Paper.

³⁴⁶ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 30.

³⁴⁷ *Ibid.*

³⁴⁸ See p 168 of this Discussion Paper for a discussion of this doctrine.

³⁴⁹ Wood O and Certoma GL, *Hutley, Woodman and Wood: Succession Commentary and Materials* (4th ed 1990) at 263.

³⁵⁰ See Chapter 6 of this Discussion Paper for a discussion of the doctrine of executorship by representation.

³⁵¹ See generally the discussion of informal administration and, in particular, of ss 54 and 45(7) of the *Succession Act 1981* (Qld) in Chapter 10 of this Discussion Paper.

Subsections (3) to (7) of section 45 have no equivalents in the legislation of other jurisdictions. The subsections consist partly of consequential provisions, and partly of provisions that clarify the law, or improve the operation of section 45.

In its 1978 Report, the Queensland Law Reform Commission identified a number of problems that arose out of the then Queensland law relating to vesting (that is, as the law stood before the enactment of the *Succession Act 1981(Qld)*).³⁵²

- **The law was in a state of confusion**

The Queensland Law Reform Commission observed in its 1978 Report.³⁵³

It seems to be the object of section 30 of the *Public Curator Act of 1915* to vest property of an intestate in the Public Curator. But that section uses the language of beneficial succession when what appears to be intended is representative succession; and in any case, the section does not expressly include property of a testator who has died without an executor.

This observation applies to intestates and to testates whose wills do not effectively appoint an executor.

- **Devised realty vested in the devisee**

In some jurisdictions this remains true now. Although some advantages were recognised in relation to the rule's application in the case of simple estates, there are considerable practical disadvantages in this rule in relation to other cases. The rule tends to undermine the principle that real and personal property should be equally available for the payment of the debts of the estate. The Queensland Law Reform Commission made the further observation in its 1978 Report.³⁵⁴

It is clearly undesirable from the point of view of creditors and even from the point of view of devisees that the former should find themselves having to pursue devisees rather than personal representatives, and that the latter should not know whether their devise, even after transmission of the title to them, is freed of future liability to other beneficiaries of the estate.

- **The rule that devised property vests in the devisee conflicts with the policy of the *Trusts Act 1973 (Qld)***

Further, the Queensland Law Reform Commission observed in its 1978 Report that the rule that realty vests in the devisee conflicts with the policy of the *Trusts*

³⁵² Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 29.

³⁵³ Ibid.

³⁵⁴ Id at 30.

Act 1973 (Qld), which is, as far as possible, to convert all forms of property held for successive interests into trust property.³⁵⁵

The objective of the *Trusts Act* is to ensure that all trust property as defined by that Act becomes vested in trustees having the powers of trustees given by that Act. Where land is devised to beneficiaries in succession, without the appointment of trustees, however, the vesting rule constitutes an obstacle to that policy.

5. NEW SOUTH WALES, THE AUSTRALIAN CAPITAL TERRITORY, THE NORTHERN TERRITORY AND WESTERN AUSTRALIA: FULL VESTING IN THE PUBLIC TRUSTEE

New South Wales, the Australian Capital Territory, the Northern Territory and Western Australia have all enacted statutory provisions that vest both real and personal property in the Public Trustee in both testate and intestate estates from death until grant.³⁵⁶ In each of these jurisdictions, with the exception of the Australian Capital Territory, on grant, the estate vests in the executor or administrator; there is a relation back so that the estate vests in the grantee as from death.³⁵⁷

Sections 44 and 61 of the *Wills, Probate and Administration Act 1898 (NSW)* vest the whole estate in the Public Trustee on death, and then, on grant of probate or letters of administration, vest the whole estate in the executor or administrator as from death. Section 61 of that Act is in terms which would apply to testate and intestate property.

The New South Wales provisions have caused a good deal of litigation, and do not appear to have worked well. In *Darrington v Caldbeck*,³⁵⁸ Young J said of section 61:³⁵⁹

Section 61 has caused a tremendous amount of problems to persons affected by it over the years.

There is an opinion that it is preferable to allow the executor to have the estate vested in him or her, as in England and under section 45 of the *Succession Act 1981 (Qld)*, and take his or her authority from the will rather than from the grant.

355 Ibid.

356 *Wills, Probate and Administration Act 1898 (NSW)* s 61; *Administration and Probate Act 1929 (ACT)* s 38A; *Administration and Probate Act (NT)* s 51; *Public Trustee Act 1941 (WA)* s 9.

357 *Wills, Probate and Administration Act 1898 (NSW)* s 44(1); *Administration and Probate Act (NT)* s 52; *Administration Act 1903 (WA)* s 8.

358 (1990) 20 NSWLR 212.

359 Id at 218.

6. VICTORIA, SOUTH AUSTRALIA AND TASMANIA: LIMITED VESTING IN THE PUBLIC TRUSTEE

In Victoria, South Australia and Tasmania, it is only where a person dies intestate that the whole of the person's estate vests in the Public Trustee (or similar officer) on death and until grant.³⁶⁰ Atherton and Vines explain that this extends the former law to the entire property of the deceased, not just personal property.³⁶¹

Atherton and Vines point out that in these States there is a different approach in the case of testate estates, where there is no provision for vesting in the Public Trustee.³⁶² South Australia and Tasmania provide that real property is to vest in the executor or administrator on the death of the deceased.³⁶³ In Victoria, in the case of testate estates, it is only on the grant that the estate vests in the executor or administrator as from the death;³⁶⁴ there is no provision for the vesting of real property from the date of death until the grant.³⁶⁵ According to Sundberg, Victoria retains the old rule in relation to assets during the period before grant - real property vests in the devisee from death until grant.³⁶⁶ Atherton and Vines, however, regard the Victorian position as unclear.³⁶⁷ They explain the effect of the various gaps in the law in these jurisdictions as follows.³⁶⁸

In relation to personal property in testate estates these three jurisdictions make no express provision, but it would seem that the common law position would still apply. Pending a grant of probate personal property would be vested in the executor. But where the grant is not one of probate but letters of administration *cfa* the position is not entirely clear. The old common law provided that it vested in the Ordinary. If the provisions which apply to intestate estates are wide enough to apply to cases of grants *cfa* then the personal property in such estates could vest in the Public Trustees as successors to the Ordinary. [note omitted]

³⁶⁰ *Administration and Probate Act 1958 (Vic) s 19; Administration and Probate Act 1919 (SA) s 45; Administration and Probate Act 1935 (Tas) s 12. See also Atherton RF and Vines P, Australian Succession Law: Commentary and Materials (1996) at paras 17.4.2-17.4.4.*

³⁶¹ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.4.4.

³⁶² *Ibid.*

³⁶³ *Administration and Probate Act 1919 (SA) s 46; Administration and Probate Act 1935 (Tas) s 4.*

³⁶⁴ *Administration and Probate Act 1958 (Vic) s 13(1).*

³⁶⁵ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.4.4.

³⁶⁶ Sundberg RA, *Griffith's Probate Law and Practice in Victoria* (3rd ed 1983) at 23 n 13 and the cases there cited.

³⁶⁷ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 17.4.4.

³⁶⁸ *Ibid.*

The Victorian legislation also includes an additional provision to the effect that an estate does not vest in a minor executor.³⁶⁹

7. NEW SOUTH WALES: VESTING OF PROPERTY THE SUBJECT OF A GENERAL POWER OF APPOINTMENT

Section 46B of the *Wills Probate and Administration Act 1898* (NSW) provides that property which is the subject of a general power of appointment vests on the donee's death in the donee's personal representative. Section 46B of the *Wills, Probate and Administration Act 1898* (NSW) reads:

Appointments under general power

- (1) Real and personal estate passing under a gift in the will of a testator dying after the commencement of the *Conveyancing (Amendment) Act 1930* which operates as an appointment under a general power to appoint by will shall vest in the testator's personal representatives as if the testator had been entitled thereto at the testator's death, whether or not the testator was so entitled, and whether or not for an interest not determining on the testator's death.
- (2) Real and personal estate the subject of a gift contained in the will of a testator dying after the passing of the *Probate Act of 1890*, which operated as an appointment under a general power, shall be deemed to have vested under the provisions of that Act, or of this Act, as the case may require, in the testator's executors or administrators as if that property had been vested in the testator at the time of the testator's death, whether or not the testator was entitled thereto for an estate or interest not determining on the testator's death.
- (3) Nothing in subsection (2) shall affect any right or title accrued before the commencement of this section under any disposition by an appointee which would have been valid if this section had not been passed or shall affect the interpretation of section 44.

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Administration and Probate Act 1958 (Vic) s 26(2). A provision about vesting may not be necessary since the minor would not be able to deal with the estate. But note provisions such as s 137 of the *Land Title Act 1994* (Qld), which permits the guardian of a minor to perform acts required or permitted to be done by or in relation to a person under that Act. Section 137 reads:

Acts for minors and by attorneys etc.

- (1) If -
 - (a) an act is required or permitted to be done by or in relation to a person under this Act; and
 - (b) the person is a minor or is mentally or intellectually impaired or incapable of managing the person's own affairs;
 the act may be done by or in relation to a person who is responsible by law for the management and care of the first person's interests.
- (2) If an act is required or permitted to be done by or in relation to a person under this Act, the act may be done by or in relation to the person's attorney appointed under this division.

8. STATUTORY EXECUTORSHIP AND VESTING IN THE CASE OF INTESTACY

In its 1993 Report on *Intestacy*, the Queensland Law Reform Commission recommended that, in certain circumstances, property in a deceased estate should vest directly in those persons entitled to apply for letters of administration.³⁷⁰ It was considered by the Commission that it was desirable to assimilate the vesting rules for intestacy (or where there was a will that failed to appoint an executor) with the vesting rules that apply where an executor is appointed by will.

9. ISSUES CONSIDERED BY THE NATIONAL COMMITTEE

The National Committee considered whether:

- (1) a provision to the effect of section 45 of the *Succession Act 1981* (Qld) should be included in the model legislation in preference to the vesting provisions of other jurisdictions;
- (2) it is desirable to include provisions that create a statutory executorship in the case of an intestacy or a will that does not effectively appoint an executor and, by doing so, assimilate the vesting rules for executors and statutory executors;
- (3) section 45(6) of the *Succession Act 1981* (Qld) should be amended to provide that, when property is vested in the Public Trustee under that section, the Public Trustee should act in the administration of the estate or whether the vesting should be purely notional.

10. THE NATIONAL COMMITTEE'S PRELIMINARY VIEW

Some concern was expressed about the provisions in a number of jurisdictions that automatically vest property in the Public Trustee on the death of a deceased person. Whereas, traditionally, a Public Trustee would not actively administer a deceased estate pending grant³⁷¹ and would therefore charge no fee, the trend towards commercialisation of Public Trustees might result in active management and the

³⁷⁰ Queensland Law Reform Commission, Report, *Intestacy* (R 42, 1993) at 71-72.

³⁷¹ In *In re Broughton* (1902) 19 WN (NSW) 69, which was decided at a time when in New South Wales property vested in the Chief Justice prior to a grant, leave was sought to serve the Chief Justice along with the executors named in the will with certain legal proceedings. Although the Court found it unnecessary to decide the question, it made the following comments about the appropriateness of joining the Chief Justice (at 70):
My present impression is, however, that it would be improper to make him a party. I do not think that the Legislature intended to do more than make him a mere formal repository of the legal estate, until the Probate Court should grant probate or administration, and I am of opinion that it was never intended that he should thereby be put in the position of being joined as a party in litigious proceedings.

imposition of fees. However, the independence of the Public Trustee was recognised as a factor in favour of vesting in the Public Trustee.

Consideration was given to a possible redraft of section 45(6) of the *Succession Act 1981* (Qld) to confine the effect of vesting in the Public Trustee to a notional vesting. However, the Committee noted that the Public Trustee might have legitimate reasons to act - for example, for the benefit of the beneficiaries or to maintain the estate. There was also a reluctance to be seen to override the particular powers that the Public Trustee might otherwise have, especially in emergency situations. Consideration was also given to providing that the Public Trustee must not charge a fee, but the general view was that such an approach would not be practicable.

It was considered inappropriate that property should vest in the Chief Justice of any particular jurisdiction,³⁷² since failure to perform anything required to be done in the administration of the property could lead to personal liability for non-feasance.

The possibility of a statutory scheme of executorship to take effect on intestacy was considered. In particular, consideration was given to the proposal that, on an intestacy, the spouse or others entitled to share the estate of the deceased should be considered to be the executors of the deceased, and the estate should vest directly in them.

However, concerns were expressed about this proposal. It was suggested that it would lead to uncertainty when a number of people claimed to be entitled to take under the relevant intestacy rules. The uncertainty would not be overcome by providing that the property should vest in the person entitled to be granted letters of administration, since there may be several people with equal claim - for example, where there is no spouse, but are a number of siblings. Registrars of Probate also commented that many people who believe that they are entitled to a grant of letters of administration in fact are not so entitled.³⁷³ A further concern related to statutory executors overstepping their powers and threatening the security of the property.

The National Committee considered section 45(7) of the *Succession Act 1981* (Qld) in Chapter 10 of this Discussion Paper in the context of informal administration.

The National Committee did not consider the inclusion in the model legislation of a provision to the effect of section 46B of the *Wills, Probate and Administration Act 1898* (NSW) relating to the vesting in the personal representatives of property the subject of a general power of appointment.

³⁷² See *Administration and Probate Act 1935* (Tas) s 12.

³⁷³ See Chapter 5 of this Discussion Paper in relation to entitlement to letters of administration.

11. PROPOSAL

A provision to the effect of section 45(1)-(6) of the *Succession Act 1981* (Qld) should be included in the model legislation.

12. QUESTION FOR DISCUSSION

12.1 Should the model legislation include a provision to the effect of section 46B of the *Wills, Probate and Administration Act 1898* (NSW) so that property the subject of a general power of appointment vests on the donee's death in the donee's personal representative?

CHAPTER 13

PARTITION OF PROPERTY IN THE ESTATE

1. INTRODUCTION

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
	52		58	48	19	84			

People who own land together either as joint tenants or tenants in common and who wish to terminate the co-ownership may be able to do so by agreeing to subdivide the land, or by commencing an action for “partition” requesting the court to subdivide the land.

Some jurisdictions have provisions in their administration and probate legislation empowering the court to order partition as a means of ending a joint tenancy or a tenancy in common.

Section 58 of the *Wills, Probate and Administration Act 1898* (NSW) provides:

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.

2. ISSUE CONSIDERED BY THE NATIONAL COMMITTEE

The National Committee considered whether the model legislation should include a provision to the effect of section 58 of the *Wills, Probate and Administration Act 1898* (NSW).

3. THE NATIONAL COMMITTEE'S PRELIMINARY VIEW

The National Committee noted that a provision to the effect of section 58 of the *Wills, Probate and Administration Act 1898* (NSW) does not exist in the Queensland administration and probate legislation. However, in Queensland, there are provisions in the *Property Law Act 1974* (Qld) dealing with statutory trusts for sale or partition which have the same effect and appear to be working well.³⁷⁴

The National Committee has adopted a policy that statutory provisions should be placed in the principal legislation covering the subject matter of the provisions.

4. PROPOSAL

The model legislation should not include a provision to the effect of section 58 of the *Wills, Probate and Administration Act 1898* (NSW). Any jurisdiction that wishes to enact such a provision should do so in its real property legislation.

³⁷⁴

See *Property Law Act 1974* (Qld) ss 37B, 38. See also ss 66F-66I of the *Conveyancing Act 1919* (NSW) and cls 37-45 of the *Law of Property Bill 1998* (NT) attached to Northern Territory Law Reform Committee, *Report on the Law of Property* (R 18, 1998) at 16. Those clauses are based on the Queensland provisions.

CHAPTER 14

SURVIVAL OF ACTIONS

1. INTRODUCTION

QLD	ACT ³⁷⁵	VIC	NSW ³⁷⁶	SA ³⁷⁷	WA ³⁷⁸	NT ³⁷⁹	TAS	UK	NZ
66	Pt II	29	Pt 2	27	4	2	27, 57, 58, 60		

Prior to the legislative changes discussed below, a deceased estate could not be sued in tort in relation to an act alleged to have been committed by the deceased for which only unliquidated damages were recoverable. This “rule” was described by the Latin maxim “*actio personalis moritur cum persona*” - a personal action dies with the person.³⁸⁰ The Queensland Law Reform Commission observed that this “rule” proved intolerable, particularly in the era of motor vehicle accidents.³⁸¹ As already noted, this “rule” has been largely abrogated by statute. The effect of these statutory provisions is discussed below.

2. QUEENSLAND

The most recent legislative response to this “rule” is section 66 of the *Succession Act 1981* (Qld) - based upon the recommendations of the Queensland Law Reform Commission in its report on *The Law Relating to Succession*.³⁸² Section 66 of the *Succession Act 1981* (Qld) reads:

³⁷⁵ *Law Reform (Miscellaneous Provisions) Act 1955* (ACT) Pt II.

³⁷⁶ *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) Pt II.

³⁷⁷ *Survival of Causes of Action Act 1940* (SA).

³⁷⁸ *Law Reform (Miscellaneous Provisions) Act 1941* (WA).

³⁷⁹ *Law Reform (Miscellaneous Provisions) Act 1956* (NT).

³⁸⁰ *Kirk v Todd* (1882) 21 Ch D 484 at 488-489; *Quirk v Thomas (Executor of)* [1916] 1 KB 516 at 530. See Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 923.

³⁸¹ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 49.

³⁸² Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 49-51. The Commission recommended the repeal of an earlier provision to this effect, namely s 15D of the *Common Law Practice Act 1867* (Qld), which had proved inadequate in certain respects.

Survival of actions

- (1) Subject to the provisions of this section and with the exception of causes of action for defamation or seduction, on the death of any person after the 15 October 1940 all causes of action subsisting against or vested in the person shall survive against, or, as the case may be, for the benefit of, the person's estate.
- (2) Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought -
 - (a) shall not include damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life;
 - (b) shall not include exemplary damages;
 - (c) in the case of a breach of promise to marry - shall be limited to damages in respect of such damages as flow from the breach of promise to marry;
 - (d) where the death has been caused by the act or omission which gives rise to the cause of action - shall be calculated without reference to -
 - (i) loss or gain to the estate consequent upon the death save that a sum in respect of funeral expenses may be included;
 - (ii) future probable earnings of the deceased had the deceased survived.
- (3) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against that person before his or her death such cause of action in respect of that act or omission as would have subsisted if that person had died after the damage was suffered.
- (4) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the provisions of the *Supreme Court Act 1995*, part 4³⁸³ and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).
- (5) Nothing in this section enables any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.
- (6) An action which survives pursuant to subsection (1) against the estate of a deceased person may be brought against any beneficiary to whom any part of the estate has been distributed as well as against the personal representatives.
- (7) Where an action is brought against a beneficiary to whom a part of the estate has been distributed that beneficiary is entitled to contribution from any

beneficiary to whom a distribution has been made, being a beneficiary ranking in equal degree with himself or herself for the payment of the debts of the deceased, and to an indemnity from any beneficiary to whom a distribution has been made, being a beneficiary ranking in lower degree than himself or herself for the payment of the debts of the deceased, and the beneficiary may join any such beneficiary as a party to the action brought against him or her.

- (8) Where an action is brought against a beneficiary (including a beneficiary who has been joined as aforesaid) whether in respect of an action which has survived against the estate or for contribution or indemnity, the beneficiary may plead equitable defences and if the beneficiary has received the distribution made to the beneficiary in good faith and has so altered the beneficiary's position in reliance on the propriety of the distribution that, in the opinion of the court, it would be inequitable to enforce the action, the court may make such order as it thinks fit.
- (9) In no case may a judgment against a beneficiary exceed the amount of the distribution made to the beneficiary. [note included]

3. OTHER JURISDICTIONS

Provisions similar to section 66 of the *Succession Act 1981* (Qld) appear in all jurisdictions so there is already substantial, though not complete, uniformity in Australia in relation to the survival of causes of action.

The Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Western Australia deal with the survival of causes of action in separate legislation. Only Queensland, Victoria and Tasmania incorporate relevant provisions in their succession legislation.

4. ACTIONS AGAINST BENEFICIARIES

In at least one significant respect, the Queensland provision is different from the provisions in other jurisdictions. Section 66(6) to (9) of the Queensland legislation significantly extends the effect of the survival provisions. Those subsections enable an action that survives against the estate of a deceased person to be brought not only against the personal representatives, as in other jurisdictions, but also against beneficiaries to whom distributions have been made. The provision was recommended by the Queensland Law Reform Commission, which noted:³⁸⁴

The personal representative may distribute the estate paying attention to claims of which he has knowledge, and if he has duly advertised and does not know of a claim, he is protected. Creditors may pursue beneficiaries to whom distributions have been made but it is not entirely clear whether tort plaintiffs may.

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Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 50.

Survival of actions provisions that simply refer to survival of actions against or for the benefit of the "estate" of the deceased person may be problematic if the term "estate" is read as meaning, as it has been held to mean in the context of family provision applications, the estate of the deceased in the hands of the personal representatives. On this reading, assets distributed to beneficiaries in due course are not part of the "estate".³⁸⁵

The Queensland Law Reform Commission did not consider that the use of the term "estate" in survival of actions legislation was intended to add a further limitation period against claimants against estates by requiring the action to be commenced before the estate is distributed.³⁸⁶

In any case, if such a construction is possible, as it now is, we consider it to be undesirable in this context since it is an oblique way of importing a special and, to some extent, capricious limitation period into this branch of the law. ... [We] therefore recommend that it be stated clearly that the surviving cause of action may be brought against beneficiaries as well as against personal representatives.

The Commission further recommended:³⁸⁷

... that beneficiaries should only be liable to the extent of the distributions made to them, that they should be able to plead equitable defences (particularly laches) and that they should be afforded the defence of change of position ...

The Commission was of the view that such protections to beneficiaries should constitute an added incentive to claimants against estates "to come into the open and pursue their claims against the personal representatives promptly".³⁸⁸

Where a beneficiary is pursued by a claimant against the estate, the Commission was of the view that the normal principles of application of the doctrines of contribution and indemnity should be expressed in the legislation. Thus, in the Commission's recommendations that were implemented by section 66(7) of the *Succession Act 1981* (Qld), a beneficiary is able to: seek contribution against other beneficiaries ranking equally with him or her for the payment of debts; seek indemnity from beneficiaries ranking below him or her for the payment of debts; and, bring co-beneficiaries into court so that the matter can be determined at one time.

³⁸⁵ For a discussion on the concept of "notional estate" see National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, 1997) at 76-94.

³⁸⁶ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 51.

³⁸⁷ *Ibid.* See *Succession Act 1981* (Qld) s 66(8), (9).

³⁸⁸ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 51.

5. ISSUES CONSIDERED BY THE NATIONAL COMMITTEE

The National Committee considered whether:

- (1) the model legislation should contain a provision dealing with the survival of causes of action or whether that issue is better dealt with in separate legislation (as it is in the Australian Capital Territory, New South Wales, the Northern Territory, South Australia and Western Australia);
- (2) the model legislation should include provisions to the effect of section 66(6) to (9) of the *Succession Act 1981* (Qld).

6. THE NATIONAL COMMITTEE'S PRELIMINARY VIEW

The National Committee was of the view that a provision to the effect of section 66 of the *Succession Act 1981* (Qld) in the model legislation would be a useful reference point for personal representatives, although the exceptions referred to in that provision would be better placed in other legislation in the respective jurisdictions because the law relating to each exception may differ between jurisdictions.

7. PROPOSAL

A provision to the effect of section 66(1) to (5) of the *Succession Act 1981* (Qld) should be included in the model legislation, but in a more generic form. There should be no reference to the exceptions (for example, defamation,³⁸⁹ mentioned in section 66(4) of the *Succession Act 1981* (Qld)). The exceptions, which are not uniform between the various jurisdictions reviewed by the National Committee, should be set out in separate legislation in each jurisdiction.

³⁸⁹

See New South Wales Law Reform Commission, *Report of the Law Reform Commission on Defamation* (LRC 11, 1971) at paras 24-26; Australian Law Reform Commission, *Report, Unfair Publication: Defamation and Privacy* (ALRC 11, 1979) at para 107; South Australian Law Reform Commission, *Fifteenth Report of the Law Reform Committee of South Australia to the Attorney-General Relating to the Reform of the Law of Libel and Slander* (R 15, 1972) at 7 (para 6) for a discussion of particular issues concerning the exclusion of defamation.

8. QUESTIONS FOR DISCUSSION

- 14.1** Does case law adequately deal with the situations contemplated by section 66(6) to (9) of the *Succession Act 1981 (Qld)*?
- 14.2** Should a provision to the effect of section 66(6) to (9) of the *Succession Act 1981 (Qld)* be included in the model legislation?
- 14.3** If there is to be no reference to the exceptions in section 66 of the *Succession Act 1981 (Qld)* in the model legislation, does this affect the National Committee's proposal in Chapter 8 of this Discussion Paper that it is not necessary for the model legislation to include a provision to the effect of section 52A of the *Succession Act 1981 (Qld)*?

CHAPTER 15

ADMINISTRATION OF ASSETS

1. INTRODUCTION

The law in relation to the administration of assets deals with the manner in which the assets of a deceased estate are distributed. This aspect of the law is significant in two respects:

- In relation to an insolvent estate - that is, where there are insufficient assets in the estate to pay all the debts - it determines whether some debts have priority over others.
- In relation to a solvent estate - where there are obviously sufficient assets to pay all the debts - the law in relation to the administration of estates may determine how an estate is distributed between a number of beneficiaries. This will be so where there are insufficient assets in the estate - after paying all the debts - to pay all the beneficiaries according to the terms of the will. Lee gives this brief explanation of how the assets in a solvent estate are distributed:³⁹⁰

Where the estate is solvent, ... the question is not what creditors will be paid, since, the estate being solvent, they all will be. 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.

There is a designated order in all Australian jurisdictions for the application of different classes of property towards the payment of debts. Depending on the nature of the property comprising the estate and the terms of the will, the effect of the designated order may be that some beneficiaries receive in full what is left to them by the will, while others receive part only, or - in some cases - nothing.

The present law on administration of assets is far from uniform.³⁹¹ The Queensland Law Reform Commission noted in its 1978 Report that the reforms in the *Administration of Estates Act 1925* (UK), which were adopted in New South Wales and Victoria (with modifications), had not worked well and had produced much litigation.³⁹²

³⁹⁰ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1101.

³⁹¹ For example, in relation to the payment of debts in solvent estates, South Australia and Western Australia still retain the traditional list of classes. All other Australian jurisdictions have developed their own statutory lists. With the exception of Queensland, these statutory lists are based on the *Administration of Estates Act 1925* (UK). See pp 200-203 of this Discussion Paper for a discussion of the various statutory lists.

³⁹² Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 39.

This litigation tends to result in the court analysing the detailed wording of the legislative provisions, and of the wills that bring those provisions into operation. Almost always, the testator has not provided for the precise problem that has arisen, because the testator did not foresee the events that occurred. The courts are then asked to determine how the legislative provisions would impact on those events. Simplification of the provisions may reduce the uncertainty involved in, and the opportunities for, such litigation.

2. AGREED PRINCIPLES

The National Committee, in consultation with the Registrars of Probate, agreed on a set of principles to provide for the administration of assets. Some of these principles simply restate the existing law. Other principles, however, involve quite a significant change in the law.³⁹³

The agreed principles are as follows:

- (1) The duties of personal representatives are:
 - (a) to get in the assets of the estate;
 - (b) to pay the debts of the deceased; and
 - (c) to distribute what remains among the beneficiaries entitled to those assets.
- (2) The assets of the estate are those assets that devolve upon the personal representatives of the deceased person.
- (3) If the estate is insolvent, the estate is administered as if in bankruptcy.
- (4) Where the estate is solvent, the debts are payable out of the assets of the estate.
- (5) The assets of the estate are either specific or are part of the residuary estate -
 - (a) - specific assets are assets specifically referred to in a will of the deceased and the subject of a disposition that has effect;
 - (b) residuary assets are assets that form part of the residuary estate - that is, they are not specific and include assets specifically referred to in a will of the deceased the subject of a disposition that fails to have effect.

³⁹³

For example, principle (5).

- (6) Residuary assets are first applicable towards the discharge of the debts of the deceased.
- (7) (a) Specific assets are next applicable towards the discharge of the debts of the deceased.
- (b) Where specific assets are applicable towards the discharge of the debts, specific assets remaining after the payment of debts must be distributed rateably among all the beneficiaries entitled under a disposition of specific assets.
- (8) Mortgaged property must pay off its own mortgage debt (*Locke King's Act*).³⁹⁴
- (9) Pecuniary legacies³⁹⁵
- (a) Pecuniary legacies are payable from residuary assets after the payment of debts, although the National Committee seeks submissions on whether this should be the case.
- (b) Where residuary assets, after the payment of debts, are insufficient to pay all pecuniary legacies in full, the pecuniary legacies abate rateably.
- (10) Contrary intention³⁹⁶
- These provisions should be subject to an admissible expression of a contrary intention, whether contained in the will or elsewhere.
- (11) Rateability
- Subject to the expression of a contrary intention, where more than one specific asset is made subject in the will to a charge, trust or direction for the payment of any debt or debts of the deceased, all such specific assets must be applied rateably to the payment of the debts.
- (12) *Donationes mortis causa* should not be included in the list of assets from which debts can be paid.³⁹⁷

The main principles and a number of subsidiary issues that arise from these principles are discussed in detail below.

³⁹⁴ See p 231 of this Discussion Paper.

³⁹⁵ See p 226 of this Discussion Paper.

³⁹⁶ See pp 216, 226 and 232 of this Discussion Paper.

³⁹⁷ See p 212 of this Discussion Paper.

3. DECEASED'S PROPERTY IS ASSETS FOR THE PAYMENT OF DEBTS

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
56	41, 41A(1)	37	46, 46A	51	10	54, 55	32	32	26

(a) Queensland provision

Section 56 of the *Succession Act 1981* (Qld) reads:

Property of the 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 encumbrances.

This section ensures that all property of the deceased, real and personal, without distinction, is available for the payment of debts, and that any attempt of the testator by his or her will to make any assets unavailable to creditors is void.

(b) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 56 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(c) The National Committee's preliminary view

The National Committee was of the view that a provision to the effect of section 56(1) of the *Succession Act 1981* (Qld) should be included in the model legislation. It was of the view, however, that section 56(2)³⁹⁸ - which deals with the rights of mortgagees and other encumbrances - was declaratory only, and could therefore be omitted.

The Registrars of Probate agreed with this approach.

³⁹⁸

Provisions to the same effect are also found in s 37 of the *Administration and Probate Act 1958* (Vic) and s 32(1) of the *Administration and Probate Act 1935* (Tas).

(d) Proposal

A provision to the effect of section 56(1) of the *Succession Act 1981 (Qld)* should be included in the model legislation.

4. PAYMENT OF DEBTS IN THE CASE OF INSOLVENT ESTATES

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
57	41C, Sch 4 Pt II	39(1), Sch 2 Pt I	46C(1), Sch 3 Pt 1	60, 61	10A, Sch 5	57(2), Sch 4, Pt II	34, Sch II Pt 1		31, 37

(a) Introduction

Ordinarily, the administration of a deceased estate is undertaken by the personal representative. However, where a person dies while insolvent or a deceased estate becomes insolvent, there is an alternative regime for the administration of the estate.³⁹⁹ Part XI of the *Bankruptcy Act 1966 (Cth)* deals with the administration of estates of deceased persons in bankruptcy. Both the *Bankruptcy Act 1966 (Cth)* and the various jurisdictions' administration legislation contain provisions giving priority to the payment of different types of debts.

(b) Administration under Part XI of the *Bankruptcy Act 1966 (Cth)*

A petition may be presented for the administration of a deceased estate by either a creditor or creditors of the deceased person⁴⁰⁰ or the person administering the estate of the deceased person.⁴⁰¹ In both cases, a relevant connection between the deceased and the jurisdiction must be established.⁴⁰² Further, for a petition to be presented by a creditor or creditors:

³⁹⁹ *The Laws of Australia*, art 3.14, Chapter 1, Part A, para 1.

⁴⁰⁰ *Bankruptcy Act 1966 (Cth)* s 244.

⁴⁰¹ *Bankruptcy Act 1966 (Cth)* s 247.

⁴⁰² A petition shall not be brought unless, at the time of his or her death, the deceased:

- (a) was personally present or ordinarily resident in Australia;
- (b) had a dwelling house or place of business in Australia;
- (c) was carrying on business in Australia, either personally or by means of an agent or manager; or
- (d) 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.

See *Bankruptcy Act 1966 (Cth)* ss 244(6)(b), 247(2).

- there must be a debt of not less than \$2,000 or debts totalling not less than that amount -
 - * owing to the creditor or creditors by the deceased person at the time or his or her death,⁴⁰³ or by the personal representative of the deceased person;⁴⁰⁴ or
 - * which becomes or become owing after the deceased person's death, being a debt or debts that the deceased person would have been liable to pay to the petitioning creditor or creditors if he or she had not died;⁴⁰⁵ and
- the debt or debts must be for a liquidated sum and payable immediately or at a certain future time.⁴⁰⁶

Generally, all debts proved in a bankruptcy rank equally.⁴⁰⁷ However, the *Bankruptcy Act 1966* (Cth) provides for nine classes of debts to have priority in descending order.⁴⁰⁸ In particular, the payment of "proper funeral and testamentary expenses" is fourth in the list of priority payments, being displaced only by three types of debts that relate specifically to various costs and expenses of the bankruptcy.

The list of priority payments is, however, itself subject to certain other Commonwealth legislation dealing with the order of payment of debts.⁴⁰⁹ Consequently, it will not always be the case that, in the absence of any costs pertaining to the first three classes of priority debts, the proper funeral and testamentary expenses of the estate will be the next debts due for payment.

403 *Bankruptcy Act 1966* (Cth) s 244(1)(a).

404 *Bankruptcy Act 1966* (Cth) s 244(1)(b).

405 *Bankruptcy Act 1966* (Cth) s 244(1)(c).

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

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

408 *Bankruptcy Act 1966* (Cth) s 109.

409 *Bankruptcy Act 1966* (Cth) s 109(1A), referring to s 50 of the *Child Support (Registration and Collection) Act 1988* (Cth) and s 221YHJ(3), (4) and (5), s 221YHZD(3), (4) and (5) and s 221YU of the *Income Tax Assessment Act 1936* (Cth).

(c) Administration under State or Territory law

Even though an estate may be insolvent, it may not necessarily be administered under the provisions of the *Bankruptcy Act 1966* (Cth). One of the grounds for bringing a petition may not be present, or there may simply be no creditor who wishes to bring a petition.

Section 57 of the *Succession Act 1981* (Qld) reads:

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.

As the Queensland Law Reform Commission pointed out in its 1978 Report, it is rare for insolvent estates to be administered otherwise than under the *Bankruptcy Act 1966* (Cth).⁴¹⁰ The Commission recommended that the State rules for the payment of debts in insolvent estates should be the same as the Commonwealth rules:⁴¹¹

... as in practice a personal representative cannot afford to follow the State rules in any case where a creditor may have power to insist that the estate be administered under the Commonwealth Act.

(d) Issues considered by the National Committee

The National Committee considered whether:

- (1) the State and Territory rules for the payment of debts in insolvent estates should be the same as the rules under the *Bankruptcy Act 1966* (Cth);
- (2) a provision to the effect of section 57 of the *Succession Act 1981* (Qld) should be included in the model legislation.

⁴¹⁰ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 40.

⁴¹¹ Ibid.

(e) The National Committee's preliminary view

The National Committee noted that the order for the payment of funeral, administration and testamentary expenses differs depending on whether an insolvent estate is being administered under the *Bankruptcy Act 1966* (Cth) or under the relevant State or Territory provisions relating to the distribution of insolvent estates.⁴¹²

The National Committee was of the view that it was necessary to retain the State and Territory provisions in some form, as the *Bankruptcy Act 1966* (Cth) will not always cover the field.⁴¹³ The National Committee was of the view, however, that the same priority rules should apply regardless of whether an estate was the subject of proceedings under the *Bankruptcy Act 1966* (Cth) or was being administered under the relevant State or Territory provision. This view was shared by the Registrars of Probate.

One suggestion for assimilating the priorities created by the two schemes was that the model provision should be made "subject to the *Bankruptcy Act 1966* (Cth)".

The National Committee did not form a preliminary view about this issue, but decided to seek submissions on how the issue might be resolved.

(f) Questions for discussion

- 15.1** In relation to the payment of debts in an insolvent estate, should the same priorities apply regardless of whether the estate is being administered under Part XI of the *Bankruptcy Act 1966* (Cth) or under the relevant provision of a State or Territory?
- 15.2** If yes to 15.1, how should the priorities of the two regimes be assimilated? For example, should the model provision be expressed to be "subject to the provisions of the *Bankruptcy Act 1966* (Cth)" or should the model provision incorporate by reference the relevant order of the *Bankruptcy Act 1966* (Cth)?

⁴¹² These expenses currently have priority in Queensland, the Australian Capital Territory, Victoria, the Northern Territory, New South Wales, Western Australia and Tasmania. See the table of provisions at p 191 of this Discussion Paper. Legislation in South Australia does not give priority to these expenses.

⁴¹³ As noted at pp 191-192 of this Discussion Paper, one of the requirements for administering a deceased estate under the *Bankruptcy Act 1966* (Cth) may not be present, making it impossible to administer the estate under that Act. Alternatively, there might not be a creditor who wishes to present a petition to have the estate administered under the Act and the personal representative may not wish to incur the further expense of making the necessary application.

15.3 If no to 15.1, should the payment of "funeral, testamentary and administration expenses" have priority when an insolvent estate is being administered other than under Part XI of the *Bankruptcy Act 1966* (Cth)?

5. RETAINER, PREFERENCE AND THE PAYMENT OF DEBTS BY THE PERSONAL REPRESENTATIVE

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK ¹⁴	NZ
58(1)	55	36	82(2)	62	10(2), (4)	87(2)		10(1)	40
58(2)					10(5)			10(2)	

(a) The right of retainer

The right of retainer - "a personal privilege of the personal representative"⁴¹⁵ - has been described in the following terms:⁴¹⁶

At common law, an executor or administrator of a deceased estate is entitled to retain from the estate an amount sufficient to cover any debts owing to him or her by the deceased in priority to the costs of the administration and also in priority to the claims of creditors of an equal or lower degree.⁴¹⁷

The following reason has been suggested for the development of the right of retainer:⁴¹⁸

The right was one originally recognised by the law on the ground that the representative cannot sue himself, and would, therefore, have been in a worse position than any other creditor, who, by suing and recovering judgment, could obtain priority over the representative. [note omitted]

⁴¹⁴ *Administration of Estates Act 1971* (UK).

⁴¹⁵ *Halsbury's Laws of England* (4th ed) Vol 17 at para 1144.

⁴¹⁶ *The Laws of Australia*, art 7.7, Chapter 2, Part B at para 14.

⁴¹⁷ For example, *Re Wester Wemyss; Tilley v Wester Wemyss* [1940] Ch 1; *Attorney-General (UK) v Jackson* [1932] AC 365.

⁴¹⁸ *Halsbury's Laws of England* (4th ed) Vol 17 at para 1144.

(b) The right to prefer creditors

The personal representative's right to prefer creditors has been described in the following terms:⁴¹⁹

A personal representative was entitled to pay creditors of the same class in such order as he pleased although there might not be enough to pay all.

(c) Abolition of the rights of retainer and preference

The personal representative's rights of retainer and preference have been abolished by statute in all Australian jurisdictions except Tasmania.⁴²⁰

When recommending the abolition of these rights, the Queensland Law Reform Commission observed that the English Law Commission was of the view that the old rules of retainer and preference "stem from former distinctions made by the law relative to the ability of a personal representative-creditor to sue himself in a common law court and so convert his debt into a judgment debt".⁴²¹

(d) Safeguards for personal representatives

In Queensland and Western Australia, certain safeguards have been provided to protect a personal representative who pays creditors while believing the estate to be solvent. Section 58 of the *Succession Act 1981* (Qld) reads:⁴²²

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

⁴¹⁹ Id at para 1143.

⁴²⁰ See *Administration and Probate Act 1935* (Tas) s 34(2).

⁴²¹ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 41.

⁴²² Section 58 of the *Succession Act 1981* (Qld) was based on s 10 of the *Administration of Estates Act 1971* (UK). See Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 41.

- (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.

If a personal representative has been granted letters of administration solely by reason of being a creditor of the estate, a lesser level of protection is afforded to the personal representative. The personal representative is protected in respect of payments made to another creditor, but not in respect of a payment made to himself or herself.

The Queensland Law Reform Commission recognised in its 1978 Report that a personal representative might pay debts in good faith, and without reason to suspect the impending insolvency of the testator's estate.⁴²³ The Commission recommended that the English provision that protects a personal representative who so acts be adopted.⁴²⁴ This recommendation was implemented by section 58(2) of the *Succession Act 1981* (Qld). The provision frees the personal representative, in that capacity, from liability to other creditors who have not been paid in full to account for the debts so paid if it subsequently appears that the estate is insolvent.

(e) Issues considered by the National Committee

The National Committee considered whether:

- (1) the personal representative's rights of retainer and preference should be abolished by a provision in the model legislation;
- (2) a personal representative who pays debts in good faith and without suspecting the impending insolvency of the deceased's estate should be protected from liability to other creditors;
- (3) if yes to (1) and (2), a provision to the effect of section 58 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(f) The National Committee's preliminary view

The National Committee observed that the effect of section 58 of the *Succession Act 1981* (Qld) was to absolve the personal representative from liability in his or her capacity as a personal representative, not in his or her capacity as a creditor. The National Committee was of the view that the rights of retainer and preference should

⁴²³ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 41.

⁴²⁴ *Ibid.*

not be retained. A provision in the terms of section 58(1) of the *Succession Act 1981* (Qld) should be included in the model legislation, but the provision should also state the effect of the principles that are being abolished.

The Registrars of Probate agreed with this view.

(g) Proposal

A provision to the effect of section 58(1) of the *Succession Act 1981* (Qld) should be included in the model legislation. However, instead of referring simply by name to the doctrines of retainer and preference, the model legislation should state the effect of the principles that are being abolished.

6. PAYMENT OF DEBTS IN THE CASE OF SOLVENT ESTATES

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
59(1)	41C, Sch 4 Pt 1	39, Sch 2 Pt 2	46C(2), Sch 3 Pt 2			57, Sch 4 Pt 1	34(3), Sch 2 Pt 2	34, Sch 1 Pt 2	
59(2)	Sch 4 Pt 1 Class 6	Sch 2 Pt 2	Sch 3 Pt 2			Sch 4 Pt 1 Class 6			
59(3)		Sch 2 Pt 2 Class 8					Sch 2 Pt 2, Class 8	34(3), Sch 1 Pt 2 Class 8	

(a) Introduction

The traditional, case law derived, rules for the order of payment of debts are still in force in South Australia and Western Australia. With the exception of Queensland - which has enacted its own rules - the other States and Territories have adopted the English precedent contained in the *Administration of Estates Act 1925* (UK). Victoria has departed in a significant respect from the other States and Territories.

When the Queensland Law Reform Commission was considering this matter prior to the publication of its 1978 Report, it had the assistance of Professor Charles Ryder of University College London, the editor of *Hawkins on the Construction of Wills*. Professor Ryder pointed out some of the problems that the English precedent was causing, and helped the Commission in its adoption of a less cluttered order of

application of assets.⁴²⁵ The Commission's recommendations were carried into legislation in sections 59 and 60 of the *Succession Act 1981* (Qld).

(b) The historical development of classes of assets

The courts have held in the past that there were eight classes of assets, which were applied in descending order, to the payment of debts. Those classes were summarised as follows by Hoare J in *Calcino v Fletcher*.⁴²⁶

- Class 1 Residuary personalty, the executor reserving a fund sufficient for the payment of general legacies.⁴²⁷
- Class 2 Realty devised on trust for (and not merely charged with) the payment of debts.
- Class 3 Realty undisposed of by the will (which descended to the heir).
- 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 land and specific, including secured demonstrative, legacies.⁴²⁸
- Class 7 Property (realty and personalty) the subject of a general power of appointment exercised expressly by the testator.
- Class 8 *Donationes mortis causa*.

The order of application of the various classes of assets to the payment of debts was subject to the expression in the will of a contrary intention by the testator.

The above list grew in a piecemeal fashion. It enshrined attempts by the equity courts to ensure that realty could be used to pay debts, the old law being that it could not be

⁴²⁵ This information was provided by Mr WA (Tony) Lee.

⁴²⁶ [1969] Qd R 8 at 22-23.

⁴²⁷ Lee suggests that "residuary personalty" means, in this context, both personalty bequeathed by a residuary provision in the testator's will and personalty undisposed of by the will: Lee WA, *Manual of Queensland Succession Law* (1975) at para 101. The discussion of the old classes has not been included in later editions of that text. See also *In Re Kempthorne; Charles v Kempthorne* [1930] 1 Ch 268 per Maugham J at 277 for a similar view.

⁴²⁸ In *Calcino v Fletcher* [1969] Qd R 8 at 23, Hoare J observed that "a mere general direction to pay debts has the effect of moving these assets from this class and placing them in Class 4".

used for that purpose. The policy of the old law was to preserve the rights of the heir at law. In all States and Territories the distinction formerly made between realty and personalty has been abolished for the purpose of paying the deceased's debts.⁴²⁹

(c) Development of classes - statutory lists

In England, the *Administration of Estates Act 1925* (UK) introduced a new order, which was followed by most Australian jurisdictions that enacted a statutory list. These statutory lists did not make a complete break with the old rules.

(i) English statutory list

The English statutory list has eight classes:⁴³⁰

- Class 1 Property of the deceased, undisposed of by will,⁴³¹ subject to the retention thereof of a fund sufficient to meet any pecuniary legacies.⁴³²
- Class 2 Property of the deceased, not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift,⁴³³ subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not

⁴²⁹ *Administration and Probate Act 1929* (ACT) s 41; *Wills, Probate and Administration Act 1898* (NSW) ss 46 and 46A; *Administration and Probate Act* (NT) s 57; *Succession Act 1981* (Qld) s 56; *Administration and Probate Act 1919* (SA) s 51; *Administration and Probate Act 1935* (Tas) s 32; *Administration and Probate Act 1958* (Vic) s 37; *Administration Act 1903* (WA) s 10(1).

⁴³⁰ *Administration of Estates Act 1925* (UK) s 34, Schedule 1 Part II.

⁴³¹ It has been held that Class 1 includes a lapsed share of residue: see *In Re Kempthorne; Charles v Kempthorne* [1930] 1 Ch 268 per Maugham J at 277, 278:

I have no doubt that the language of that section [Class 1] is sufficient to include a lapsed share of residue ...

It is plain that the old law as to application of assets is there being altered to the detriment of people entitled upon an intestacy.

The Court of Appeal in that case did not reach a final conclusion on that point: *In Re Kempthorne, Charles v Kempthorne* [1930] 1 Ch 268 per Lord Hanworth MR at 296 and per Lawrence LJ at 298-299.

⁴³² See pp 218-227 of this Discussion Paper for a discussion of the payment of legacies including pecuniary legacies.

⁴³³ A gift of "all my real estate" has been held to be a residuary gift for the purpose of Class 2: *In re Wilson, Decd, Wilson v Mackay and Others* [1967] 1 Ch 53 per Pennycuik J at 69-70:

[It was argued] that a devise is only residuary if there has been a previous devise, so that the residuary devise operates upon what remains after the previous devise has taken effect. That is a grammatically good point. ...

The only alternative in the context of paragraph 2 is to treat a general or universal gift as a specific gift, and that I should have thought certainly it was not. This construction would produce an wholly illogical result, that is, as regards payment of debts; on the one hand a residuary devise following a specific devise, that would be a residuary gift for the purpose of paragraph 2; on the other hand, a general or universal devise would be a specific devise and would fall, not within paragraph 2, but paragraph 6. I cannot think that is right.

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, including the statutory power to dispose of entailed interests, rateably according to value.
- Class 8 The following provisions shall also apply -
- (a) the order of application may be varied by the will of the deceased.
- (b) ...

The English list has been substantially adopted in the Australian Capital Territory,⁴³⁴ New South Wales,⁴³⁵ the Northern Territory⁴³⁶ and Tasmania,⁴³⁷ although the lists in the Australian Capital Territory, New South Wales, and the Northern Territory are written in plain English and omit Classes 7 and 8 of the English list.

(ii) Victorian statutory list

The Victorian statutory list⁴³⁸ differs from the other Australian statutory lists based on the English statutory list in an important respect (as does the

⁴³⁴ *Administration and Probate Act 1929* (ACT) Fourth Schedule Part 1. This list contains the first six of the English classes with a slight variation in terminology.

⁴³⁵ *Wills, Probate and Administration Act 1898* (NSW) Schedule 3 Part 2. This list contains the first six of the English classes with a slight variation in terminology.

⁴³⁶ *Administration and Probate Act* (NT) Schedule 4 Part 1. The Northern Territory schedule appears to contain two misprints - "Assents" for "Assets" in Class 1 and "unappropriated" for "appropriated" in Class 3. This list contains the first six of the English classes with a slight variation in terminology.

⁴³⁷ *Administration and Probate Act 1935* (Tas) Schedule II Part II.

⁴³⁸ *Administration and Probate Act 1958* (Vic) Second Schedule Part II.

Queensland list). Class 2 in the other States and Territories has been moved to Class 4 in Victoria, so that in Victoria property specifically appropriated or devised or bequeathed for, or charged with, the payment of debts (Classes 2 and 3) is applied towards the payment of debts ahead of property comprising the residuary estate (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.

(iii) Queensland

When the *Succession Act 1981* (Qld) was enacted, Queensland made a significant departure from the English statutory list, reducing the number of classes to four. Section 59(1) of the *Succession Act 1981* (Qld) provides for the following classes:⁴³⁹

- 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

⁴³⁹

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, Report, *The Law Relating to Succession* (R 22, 1978) at 41.

specific or general description) subject to a charge for the payment of debts.

Class 2 Property comprising the residuary estate⁴⁴⁰ 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*.

Class 1 abolishes the distinction, which is found in all other jurisdictions, between property left on trust for the payment of debts on the one hand, and property charged to pay debts on the other.⁴⁴¹ The two types of property are combined into one class.⁴⁴²

Class 2 comprises the residuary estate of the testator, which includes, by virtue of section 55 of the *Succession Act 1981* (Qld),⁴⁴³ property the subject of a disposition that has failed.

The list does not include as a class the fund retained for the payment of pecuniary legacies. The Queensland Law Reform Commission noted in its 1978 Report that the fund for the payment of pecuniary legacies is in most legislation inserted as a class before what is Class 3 in the Queensland list - that is, property specifically devised or bequeathed.⁴⁴⁴ In Queensland, pecuniary legacies are dealt with in section 60 of the *Succession Act 1981* (Qld). The effect of section 60 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, and the fund is still available for the payment of debts immediately before Class 3 property. It is therefore unnecessary to include this fund as a separate class.

440 See the discussion of s 55 of the *Succession Act 1981* (Qld) at pp 206-208 of this Discussion Paper.

441 The other Australian jurisdictions differ as to where these two types of property come in their respective lists.

442 If class 1, as set out above, were included in the model legislation, it would have the effect in New South Wales that classes 3 and 4 in Part 2 of Schedule 3 of the *Wills, Probate and Administration Act 1898* (NSW) would be merged. Thus, the present New South Wales Class 3, "Assets specifically appropriated or disposed of by will ... for the payment of debts", and Class 4 "Assets charged with or disposed of by will ... subject to a charge for the payment of debts" would be merged to form the first class above the present first and second classes, which would themselves be merged to form one class. This merged class would become the second class, available for the payment of debts after the first class, and would consist of assets comprised in the residuary estate, as well as assets undisposed of by will.

443 Section 55 of the *Succession Act 1981* (Qld) is set out at p 207 of this Discussion Paper.

444 Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 42.

(d) Criticisms of the existing statutory classes

The English legislation - which has been substantially followed in Australia - has proved difficult to comprehend and apply.⁴⁴⁵ Further, all the existing statutory lists can be criticised on three grounds:

- they mix questions of law with questions of fact;
- they make assumptions, which arguably cannot be justified, about the testator's intention; and
- with the exception of Queensland, preference is given to residuary dispositions over property not disposed of by will.

(i) Mixing of questions of law and fact

The legislation is seriously deficient in principle because it fails to distinguish between questions of law and questions of fact. The order in which debts should be paid from assets is a question of law. The intention of the testator is a question of fact.

In the Australian Capital Territory, New South Wales, the Northern Territory and Tasmania, Classes 1, 2, 5 and 6 are questions of law; on the other hand, Classes 3 and 4 refer to expressions of the testator's intention. In Victoria, Classes 1, 4, 5, 6 and 7 are questions of law, whereas Classes 2 and 4 refer to expressions of the testator's intention. In Queensland, although the number of classes was significantly reduced, the same defect is present: Classes 2, 3 and 4 are questions of law, but Class 1, which refers to expressions of the testator's intention, is a question of fact.

(ii) Assumptions about the testator's intention

The various statutory lists make questionable assumptions about a testator's intention. In jurisdictions other than Queensland, the lists of classes assume that the testator intends that property specifically appropriated or devised for the payment of debts is to be used before property charged or devised or bequeathed subject to a charge for the payment of debts. In Queensland, the list assumes that they should be used rateably.

445

This is illustrated by the extent of the literature on the subject. See Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 39-41.

(iii) The preference given to residuary dispositions over property not disposed of by will

With the exception of Queensland, all Australian jurisdictions distinguish in their statutory lists between the residuary estate and assets undisposed of by will. This distinction was not made in early case law. It was introduced in England by the *Administration of Estates Act 1925* and copied in the various Australian statutes. The distinction has been criticised on a number of grounds:

- Under the intestacy rules, property undisposed of by will goes to the next of kin of the deceased, very often the spouse or issue of the deceased. Consequently, if the residue of the estate is left between two persons who are not next of kin and one predeceases the testator, so that the gift of residue fails as to half, the next of kin of the testator, who take the failed gift under the intestacy rules, will pay the debts ahead of the beneficiaries who are not next of kin.

Such an approach might have been justifiable in the old days to ensure that, as against an heir at law, creditors were paid; but that is an insufficient reason, now, to require next of kin to pay debts ahead of beneficiaries who are not next of kin. An old rule about protecting creditors has become a legal presumption about a testator's intention.

In its 1978 Report, the Queensland Law Reform Commission did not consider that an intestacy beneficiary should 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. (This follows from the fact that, if the beneficiaries of the residue were closer to the testator or of the same remoteness, they would take the failed gift of residue under the intestacy rules anyway.) The Commission suggested that distinguishing between assets undisposed of by will and residue has the effect of driving a wedge between the next of kin and the residuary beneficiaries by placing them in competition, as far as payment of debts is concerned, with each other.⁴⁴⁶

- The modern law recognises that a partial intestacy of residue is rarely if ever intended by a testator. In recent reforms in Queensland and Victoria, if a gift of part of the residuary estate fails, that part is shared amongst the surviving beneficiaries of the residue.⁴⁴⁷ Provisions of this kind seek to reduce the incidence of partial intestacies of residue. As provisions of this kind have already been recommended by the National

⁴⁴⁶ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 42.

⁴⁴⁷ See *Succession Act 1981* (Qld) s 29(1)(b) and *Wills Act 1997* (Vic) s 35.

Committee,⁴⁴⁸ there is little point in maintaining the difficult distinction between assets undisposed of by the will and assets forming part of a residuary gift.

- The shorter the list of classes of assets for the payment of debts, the easier it will be to understand the effect of a direction contained in a will to pay debts. This is because the statutory order for application of assets to the payment of debts is subject to any expression in the will of contrary intention on the part of the testator. Consequently, if there is a direction in the will to pay debts, difficulties are likely to arise in determining whether such a direction should displace Class 1 assets, that is, assets undisposed of by the will.⁴⁴⁹

Distinguishing between residue and assets undisposed of by will creates conflicting pressures on the interpretation of testamentary clauses that designate property as in trust for the payment of debts or as being charged with the payment of debts.⁴⁵⁰

If there are no assets undisposed of by a will that contains a direction in relation to the use of property for the payment of debts, then it is easy to interpret such a direction as varying a statutory order that would require undisposed of assets to be applied to the payment of debts before the property designated by the will for that purpose. The effect of such an interpretation would be that property designated by a testamentary clause as being in trust for the payment of debts or charged for the payment of debts would be used first, which would generally accord with the natural interpretation of the will.

On the other hand, if the estate includes assets that are undisposed of by the will, the court will tend to assume that the testator's intention would have been to use those assets before the assets in trust for or charged with the payment of debts. For that reason, the court will not readily infer that the testator intended by such a clause to change the statutory order so as to make the affected assets the first to be used for the payment of debts. So the conflicting pressures produced irreconcilable decisions.

As mentioned above, Queensland does not make the distinction between property that is part of a gift of residue and property that is undisposed of by will. Section 55 of the *Succession Act 1981* (Qld) reads:

448 See National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997) at 63-73; New South Wales Law Reform Commission, Report, *Uniform Succession Laws: The law of wills* (R 85, 1998) at para 6.1-6.36, where provisions similar to s 29 have been recommended by the National Committee.

449 See, for example, *Re Lamb*; *Vipond v Lamb* [1929] 1 Ch 722 and *Re Kempthorne*; *Charles v Kempthorne* [1930] 1 Ch 268.

450 *Ibid.*

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.

The definition in section 55 of the *Succession Act 1981* (Qld) has the following effects:

- it abolishes the distinction, as far as the payment of debts is concerned, between property comprised in a residuary gift and property not disposed of by the will at all.⁴⁵¹
- by referring to property generally, it ensures that the same rules apply as between real and personal property.

(iv) Issues considered by the National Committee

The National Committee considered whether:

- (1) there is a need to distinguish between assets undisposed of by will and assets in a gift of residue;
- (2) if no to (1), the Queensland approach in section 55 of the *Succession Act 1981* (Qld) of defining “residuary estate” to mean both types of assets is an appropriate one.

(v) The National Committee’s preliminary view

The National Committee was of the view that there is no need to distinguish between assets undisposed of by will and assets forming part of the residuary estate. Consequently, the National Committee was of the view that a provision to the effect of section 55 of the *Succession Act 1981* (Qld) should be included in the model legislation.

The Registrars of Probate agreed with this approach.

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Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 39. As regards personalty, this was the law in Queensland even before the enactment of the *Succession Act 1981* (Qld). However, other jurisdictions still make property undisposed of by will primarily liable for the payment of deceased’s debts: see the statutory lists set out at pp 200-202 of this Discussion Paper.

(vi) Proposal

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.

(e) A new approach

The National Committee considered the proposition that there is no justification for retaining in the list of classes references to property left on trust to pay debts or property left charged with the payment of debts for the following reasons:

- (1) The list should be a matter of law and references to particular expressions of the testator's intention should not appear in it. Nor should the law make assumptions about how those expressions should be construed. That should be a matter for the ordinary process of the construction of wills.
- (2) It is highly unlikely that a testator would in the same will leave some property on trust to pay debts and other property charged with the payment of debts; and even more unlikely that the testator would consciously intend that the property left on trust to pay debts should be used before the property left charged with the payment of debts.
- (3) Current provisions are made subject to any contrary intention disclosed by the will. It is clear that this should be so; but the presence in the legislation of references to the testator's intention and the making of assumptions about how those references should be construed constitute an impediment to the ordinary process of construction. For instance, could the testator impliedly reverse them or would a reversal have to be expressed in clear and convincing terms? There is no reason to encumber construction of the testator's intention by statutory assumptions of intention based on completely obsolete law.
- (4) Even if such assumptions about the testator's intentions can reliably be made, it is unlikely that there can be any existing public policy reason for giving them legislative status. Such matters should be settled by the ordinary principles of the construction of wills, which should not be compromised by legislative assumptions.

The National Committee then considered the possibility of constructing a set of simple rules concerning the payment of debts out of assets freed from the strictures of the past. In principle there are only three issues that require consideration. These are:

- settling a rule about the order of application of assets for the payment of debts;⁴⁵²
- determining whether there should be any exception to that rule;⁴⁵³ and
- clarifying the effect of an admissible expression of contrary intention on the part of the testator.⁴⁵⁴

There can be only two kinds of assets from which the debts of the deceased can be paid:

- *Assets referred to in the will*

A testator refers to assets in a will for one of two reasons. One is to devise or bequeath a specific asset to a beneficiary. This is the common reason for referring to a specific asset in a will. The other is to point to a specific asset out of which debts should be paid. This is rarely found.

- *Assets not referred to in the will*

These assets are referred to as the residuary estate of the deceased.

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. Lee has observed:⁴⁵⁵

The policy of the law is to allow comparative immunity from the creditors to the beneficiaries of specific devises and legacies, as against beneficiaries of residue and general legatees.

The National Committee considered that it would be beyond the brief of a project seeking to render uniform Australian laws to argue about the propriety of that rule, which would indeed be revolutionary. It is therefore assumed that this rule for the order of application of assets should be retained.

(i) Issues considered by the National Committee

The National Committee considered whether:

⁴⁵² See pp 209-210 of this Discussion Paper.

⁴⁵³ See the discussion of dispositions of mortgaged property and the effect of *Locke King's Act* at pp 227-232 of this Discussion Paper.

⁴⁵⁴ See the discussion of the expression of a contrary intention at pp 214-216 of this Discussion Paper.

⁴⁵⁵ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1106.

- (1) the order in which classes of property are to be applied in the payment of debts should be a matter of law only, without initial reference to the testator's intention (and without assumptions about how references to the testator's intentions should be construed);
- (2) the list should consist of two classes only, namely:
 - residuary assets (including assets specifically referred to in a will of the deceased the subject of a disposition that fails to have effect); and
 - specific assets (assets specifically referred to in a will the subject of a disposition that has effect).

(ii) The National Committee's preliminary view

The National Committee was of the view that, in relation to the order in which property in a solvent estate is applied towards the discharge of debts, there should be only two classes of property, namely:

- 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); and
- Class 2 Specific assets (that is, assets specifically referred to in a will and the subject of a disposition that has effect).

The Registrars of Probate agreed with this view.

(iii) Proposal

Assets should be applied towards the payment of debts in the following order:

- Class 1 Assets forming part of the residuary estate (which includes assets specifically referred to in a will and which are the subject of a disposition that fails to have effect).**
- Class 2 Specific assets.**

- (f) **Associated issues**
- (i) ***Donationes mortis causa***⁴⁵⁶

These gifts were referred to in the case law derived list,⁴⁵⁷ but seem to have escaped the attention of the English and Australian statutes with the exception of the Queensland legislation, which defines them as Class 4 assets.⁴⁵⁸ Using *donationes mortis causa* to pay debts involves recovering those gifts from the donees.

As the Queensland Law Reform Commission pointed out in its 1978 Report, property the subject of a *donatio mortis causa* has always been available for the payment of debts after all other assets have been exhausted.⁴⁵⁹ Class 4 reflects the general law in that respect. Consequently, *donationes mortis causa* may be used to pay debts only if the estate is insufficient.

The legal title to the chattel the subject of a *donatio mortis causa* passes to the donee and does not vest in the personal representatives of the deceased. The gift has the appearance of one that is, and it is probably the intention of the testator for it to be, special and specially protected.

These gifts are not, however, a phenomenon so common that they should create special difficulty.

A. Issue considered by the National Committee

The National Committee considered whether it is appropriate to call in a *donatio mortis causa* to pay the debts of a solvent estate.

B. The National Committee's preliminary view

The National Committee was of the view that it is inappropriate to call in a *donatio mortis causa* to pay the debts of a solvent estate. It considered that, if the debts of an estate could not be paid without resort to a *donatio mortis causa*, the estate was really insolvent, and the rules in relation to the payment of debts of an insolvent estate should apply.

The Registrars of Probate agreed with this view.

⁴⁵⁶ A gift of personal property in anticipation of death.

⁴⁵⁷ These gifts were Class 8 of the case law derived list, which is set out at p 199 of this Discussion Paper.

⁴⁵⁸ The Queensland classes are set out at pp 202-203 of this Discussion Paper.

⁴⁵⁹ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 42-43. See *Re Korvine's Trust; Levashoff v Block* [1921] 1 Ch 343 at 348.

C. Proposal

A donatio mortis causa should not be called in to pay the debts of a solvent estate.

(ii) Rateability

The principle of rateability means that, if some of the assets in a particular class must be applied to pay debts, all the beneficiaries with an interest in that class of assets bear that loss in proportion to their respective interests.

For example, suppose that, after applying all the residuary estate towards the payment of debts, there was still a shortfall of \$10,000 to be met from assets subject to specific bequests, and that the value of those assets was \$40,000. The personal representative has to sell some of the assets the subject of specific bequests to pay the debts. As between specific legatees, their benefits abate proportionately.

The principle of rateability has always been accepted and is enshrined in section 59(2) of the *Succession Act 1981* (Qld), which reads:

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.

Section 59(2) ensures that the principle of rateability applies to all property within each class, without regard to whether the property concerned is real or personal.

A. Issue considered by the National Committee

The National Committee considered whether the principle of rateability should be incorporated in relation to all assets within a given class.

B. The National Committee's preliminary view

The National Committee was of the view that the principle of rateability should apply in relation to all property within a given class. For example, where specific assets are applicable towards the discharge of the debts, specific assets remaining after the payment of debts must be distributed rateably among all the beneficiaries entitled under a disposition of specific assets.

The Registrars of Probate agreed with this view.

C. Proposal

The principle of rateability should apply to all property within a given class.

(iii) Property the subject of a general power of appointment

In all Australian jurisdictions other than Queensland, property the subject of a general power of appointment is applied towards the payment of debts only after property the subject of specific dispositions has been exhausted. There is no clear reason why property the subject of a general power of appointment should be so privileged.

In its 1978 Report, the Queensland Law Reform Commission made the following recommendation to remove the special privilege that was given at the time to property the subject of a general power of appointment.⁴⁶⁰

[I]f 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.

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, and do not give a special class or position to property the subject of a general power of appointment. These assets are included in the classes within which they are impliedly or expressly exercised. For instance, a residuary provision impliedly exercises a general power of appointment under wills legislation.⁴⁶¹ So it is placed in the same class. Property specifically appointed under a general power of appointment is, however, considered to be in the same class as any other property specifically given.

⁴⁶⁰ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 43. See pp 200-203 of this Discussion Paper where the various statutory lists are set out. Property appointed by will under a general power is Class 7 in the statutory lists of all Australian jurisdictions except Queensland.

⁴⁶¹ See s 28(d) of the *Succession Act 1981* (Qld) and cl 35 of the draft *Wills Bill 1997* attached to the National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997); New South Wales Law Reform Commission, Report, *Uniform Succession Laws: The law of wills* (R 85, 1998). The latter clause provides:

What does a general disposition of property include?

- (1) A general disposition of all or the residue of the testator's property, or of all or the residue of his or her property of a particular description, includes all the property of the relevant description over which he or she has a general power of appointment exercisable by will and operates as an exercise of the power.
- (2) This section does not apply if a contrary intention appears (whether in the will or elsewhere).

A. Issue considered by the National Committee

The National Committee considered whether it is desirable to give a special class or position to property the subject of a general power of appointment.

B. The National Committee's preliminary view

The National Committee was of the view that there was no reason to depart from the existing Queensland rules in this respect.

C. Question for discussion

15.4 Should property the subject of a general power of appointment continue to be preferred over property the subject of a specific disposition or should such property be included in the class within which it is impliedly or expressly exercised?

(iv) Contrary intention

Section 59(3) of the *Succession Act 1981* (Qld) provides for the variation by a testator of both the order of the discharge of debts and the operation of the principle of rateability. The section reads:

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. [emphasis added]

In its 1978 Report, the Queensland Law Reform Commission gave two reasons for the drafting of section 59(3):⁴⁶²

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 ...

[!]t is important to ensure that a general direction to pay debts out of residue cannot be used as an argument to drive a wedge of litigation between residuary

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Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 43.

beneficiaries taking under the will and the next of kin entitled on a partial intestacy, although, as a result of the change in the law proposed by section 29, this will not happen often in practice.⁴⁶³

However, if the list of classes of assets is to be further simplified to only two categories - assets forming part of the residuary estate and assets that are specifically bequeathed by the will - it may be necessary to consider further the need for this provision in its present terms.

It goes without saying that a simplified rule should still be subject to an expression of contrary intention on the part of the testator. The question that arises is what is sufficient to constitute such an expression.

One of the purposes of the present Queensland provision was to ensure that a general direction in a will to pay debts would not displace Class 1 assets, that is, briefly, property devised upon trust to pay debts and property charged with the payment of debts, rateably. If the list is reduced to only two classes, there may be no need to include this provision in its present form. In the context of two classes of assets, it could be argued that a testamentary clause appropriating property for the payment of debts or charging property with the payment of debts would, in fact, amount to an expression of intention contrary to the application of the rule that residuary assets should be applied to the payment of debts before any other assets of the estate. In that case, further consideration would need to be given to the issue of how legislation should attempt to define a permissible expression of contrary intention.

A. Issues considered by the National Committee

The National Committee considered whether

- (1) the classes listing the order in which property is to be applied, and the principle of rateability should be subject to an expression of a contrary intention by the testator;
- (2) if yes to (1), there is an acceptable expression of a contrary intention.

B. The National Committee's preliminary view

The National Committee was of the view that both the classes listing the order in which property is to be applied, and the principle of rateability, should be subject to an expression of a contrary intention by the testator.

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See the comments on s 55 of the *Succession Act 1981* (Qld) (Definition of "residuary estate") at pp 206-207 of this Discussion Paper.

The expression of the contrary intention should not be confined to the will.⁴⁶⁴

The Registrars of Probate agreed with these views.

C. Proposal

The provisions in the model legislation that are based on proposals made in this Chapter should be subject to an admissible expression of a contrary intention by the testator (whether or not it is contained in the will).

D. Question for discussion

15.5 Should the model legislation stipulate what should or should not constitute an expression of a contrary intention (see, for example, section 59(3) of the *Succession Act 1981 (Qld)*)?

(v) The need to refer to property given on trust to pay debts and property given charged with the payment of debts

If the classes of assets to be applied for the payment of debts are to be subject to a contrary intention expressed by the testator, this raises the question of whether there is a continuing need to distinguish between property given on trust to pay debts and property given charged with the payment of debts.

The case law derived classes of assets distinguished between property given on trust to pay debts and property given charged with the payment of debts. All the statutes retain this distinction, although they differ as to where they come within the list.

Even if the simplified classes of assets are expressed to be subject to a contrary intention, there may still be an argument for making express reference to property given on trust to pay debts and property given charged with the payment of debts. Suppose a testator, in clause 3 of a will, gives property charged with the payment of debts generally, and then in clause 18, or in a later codicil, gives property on trust to pay debts generally. Any court would find it difficult to come to a conclusion that the property given charged with the payment of debts should be used for that purpose ahead of the property, given

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See National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997) at 62-73; New South Wales Law Reform Commission, Report, *Uniform Succession Laws: The law of wills* (R 85, 1998) at para 6.1-6.36.

later, on trust to pay debts. No doubt it would 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 pre-1925 English rules should be applied, and that realty devised on trust for (and not merely charged with) the payment of debts should be applied first.⁴⁶⁵

Perhaps there should be a provision in the model legislation to resolve doubt, since without a provision litigation could almost always be expected if a testator happened to insert two provisions for the payment of debts out of particular assets in the will. The question is whether the provision should follow the old law, by providing that, in the absence of a contrary intention, property given upon trust to pay debts should be used for that purpose ahead of property given charged with the payment of debts. Alternatively, the precedent in Class 1 of the Queensland list - in which property given upon trust and property given charged with the payment of debts are applied rateably - could be followed.

The advantage of the Queensland precedent is twofold:

- It does not make an assumption about the testator's intention as to order, as the old rules and other statutes 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 given on trust to pay debts should be used ahead of property given charged with the payment of debts. An ordinary person would be unlikely to think of the difference.
- If the old law and the non-Queensland statutes are followed, there could always be a dispute as to whether one direction created a trust and the other a charge, or vice versa; and whether, when that issue is settled, a contrary intention can be discerned from admissible evidence.

Finally, whether there is a need to insert such a provision, with the object of reducing the possibility of litigation, depends on whether it is thought that the insertion of two provisions of these kinds in wills is so common that it is worth expending legislative time on it. The historical phenomenon might be regarded as an insignificant "loose end" and to consider a legislative response to it as an academic indulgence.

A. Issues considered by the National Committee

The National Committee considered whether:

- (1) if the classes are to be subject to a contrary intention, there would still be a need to refer to dispositions of property on trust to pay debts and property charged with the payment of debts;

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See p 199 of this Discussion Paper where the case law derived classes of assets are set out.

- (2) if yes to (1), in the absence of a contrary intention, property given upon trust to pay debts should be used for that purpose ahead of property given charged with the payment of debts, or whether property given upon trust and property given charged with the payment of debts should be applied rateably.

B. Question for discussion

15.6 If the model legislation refers only to two classes of property to be applied for the payment of debts - with that order being subject to the expression of a contrary intention - is there any need for the model legislation to provide for the situation where a will refers both to dispositions of property on trust to pay debts and property charged with the payment of debts?

7. PAYMENT OF LEGACIES

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
59(2), 60	Sch 4	Sch 2 Pt II	Sch 3 Pt II			Sch 4	2nd Sch	1st Sch	

(a) Types of legacies

There are five types of legacies: specific, residuary, general, pecuniary and demonstrative.⁴⁶⁶ The National Committee has already made a proposal that the list prescribing the order in which assets are used to pay debts should consist of two classes - first, residuary assets and then specific assets.⁴⁶⁷ That recommendation addresses the question of the payment of the first two types of legacies mentioned: the residuary assets will be used first, and specific legacies will be used only if the residuary estate is insufficient to pay all the debts. Consequently, if all the residuary estate is required to pay the debts, the residuary legatee will receive nothing.

However, the question of which parts of an estate are to bear the payment of the other types of legacies - general, pecuniary and demonstrative legacies - remains to be considered.

⁴⁶⁶ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1001.

⁴⁶⁷ See p 210 of this Discussion Paper.

(b) General legacies

Unlike a specific legacy, a general legacy "does not earmark any particular property or fund as the subject of the legacy".⁴⁶⁸ A gift of "my horse Dobbin" is a specific legacy,⁴⁶⁹ whereas a gift of "a horse" is a general legacy.⁴⁷⁰

[I]t will be the duty of the representative to purchase a horse, or, if there are horses in the testator's estate, to allow the beneficiary to select one ... The representative may, instead, pay direct to the legatee the sum of money which would be required to make the purchase.

A disposition of money may also be a general legacy, and will be where it is not a gift of a distinguishable part of the testator's estate.⁴⁷¹ A legacy of a sum of money is often referred to generally as a "pecuniary legacy", although that term, when used in the various statutory lists for the order of payment of debts, has a broader meaning than simply a legacy with a monetary component.⁴⁷²

(c) Pecuniary legacies**(i) What is a pecuniary legacy?**

A pecuniary legacy is not an asset of the estate. It is a charge on the estate that is payable after all debts have been paid.⁴⁷³ It amounts to "a direction to the representative to pay an ascertainable sum of money".⁴⁷⁴

⁴⁶⁸ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1003.

⁴⁶⁹ Id at para 1002.

⁴⁷⁰ Id at para 1003. References omitted.

⁴⁷¹ Id at para 1004. Note, however, that, in some circumstances, a pecuniary legacy may be a specific legacy, for example, when a testator makes a bequest of "all the money in the ivory box in my desk": Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1004.

⁴⁷² See p 220 of this Discussion Paper.

⁴⁷³ There has been some confusion under the English statutory list (and consequentially under the Australian lists that have adopted the English list) about the order in which different classes of assets are applied towards the payment of pecuniary legacies: see *Halsbury's Laws of England* (4th ed) Vol 17 at paras 1283 and 1284 and Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 43. Both of the first two classes of the English list refer to the retention of a fund to meet pecuniary legacies. While it might be assumed that assets in Class 1 should be first applied towards the payment of legacies, the difficulty is that the list prescribes an order for the payment of debts - not for the payment of legacies. The legislation does not make it entirely clear that assets in the first class should be exhausted to pay pecuniary legacies before assets in the second class are applied. There is divergent case law on this point: see *Halsbury's Laws of England* (4th ed) Vol 17 at para 1284, note 2. By merging assets undisposed of by will with assets forming the residue - as occurs in the Queensland Class 2, and has been suggested at pp 205-208 of this Discussion Paper - this ambiguity can be avoided: Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 43.

⁴⁷⁴ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1110.

The term “pecuniary legacy” is used in the statutory lists that apply in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Victoria⁴⁷⁵ and in the Queensland provision that deals with the payment of pecuniary legacies.⁴⁷⁶

Significantly, the term “pecuniary legacy” is defined in the Queensland, Victorian, Tasmanian and United Kingdom legislation to include a general legacy and a demonstrative legacy to the extent to which it is not secured.⁴⁷⁷ The following definition is contained in the *Succession Act 1981* (Qld):⁴⁷⁸

“**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.

Legislation in the Australian Capital Territory, New South Wales and the Northern Territory does not contain a definition of the term “pecuniary legacy”. Atherton and Vines query the effect of the lack of a definition of that term in these jurisdictions.⁴⁷⁹

In the [above jurisdictions] there is no definition of this expression. 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’.

Atherton and Vines refer to the following commentary on this question:⁴⁸⁰

Certoma suggests in relation to the New South Wales provisions that ‘it is probable that a court would give the expression the same meaning as it has been statutorily given in England from where the expression was originally borrowed’.

They conclude that this observation would apply with equal force in the other Australian jurisdictions where the term is not defined.⁴⁸¹

⁴⁷⁵ See pp 200-202 of this Discussion Paper.

⁴⁷⁶ *Succession Act 1981* (Qld) s 60, which is discussed at pp 221-222 of this Discussion Paper.

⁴⁷⁷ See *Succession Act 1981* (Qld) s 5; *Administration and Probate Act 1958* (Vic) s 5; *Administration and Probate Act 1935* (Tas) s 3; and *Administration of Estates Act 1925* (UK) s 55(1)(ix). The definitions of “pecuniary legacy” in the Victorian, Tasmanian and United Kingdom legislation are virtually identical to the Queensland definition.

⁴⁷⁸ *Succession Act 1981* (Qld) s 5.

⁴⁷⁹ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 18.7.6.

⁴⁸⁰ *Ibid*, citing Certoma LG, *The Law of Succession in New South Wales* (2nd ed 1992) at 287-288.

⁴⁸¹ Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 18.7.6.

This expanded meaning of “pecuniary legacy” should be borne in mind in the following discussion about the payment of “pecuniary legacies”.

(ii) Payment of pecuniary legacies

As discussed earlier, where a will makes a disposition of specific property, whether it is realty or personalty, that property has a privileged position as far as the payment of debts is concerned.⁴⁸² Property the subject of a specific devise or legacy is usually the last property to be used to pay the debts.

Historically, pecuniary legacies have been distinguished from property specifically devised or bequeathed.

In the non-statutory list for the order of payment of debts and in the statutory lists that refer to pecuniary legacies, the fund reserved for the payment of pecuniary legacies is in a class prior to the class comprised of property the subject of a specific devise or legacy. Similarly, in the statutory lists in the Australian Capital Territory, New South Wales, the Northern Territory, Tasmania and Victoria,⁴⁸³ the fund reserved to meet pecuniary legacies is also exhausted before assets specifically disposed of by will are used to pay debts. Consequently, if that fund has been exhausted by the payment of debts, the pecuniary legatees receive nothing. Property specifically devised or bequeathed abates only if it has been necessary to draw on such property to pay debts. It does not abate to enable pecuniary legacies to be paid.

In Queensland, Lee notes that pecuniary legacies “do not appear within the classes defined by s 59(1) because they do not consist of specific property”.⁴⁸⁴ They are dealt with by section 60 of the *Succession Act 1981* (Qld), which reads:

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 59⁴⁸⁵ after the discharge of the debts or such part thereof as are payable out of that property; and

482 But see the discussion below of demonstrative legacies. Under the rules derived from case law, secured demonstrative legacies are included in Class 6, devises of land and specific legacies, so that they are included with the property on which they are charged. So if a will devised Blackacre to A and made a gift of \$500 to B charged on Blackacre, as long as Blackacre is part of the testator's estate on the testator's death, the legacy of \$500 is regarded as a specific legacy and is paid along with other specific devises and legacies in that class. See Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1005.

483 See pp 200-202 of this Discussion Paper.

484 Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1110.

485 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. This is the same as the first of the two classes recommended by the National Committee for the payment of debts. See p 210 of this Discussion Paper.

- (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. [notes added]

The effect of section 60 is that, subject to a contrary or other intention signified by the will, pecuniary legacies are to be paid first out of the assets comprising the residuary estate, and, to the extent that these are insufficient, the pecuniary legacies abate proportionately. If the residuary estate is insufficient to pay all the debts, the pecuniary legatees receive nothing.

When the Queensland Law Reform Commission considered the question of pecuniary legacies in its 1978 Report, it recommended the retention of this distinction, although it conceded that the distinction was perhaps difficult to justify.⁴⁸⁶

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.

(d) Demonstrative legacies

A "demonstrative legacy" is a pecuniary legacy payable out of a particular fund,⁴⁸⁷ for example, a gift of "\$500 charged on my property Blackacre".⁴⁸⁸

(i) Advantages of a demonstrative legacy

Compared with general pecuniary legacies, demonstrative legacies are in a preferred position in relation to the payment of the debts of a deceased estate. Lee describes the advantages enjoyed by demonstrative legacies in the following terms:⁴⁸⁹

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

⁴⁸⁶ Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 42.

⁴⁸⁷ *Halsbury's Laws of England* (4th ed) Vol 17 at para 1230.

⁴⁸⁸ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 1005.

⁴⁸⁹ *Ibid.*

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, which 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]

To the extent that a demonstrative legacy is not secured, it is treated as a general legacy.⁴⁹⁰

(ii) Application of the principle of rateability to a secured demonstrative legacy

Ordinarily, where a legacy is charged on a particular asset, the law provides that.⁴⁹¹

In the absence of a contrary indication in the will, a legacy charged on an asset specifically given has priority over the asset itself.

Except in Queensland, a demonstrative legacy does not abate with the property on which it is charged.

The Queensland Law Reform Commission explained the injustice of the traditional rule as follows:⁴⁹²

At present, where property bequeathed is charged with the payment of a legacy the legatee on whose legacy the legacy is charged has to meet the entire burden of the legacy but no allowance is made for that in determining the contribution which he must make towards the payment of debts. Thus 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, and indeed the legacy charged on the asset will have to be utilised.

The Commission recommended that the fund and the legacy should be charged rateably. Section 59(2) of the *Succession Act 1981* (Qld) implements the Commission's recommendation. It reads:

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]

⁴⁹⁰ See the definition of "pecuniary legacy" in s 5 of the *Succession Act 1981* (Qld), in s 5 of the *Administration and Probate Act 1958* (Vic), in s 3 of the *Administration and Probate Act 1935* (Tas), and in s 55(1)(ix) of the *Administration of Estates Act 1925* (UK).

⁴⁹¹ Geddes RS, Rowland CJ and Studdert P, *Wills, Probate and Administration Law in New South Wales* (1996) at para 46C.04 citing *Re Sloan; Stevens v Sloan* [1943] VLR 63. This is the current law in New South Wales.

⁴⁹² Queensland Law Reform Commission, Report, *The Law Relating to Succession* (R 22, 1978) at 43.

(e) Issues considered by the National Committee

The National Committee considered whether:

- (1) a provision to the effect of section 60 of the *Succession Act 1981* (Qld) should be included in the model legislation, so that pecuniary legacies are paid out of the residuary estate, and, to the extent that the residuary estate is insufficient to pay them all in full, abate proportionately;
- (2) if yes to (1), the provision should be expressed to be subject to a contrary intention by any admissible evidence, rather than by a contrary intention expressed only in the will.

(f) The National Committee's preliminary view

(i) The payment of legacies

The National Committee has already proposed that there should be only two classes of property to be applied for the payment of debts: the residuary estate and specific assets, with property in the residuary estate being used first.⁴⁹³ This raises the question whether general legacies (that is, legacies that are not legacies of specific assets) should be paid out of the residuary estate only. That approach would be consistent with the law as it presently stands in all Australian jurisdictions.

The effect of the current law can be seen in the following scenarios:

Scenario 1

A testator leaves the family farm (valued at \$200,000) to his son and a pecuniary legacy of \$200,000 to his daughter. On his death, the debts of the estate are \$200,000. After paying the debts, the only remaining asset is the farm.

As the residuary estate is exhausted by the payment of the debts, the son will receive the farm, but the daughter will receive nothing.

Scenario 2

A testator leaves her house and contents to her husband, and a pecuniary legacy of \$10,000 to a charity. After paying the debts of the deceased, the estate consists of the house and contents (together worth \$90,000) and the sum of \$5,000 in a bank account.

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See p 210 of this Discussion Paper.

At present, the testator's husband would receive the house and contents and the charity would receive the sum of \$5,000. If however, the pecuniary legacy were to be treated as a specific legacy, it would not be limited by the value of the residuary estate, but would abate proportionately along with the dispositions of the house and contents. The beneficiaries would each receive 95 percent of the value of the gifts left to them. Consequently, the pecuniary legatee would receive \$9,500 of the \$10,000 legacy. The additional \$4,500 would, if the husband did not have that sum to pay the pecuniary legatee, have to be raised from the sale of either the home or its contents. The husband would receive \$85,500.

The National Committee was conscious of the fact 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 form of redress, such as an application for family provision.⁴⁹⁴

It is not possible to say that one position or the other more closely reflects the probable intentions of a testator. Where the pecuniary legacy is very small, it is perhaps arguable that a testator would not want specific assets sold in order to pay the legacy. However, as the Queensland Law Reform Commission observed when it considered this issue in its 1978 Report,⁴⁹⁵ it is difficult - where the pecuniary legacy is a relatively substantial one - to make the assumption that the testator intends for the pecuniary legacy to pay the debts while the specific legacy is protected.

The National Committee was not entirely persuaded by the argument that money is an amorphous thing and, for that reason alone, should be treated differently from specific assets. However, the National Committee was conscious of the fact that, if pecuniary legacies are treated on the same footing as specific legacies, this may complicate the administration of estates, in that it could require many assets the subject of specific legacies to be sold in order to pay pecuniary legacies in circumstances where the residuary estate is insufficient.

On balance, the National Committee was of the view that, subject to the expression of a contrary intention, pecuniary legacies should be paid out of the residuary estate after the payment of debts. However, the National Committee specifically seeks submissions on whether a pecuniary legacy should be treated as a specific gift along with assets specifically devised or bequeathed.

The Registrars of Probate agreed with this approach.

⁴⁹⁴ See National Committee for Uniform Succession Laws, *Report to the Standing Committee of Attorneys General on Family Provision* (QLRC MP 28, 1997).

⁴⁹⁵ See p 222 of this Discussion Paper.

When the National Committee considered this question, it did not advert to the fact that a pecuniary legacy is usually a type of general legacy and that, in some jurisdictions,⁴⁹⁶ the term "pecuniary legacy", as used in the statutory order for the payment of debts, includes a general legacy. Because general legacies - whether pecuniary or non-pecuniary - have traditionally been treated the same, this raises the question whether, if a general pecuniary legacy, such as a gift of \$5,000, should be treated as a specific legacy, a non-pecuniary general legacy should also be treated as a specific legacy.⁴⁹⁷

(ii) Expression of a contrary intention

The National Committee was also of the view that the expression of a contrary intention should not be limited to one found in the will.

The Registrars of Probate also agreed with this view.

(iii) Application of the principle of rateability to a secured demonstrative legacy

Although the National Committee has generally accepted the principle of rateability in relation to the application of assets within a particular class,⁴⁹⁸ it did not specifically consider whether the principle of rateability should be extended to legacies secured on specific property.

(g) Proposals

Subject to the expression of a contrary intention:

- (1) pecuniary legacies should be paid out of the residuary estate after the payment of debts;⁴⁹⁹ and**
- (2) if the residuary estate is insufficient, after the payment of debts, to pay the pecuniary legacies in full, they should abate proportionately.**

The National Committee also proposes that the expression of a contrary intention should not be confined to one found in the will.

⁴⁹⁶ See p 220 of this Discussion Paper.

⁴⁹⁷ See question 15.8 where the National Committee seeks submissions on this issue.

⁴⁹⁸ See pp 212-213 of this Discussion Paper.

⁴⁹⁹ But see question 15.7 where submissions are sought on whether pecuniary legacies should be treated as specific gifts.

(h) Questions for discussion

- 15.7** Should a pecuniary legacy (for example, a legacy of \$5,000) be treated as a gift of specific property?⁵⁰⁰
- 15.8** If yes to 15.7, should a non-pecuniary general legacy also be treated as a gift of specific property?⁵⁰¹
- 15.9** Should the principle of rateability - previously proposed by the National Committee in relation to the application of assets within a particular class⁵⁰² - be applied to demonstrative legacies so that they abate proportionately with the property on which they are charged (as occurs under section 59(2) of the *Succession Act 1981 (Qld)*)?⁵⁰³

8. PAYMENT OF DEBTS ON PROPERTY MORTGAGED OR CHARGED

QLD	ACT ⁵⁰⁴	VIC	NSW ⁵⁰⁵	SA	WA ⁵⁰⁶	NT	TAS	UK	NZ
61	109	40	145	52 (applies to realty only)	28		35	35	34

(a) Introduction

There already exists one substantial exception to the rule that residuary assets should pay debts ahead of specific assets. That exception, briefly stated, is that mortgaged property should pay off its own mortgage. This exception follows the *Real Estate Charges Act 1854 (UK)* - known as *Locke King's Act* - which has since been replaced with modifications by section 35 of the *Administration of Estates Act 1925 (UK)*. There

⁵⁰⁰ See the discussion at pp 224-225 of this Discussion Paper.

⁵⁰¹ See the discussion at p 225 of this Discussion Paper.

⁵⁰² See pp 212-213 of this Discussion Paper.

⁵⁰³ See the discussion at p 226 of this Discussion Paper.

⁵⁰⁴ *Conveyancing and Law of Property Act 1898 (NSW)* s 109 as in force in the ACT. Section 109 applies only to realty and does not apply to vendors' liens: *Davies & Ors v Littlejohn & Ors* (1923) 34 CLR 174.

⁵⁰⁵ *Conveyancing Act 1919 (NSW)*.

⁵⁰⁶ *Wills Act 1970 (WA)*.

are equivalent provisions in all Australian jurisdictions except the Northern Territory. In Queensland, the provision when first enacted was confined to mortgages of realty.⁵⁰⁷ The existing provision in Queensland - section 61 of the *Succession Act 1981* (Qld) - is not so confined.

Section 61(1) of the *Succession Act 1981* (Qld) reads:

Payments of debts on property mortgaged or charged

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.

Locke King's Act was passed at a time when the English legislature was very much concerned with the attempts that were being made by testators to evade creditors. Although the law has satisfactorily addressed that issue by ensuring that the entire estate of the testator vests in the personal representative or the Public Trustee who must first pay debts,⁵⁰⁸ the rule that mortgaged property should pay off its own debts has found general acceptance.

The principal contemporary reason for retaining the rule is that, whatever the rule might be about the payment of debts from assets, lenders cannot be denied their rights of recovery against property mortgaged or charged. In addition, particularly in the context of a deceased person who at the time of death owned a home that was subject to a mortgage, the ordinary view would be that the testator's beneficial interest in the home was its value less the amount of the debt charged upon it; and that would be the value intended by any devise of the home to a devisee. The same argument is applicable to a bequest of personalty charged with the payment of debt.

It is therefore desirable that the principle of *Locke King's Act* should be retained. It is a simple and well understood rule. If a testator wishes to shift the burden of paying a particular debt away from property charged with it, the testator should include a specific provision to that effect in his or her will.

(b) Contrary intention

Section 61(2) of the *Succession Act 1981* (Qld) reads:

⁵⁰⁷ See s 78 of the *Equity Act 1867* (Qld).

⁵⁰⁸ See Chapter 12 of this Discussion Paper in relation to the vesting of property.

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.

This provision performs a similar function to section 59(3) of the *Succession Act 1981* (Qld).⁵⁰⁹ Although that provision may need to be reconsidered in light of the National Committee's proposals in relation to classes of assets for the payment of debts,⁵¹⁰ the general thrust of section 61(2) remains appropriate in the context of property charged with a debt. It ensures that the rule that mortgaged property should pay its own debt is not displaced by a general direction in the will to pay debts. However, it is desirable that the provision should not lay down a firm interpretative rule; but, rather, that it should state that directions of the kind referred to in the subsection should not on their own signify a contrary intention.

(c) A possible modification to *Locke King's* rule

In some circumstances, the usual formulation of *Locke King's* rule may not necessarily reflect the probable intention of a testator, and a modification to the rule might enable it to reflect more closely the probable intention of the testator. For example, a testator might mortgage or charge an asset with a debt for purposes connected with the asset itself, for example, to acquire, improve or maintain it. On the other hand, the testator might burden an asset with a debt for purposes unconnected with the asset itself, for example, to raise money for an unconnected project or purpose.

Where a debt is raised on a specifically bequeathed asset for purposes connected with the asset itself, it is easy to accept that the probable intention of a testator is that the asset should devolve subject to the debt. However, where a debt is raised on a specifically bequeathed asset for purposes not connected with the asset itself, it may not be as likely that the testator would have wanted the asset to pass to the beneficiary subject to the debt; rather the testator may have wanted the asset to pass to the beneficiary free of the debt, and for the debt to be paid together with the other debts of the testator. In most cases, this would mean that the mortgage debt would first be paid out of the residuary estate.

Effect could be given to this modification by a provision in the following terms:

Where -

- (a) 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 that person's 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

509 See pp 214-215 of this Discussion Paper.

510 See p 210 of this Discussion Paper.

- (b) the debt is wholly or in part referable to the purchase, preservation, maintenance or improvement of the asset; and
- (c) the deceased has not signified a contrary or other intention by will or in any other way which can be established by admissible evidence,

that part of the interest so charged which is referable to the purchase, preservation, maintenance or improvement of the asset shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the debt; and every portion of that part of the said interest, according to its value, shall bear a proportionate portion of the charge of the whole of that part.

(d) Arguments against modifying *Locke King's* rule

The above provision involves making an assumption that the testator intended that only that part of the mortgage debt that was referable to the purchase, preservation, maintenance or improvement of the mortgaged asset should be primarily liable for the mortgage debt.

It is arguable that legislation should avoid as far as possible making assumptions about a testator's intention. While in some circumstances the modification may result in a closer approximation to the testator's intention, in other circumstances the operation of the modified rule could have as arbitrary a result as the existing rule.

Suppose, for instance, that a testator mortgages the family home in order to inject the sum borrowed into a business. The testator then devises the family home to the surviving spouse, his or her business to one child, and the residue of the estate to two other children. There is no good reason for suggesting that the testator intended the two other children to pay the moneys borrowed for the purpose of the business.

A further reason for retaining the current formulation of the rule is its simplicity. If it were modified as suggested, in every case where property forming part of an estate was subject to a mortgage, the rule would require an investigation into how the money borrowed had been applied. In the meantime, the lender might have sold the mortgaged property leaving a beneficiary of the mortgaged property with the task of trying to prove how the money had been spent.

Such a rule could greatly hinder the non-litigious distribution of deceased estates.

(e) Issues considered by the National Committee

The National Committee considered whether:

- (1) a provision embodying *Locke King's Act* should be included in the model legislation;

- (2) if yes to (1), a provision to the effect of section 61 of the *Succession Act 1981* (Qld) should be included in the model legislation;
- (3) the model provision should be subject to a contrary intention expressed by the testator;
- (4) if yes to (1), the traditional formulation of the rule should be changed to provide that, to the extent that a debt is raised on a specifically bequeathed asset for purposes connected with the asset, that asset should be primarily liable for the payment of the debt, or whether the rule should remain that, subject to the expression of a contrary intention, mortgaged property should discharge its own debts, regardless of how the moneys raised on security of the asset have been applied.

(f) The National Committee's preliminary view

The National Committee agreed that a provision to the effect of section 61 of the *Succession Act 1981* (Qld) should be included in the model legislation. The National Committee also agreed that the provision should be subject to the expression of a contrary intention.

The Registrars of Probate agreed with this approach.

The National Committee rejected the suggestion that the rule should be modified to attempt to reflect more closely the testator's intention.⁵¹¹ The National Committee was of the view that the provision has been widely accepted, and that any change to the principle that mortgaged property should discharge its own mortgage debt would be very disruptive, particularly in rural communities.

A further reason for rejecting the suggested modification was that, in every case where mortgaged property formed part of a deceased estate, it would be necessary to inquire into how the money secured by the mortgage had been disbursed. The National Committee was of the view that this was an undesirable complication to introduce into the administration of assets.

The Registrars of Probate agreed that the suggested modification should not be made.

(g) Proposals

- (1) A provision to the effect of section 61 of the *Succession Act 1981* (Qld) should be included in the model legislation.**

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See pp 229-230 of this Discussion Paper.

(2) The model provision should be subject to the expression of a contrary intention, although it should not be necessary for the contrary intention to be found in the will.

(h) Question for discussion

15.10 Should the model legislation stipulate what should or should not constitute a contrary intention for the purposes of the model provision?

CHAPTER 16

RIGHT TO FOLLOW ASSETS

1. INTRODUCTION

If a deceased estate has been wrongly distributed, persons with an interest in the correct distribution of the estate may have an interest in pursuing their share of the estate. In addition to non-legislative remedies which may be available to such people, administration and probate legislation or trustee legislation in the jurisdictions considered by the National Committee provides a right to follow distributed assets and, to a lesser extent, prioritises those against whom proceedings for recovery may be brought.

2. RIGHT TO FOLLOW ASSETS

QLD ⁵¹²	ACT	VIC ⁵¹³	NSW	SA ⁵¹⁴	WA ⁵¹⁵	NT	TAS	UK	NZ
67(4)(a), 107	67 60(6) ⁵¹⁶	33(3)(a)	95 60(6) ⁵¹⁷	29(3)	63(2), 65	99	57 25A(7) ⁵¹⁸	38	49-51

Atherton and Vines describe the ability of beneficiaries and others to follow and recover property wrongly distributed during the course of the administration of a deceased estate.⁵¹⁹

Beneficiaries under wills and those entitled on intestacy are able to utilise the equitable right to trace and recover property. The right to trace is expressly preserved to creditors, beneficiaries and others in the legislation. As an equitable claim it is vulnerable to extinguishment through the intervention of a bona fide purchaser for value without notice of the claim; or, in the case of Torrens title land, the indefeasibility of the registered proprietor. [notes omitted]

512 *Trusts Act 1973 (Qld).*

513 *Trustee Act 1958 (Vic).*

514 *Trustee Act 1936 (SA).*

515 *Trustees Act 1962 (WA).*

516 *Trustee Act 1925 (ACT).*

517 *Trustee Act 1925 (NSW).*

518 *Trustee Act 1898 (Tas).*

519 Atherton RF and Vines P, *Australian Succession Law: Commentary and Materials* (1996) at para 18.9.16.

The Northern Territory includes a provision relating to the following of assets in its administration and probate legislation alone. Queensland, Victoria, South Australia and Tasmania have the equivalent provision in their trustee legislation. The Australian Capital Territory, New South Wales and Tasmania - overlap, with a "right to follow" provision in both the administration and probate and the trustee legislation.

By way of example, section 95 of the *Wills, Probate and Administration Act 1898* (NSW) reads:

Right to follow assets

Nothing contained in section 92, 93 or 94 [protection of personal representatives from claims after notices given] 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. [emphasis added]

Section 25A(7) of the *Trustee Act 1898* (Tas) includes a provision similar to that of New South Wales but provides that nothing "frees the trustee, executor, or administrator from any obligation to make searches similar to those which an intending purchaser would be advised to make".

The administration and probate statutes of the United Kingdom and New Zealand not only detail the relevant powers and orders of the court in relation to the right to follow, but define and partially restrict the rights and remedies available to a claimant.

3. PROCEEDING AGAINST TRUSTEES AND PERSONAL REPRESENTATIVES BEFORE OTHER BENEFICIARIES

QLD ²⁰⁰	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
109									

Section 109 of the *Trusts Act 1973* (Qld) sets 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: firstly against the personal representative or trustee, and secondly against the person to whom the wrongful distribution was made.

Section 109 reads:

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. [emphasis added]

4. ISSUES CONSIDERED BY THE NATIONAL COMMITTEE

The National Committee considered whether:

- (1) a provision to the effect of section 95 of the *Wills, Probate and Administration Act 1898* (NSW) should be included in the model legislation;
- (2) a provision to the effect of section 109 of the *Trusts Act 1973* (Qld) should be included in the model legislation.

5. THE NATIONAL COMMITTEE'S PRELIMINARY VIEW

The National Committee was of the view that provisions which are designed to protect the 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. A provision to the effect of section 95 of the *Wills, Probate and*

Administration Act 1898 (NSW) would address this concern.⁵²¹ However, it was considered that that provision simply re-iterated the position in *Re Diplock*.⁵²²

6. PROPOSAL

A provision to the effect of section 95 of the *Wills, Probate and Administration Act 1898* (NSW) should not be included in the model legislation.

7. QUESTIONS FOR DISCUSSION

16.1 Should a provision to the effect of section 109 of the *Trusts Act 1973* (Qld) be included in the model legislation?

16.2 Should a person have to exhaust remedies against the trustees before following the beneficiaries?

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Section 95 of the *Wills, Probate and Administration Act 1898* (NSW) is set out at p 234 of this Discussion Paper.

522

[1948] Ch 465. In that case, personal representatives distributed the deceased estate to a number of charitable institutions in the belief that they were following the testator's directions in his will to apply his residuary estate "for such charitable institutions or other charitable or benevolent object or objects in England" as they should in their absolute discretion decide. Following a challenge to the distribution by the next of kin of the deceased, the House of Lords held that the bequest was invalidated by the use of the disjunctive "or benevolent". Subsequently, in determining a related matter, the Court of Appeal held that a claim by an unpaid beneficiary to property wrongly distributed to another is subject to the qualification that since the wrong payment was due to the mistake of the personal representative, the beneficiary's primary claim is against the personal representative, and the direct claim against those overpaid or wrongly paid must be limited to the amount irrecoverable for any reason from the party responsible.

CHAPTER 17

ESTABLISHING DEATH AND THE ORDER OF DEATHS

1. INTRODUCTION

There are some pivotal questions which may need to be addressed before the estate of a deceased, or supposedly deceased, person can be administered. They include whether the testator or intestate or, perhaps, a beneficiary is in fact dead; if so, when the deceased person died; and, in the event of a common calamity involving both the testator (or intestate) and a beneficiary, which of them died first.

Lee explains the significance of an early determination of the fact of death in the administration of estates.⁵²³

The first thing any intending executor, administrator or well-wishing intermeddler should do, before actually engaging in the affairs of a person believed to be dead, is to verify the fact of death. An applicant for a grant must state the date of death of the deceased and produce evidence of death.⁵²⁴ Normally the applicant will be able to produce a death certificate but if not, its absence must be accounted for; and if the exact date of death is not known, the circumstances of the death must be stated.⁵²⁵ This will be easy to do if the deceased dies with others on a common calamity, for instance in a shipwreck or an air disaster, or if a court in another jurisdiction has accepted evidence of death. Death has been defined by s 45 of the *Transplantation and Anatomy Act 1979* as having occurred where there has been an irreversible cessation of circulation of blood in the body or an irreversible cessation of all functions of the brain. [some notes omitted]

2. PROOF AND PRESUMPTION OF DEATH

(a) Introduction

If there is no death certificate verifying the death of the testate or intestate, a court may infer from all the facts presented to it that the person has died. In such a case the court will give leave to the applicant to swear an affidavit deposing to the death. The court will not, however, infer that the death occurred at a particular time, nor will it infer that one person survived another where more than one person connected with an estate has disappeared.

Where the court is unable to draw the inference of death from the facts given in evidence, the court may have to resort to the presumption of death, which is less of a presumption of fact than it is a displacement of the presumption of continuance of life.

⁵²³ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 845.

⁵²⁴ For example, in Queensland, see *Rules of the Supreme Court 1900* (Qld) O 71, rr 11(1), 27(1).

⁵²⁵ For example, in Queensland, see *Rules of the Supreme Court 1900* (Qld) O 71, rr 11(2), 27(2).

The presumption of death was described in *Axon v Axon*⁵²⁶ in the following terms:⁵²⁷

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. But the presumption authorizes no finding that he died at or before a given date. It is limited to a presumptive conclusion that at the time of the proceedings the man no longer lives.

In that case, a husband disappeared because his wife was attempting to serve him with a maintenance order. The Court refused to presume his death on the basis that there was a reason why he had not been heard from.

The case lays down the principle that there is no presumption that death occurred at any particular time before the proceedings, even if the proceedings take place long after the seven year period has expired. The presumption is only to the effect that, at the time of the proceedings in question, the person is presumed to be dead.

Lee explains:⁵²⁸

Even if the court does infer that a person is dead, it will not infer that the death occurred at a particular time; or that one person survived another, where more than one have disappeared ... the court does not presume death as such; it gives leave to the applicant to swear death, after considering the factual circumstances deposed to.⁵²⁹ [some notes omitted]

In succession law there are two occasions when the court might be called upon to declare the death of a person on the basis of the presumption of death: where a beneficiary cannot be found and where a testator or intestate is missing.

(b) Missing beneficiary

The court might be called upon to declare the death of a person on the basis of the presumption of death where it is desired to distribute the estate of a deceased person, but, after reasonable attempts to contact a beneficiary, the beneficiary cannot be found. In such a situation, the court presumes that the beneficiary died before the deceased testator or intestate. The presumption can be rebutted only by evidence that the beneficiary survived the deceased: the presumption of continuance of life is insufficient.

⁵²⁶ (1937) 59 CLR 395.

⁵²⁷ *Id* per Dixon J at 405.

⁵²⁸ Lee WA, *Manual of Queensland Succession Law* (4th ed 1995) at para 846.

⁵²⁹ Lee refers to *Re Jackson* (1902) 87 LT 747.

In *Re Benjamin*,⁵³⁰ for instance, the testator died in June 1893. One of the testator's sons, who was a beneficiary under his father's will, had disappeared less than a year before his father's death. Joyce J said:⁵³¹

I am clearly of opinion that the onus is on those claiming under him to prove that he survived the testator. In my opinion, therefore, the trustees are at liberty to distribute. I am anxious, however, not to do anything which would prevent his 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 ...

The Court ordered that the testator's estate be distributed on the footing that the testator's son had not survived him.⁵³²

A *Benjamin* order was also made in *Re Green's Will Trusts*.⁵³³ In that case, the testatrix's son went missing in January 1943 during a wartime bombing raid. The testatrix continued to believe that her son was alive and, by her will dated 10 February 1972, she bequeathed certain property to him. The testatrix died in 1976. Her trustees sought various declarations, including one to the effect that her son had predeceased her.

Rather than make a declaration that the son had died, the Court made a *Benjamin* order. Nourse J made the following observation:⁵³⁴

My impression is that in recent years the practice of the court has been to make a *Re Benjamin* order and not a declaration [of death].

The Court ordered that the trustees be at liberty to administer the estate on the footing that the testatrix's son had predeceased her.

(c) Missing testator or intestate

The other case where the presumption of death may be required is where those entitled under the will or intestacy of a person show that that person has been missing and not been heard from for a long time, and a grant of probate or letters of administration of the estate is sought on the basis that the missing person has died. The court requires sufficient evidence relating to the person's disappearance to enable it to come to a conclusion that a grant is warranted. Any presumption of death that the court makes is rebuttable if evidence later shows the person to be alive.

530 [1902] 1 Ch 723.

531 *Id* at 726.

532 *Ibid*.

533 [1985] 3 All ER 455.

534 *Id* at 463.

(d) An alternative approach to the presumption of death

An alternative to the presumption articulated in *Axon v Axon*⁵³⁵ is a statutory provision which fixes a date of death. The formula used in the United States *Uniform Probate Code* §1-107(5) has this effect. Twenty-six States of the United States of America have adopted the Code.⁵³⁶ A typical State's version of the Code is South Dakota's which has adopted the Code without significant modification.⁵³⁷

- (5) An absentee who has not been seen or heard from for a continuous period of five years, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead and is presumed to have died at the end of the period.

In 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. The second part of the presumption - that death is presumed to have taken place at the end of the five year period - conflicts with the English policy enshrined in *Re Benjamin*.⁵³⁸ It might be questioned, too, whether a statutory five year presumption would be irrebuttable.

It is also unclear from the *Uniform Probate Code* provision who is entitled to make the presumption. It would be inappropriate for an intending personal representative to be able to make the presumption. The matter would have to go to the probate court and whatever evidence is in existence would be placed before the Registrar or Judge for determination. A rigid time provision might be seen as inconsistent with a discretionary jurisdiction.

If §1-107(5) of the *Uniform Probate Code* were applied to the facts of *Re Benjamin*, 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 1897, with the result that his estate would have taken under the will of the father who died in 1893.

⁵³⁵ See p 238 of this Discussion Paper.

⁵³⁶ See Stein RA, "Probate Reformation: The Impact of the Uniform Laws" (1997) 23 *The Probate Lawyer* 1, 14 n. 53 and correspondence to Dr Peter Handford from Professor JH Langbein, Uniform Law Commissioner (Connecticut) and member of the Joint Editorial Board for the Uniform Probate Code, 14 May 1999.

⁵³⁷ *South Dakota Code 1994* § 29A-1-107 <<http://www.law.cornell.edu/uniform/probate>> (February 1999).

⁵³⁸ See p 239 of this Discussion Paper.

3. SURVIVORSHIP

QLD	ACT	VIC ⁵³⁹	NSW ⁵⁴⁰	SA	WA ⁵⁴¹	NT	TAS ⁵⁴²	UK ⁵⁴³	NZ ⁵⁴⁴
65, 33(1), 35(2)	49P	184	35	72E	119, 120	64	2	184	3

(a) Introduction

If it is known that two or more people are dead and even if it is known what the cause of death for each was, it may not be clear from the known facts which people survived the others. The case law does not help in this situation as there is no presumption of law as to survivorship in relation to such people.⁵⁴⁵ There is, for example, no presumption that they died at the same time or that the eldest died first. Hardingham, Neave and Ford note.⁵⁴⁶

The question is one of fact, depending wholly on evidence, and if the evidence does not establish the survivorship of one of the parties, the law will treat it as a matter incapable of being determined. The onus of proof is on the person asserting the affirmative. [note omitted]

The Ontario Law Reform Commission has noted that the issue of survivorship in these circumstances, was:⁵⁴⁷

... dealt with by the general procedural rule that claimants must prove the facts necessary to establish their claims. If no beneficiary could establish the order of death in support of the claim, the property of the deceased would be awarded to his next-of-kin.

This principle could lead to unsatisfactory outcomes. For example.⁵⁴⁸

539 *Property Law Act 1958* (Vic).

540 *Conveyancing Act 1919* (NSW).

541 *Property Law Act 1969* (WA).

542 *Presumption of Survivorship Act 1921* (Tas).

543 *Law of Property Act 1925* (UK).

544 *Simultaneous Deaths Act 1958* (NZ).

545 People who died in a common disaster were traditionally referred to as "commorientes".

546 Hardingham IJ, Neave MA and Ford HAJ, *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) at para 3602.

547 Ontario Law Reform Commission, Report, *Administration of Estates of Deceased Persons* (OLRC 1991) at 128.

548 *Ibid.*

... the failure of a claimant to prove that the deaths had occurred in a certain order could lead to the property of a testator being distributed in a manner that she would certainly have opposed. [note omitted]

(b) The statutory presumption of survivorship according to seniority

Obviously it is desirable for the law to provide a solution to the problem of the succession of property in circumstances where it is not known which of a number of people died first. In an attempt to overcome the deficiency in the case law, a number of jurisdictions have introduced a statutory provision to the effect that the more senior person died first. For more than two persons, the deaths are presumed to have occurred in order of seniority.

For example, section 65 of the *Succession Act 1981* (Qld), reads:

Presumptions of survivorship and death

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), 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.

Thus, if a husband and wife died in circumstances rendering the order of their deaths uncertain, the younger would be presumed to have survived the older. Alternatively, if a parent and a child died in such circumstances, the child would be presumed to have survived the parent. In this case the presumption that the younger survived the elder seems at odds with the policy of the court demonstrated in *Re Benjamin*⁵⁴⁹ that the beneficiary is presumed to have predeceased the testator or intestate.

Provisions similar to the Queensland provision are found in New South Wales, Victoria and Tasmania.⁵⁵⁰

The words in the provision "(subject to any order of the court)" have been held not to confer on the court a power to depart from the tenor of the provision on the grounds of fairness or justice.⁵⁵¹ One interpretation of the phrase led Bennett J in *Re Lindop*⁵⁵² to the view:⁵⁵³

⁵⁴⁹ See p 239 of this Discussion Paper.

⁵⁵⁰ *Conveyancing Act 1919* (NSW) s 35; *Property Law Act 1958* (Vic) s 184; and *Presumption of Survivorship Act 1921* (Tas) s 2.

⁵⁵¹ *Re Lindop* [1942] Ch 377; *Re Brush* [1962] VR 596. Hardingham J, Neave MA and Ford HAJ, *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) at para 3602 refer to the words as "obscure".

⁵⁵² [1942] Ch 377.

⁵⁵³ *Id* at 382.

The effect of the words is to enable the court, although the circumstances in which the persons have died are such as to make it uncertain which survived, to receive evidence upon the question, and, if the evidence is such as to displace the statutory presumption, to act upon that evidence. I do not think these words give ... a discretion to the court to disregard the statutory presumption if the court came to the conclusion that it would be unfair or unjust to act upon it. It seems to me that the meaning I think ought to be given to the words is a possible one and it gives rise to no difficulty.

After reviewing a number of judicial attempts to give meaning to the words Adam J in *Re Brush*⁵⁵⁴ expressed the view that:⁵⁵⁵

... at best ... if they mean anything at all they add nothing to the section, and at worst ... they are simply meaningless. [The section] would not suffer, I think, by their now being omitted.

Section 65 of the *Succession Act 1981* (Qld) is unique among the existing provisions in providing that the younger should be deemed to survive the elder "for a period of one day". Because Queensland has a thirty day survivorship rule,⁵⁵⁶ section 65 has a very narrow operation. It is really applicable only to property held as joint tenants.⁵⁵⁷

Under the wording of the provisions containing the statutory presumption of survivorship by seniority it is not necessary to determine that the parties died as a result of a common calamity.⁵⁵⁸ It does not have to be shown that the deaths were consecutive for the statutory presumption to be invoked - the presumption applies even where an inference can be drawn that the deaths were simultaneous.⁵⁵⁹

(c) Negative results of the statutory presumption based on seniority

The Ontario Law Reform Commission has observed that although the presumption was clear and easy to administer:⁵⁶⁰

... it was 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 ...

554 [1962] VR 596.

555 Id at 601.

556 *Succession Act 1981* (Qld) ss 32(1) (wills), s 35(2) (intestacy). See pp 247-248 of this Discussion Paper for a discussion on the 30 day survivorship rule.

557 See the discussion of joint tenancies at p 248 of this Discussion Paper.

558 *Hickman v Peacey* [1945] AC 304 per Viscount Simon at 314-315.

559 Id at 319 and see Hardingham IJ, Neave MA and Ford HAJ, *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) at para 3602.

560 Ontario Law Reform Commission, Report, *Administration of Deceased Estates* (OLRC 1991) at 129.

For those jurisdictions which do not have a 30 day [or other period] survivorship provision, there is the further complexity of double succession. For example, if a husband and wife were involved in an accident - one dying immediately and the other within hours or a few days of the first - the brief period of actual survivorship would produce two quick successions.⁵⁶¹ In Queensland this difficulty is avoided by the operation of the 30 day survivorship provision.⁵⁶²

(d) Application of the statutory presumption to presumed deaths

There has been judicial disagreement about whether a provision to the effect of section 65 of the *Succession Act 1981* (Qld) applies where one of the deaths is presumed under the common law. In *Re Albert*⁵⁶³ and *Halbert v Mynar*,⁵⁶⁴ the view was taken that an equivalent section did not apply where one of the deaths was presumed. But in *Hickman v Peacey*,⁵⁶⁵ in *Re Watkinson*⁵⁶⁶ and in *Estate of Dixon*,⁵⁶⁷ the contrary view was taken.

In the New South Wales case of *Halbert v Mynar*,⁵⁶⁸ it was held that section 35 of the *Conveyancing Act 1919* (NSW) (which is in similar terms to the Queensland provision) does not apply to presumed - as opposed to proved - deaths. It has also been held in Victoria that section 184 of the *Property Law Act 1958* (Vic) does not apply to presumed deaths.⁵⁶⁹ Similar reasoning would appear to apply to the Queensland and Australian Capital Territory provisions, and to the New Zealand provision.

In *Halbert v Mynar*,⁵⁷⁰ the testator and his daughter disappeared without trace during a journey by car in 1972. Extensive inquiries did not yield any information on the cause of their disappearance or even whether they died. The testator's wife died in 1973 leaving a will. Probate of the husband's will was granted on presumption of death in 1979. The testator's will made provision for both his wife and daughter.

561 The problem could have been avoided if both spouses had wills which provided that a beneficiary must survive the testator by a certain period as a condition to taking the benefit under the will.

562 *Succession Act 1981* (Qld) ss 32(1) (wills), 35(2) (intestacy).

563 [1967] VR 875.

564 [1981] 2 NSWLR 659.

565 [1945] AC 304 per Viscount Simon LC at 314-315.

566 [1952] VLR 123.

567 (1969) 90 WN (NSW) 469.

568 [1981] 2 NSWLR 659.

569 *Re Albert* [1967] VR 871.

570 [1981] 2 NSWLR 659.

Those interested in the estate of the daughter submitted that the daughter should be found to have survived the testator. Those interested in the estate of the wife sought a declaration that the testator had predeceased his wife, arguing that her estate should take under her husband's will.

Waddell J considered section 35 of the *Conveyancing Act (NSW)*, and held that the section applied only to proved, and not to presumed, deaths.⁵⁷¹ This meant that the order and timing of the deaths of the father and daughter remained undecided. In the absence of proof that either the wife or daughter survived the testator, the estate could not be distributed in accordance with the provisions of the will.

The principal problem in restricting the provision to proved deaths only, is that doing so may leave the parties without a decision, as happened in *Halbert v Mynar* itself. However, if *Benjamin* orders had been sought in that case, it may be that the wife's estate could have been distributed on the basis that her husband and daughter had predeceased her, and that the husband's estate could have been distributed on the basis that his wife and daughter had predeceased him.

Justice Waddell's judgment in *Halbert v Mynar* is relevant to all jurisdictions where the operative words of the statutes apply where "two or more persons have died".

In *Halbert v Mynar*, Waddell J referred to the surprising consequences - identified by Lush J in *Re Albert* - that would follow if the rule about the presumption of survivorship were applied when one of the deaths was proved only by the use of the seven year presumption.⁵⁷² Lush J had observed:⁵⁷³

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.

The undesirable consequences to which Lush J referred were premised on applying the traditional statutory provision, rather than the modified provision that is found in Western Australia, New Zealand and Australian Capital Territory (discussed below). They were also premised on applying the traditional rule without the thirty day survivorship rule that applies in Queensland (discussed below) and which has been recommended by the National Committee.⁵⁷⁴

⁵⁷¹ Waddell J followed the Victorian decision in *Re Albert* [1967] VR 875, and declined to follow the New South Wales decision of Helsham J in *Re Dixon* (1969) 90 WN (NSW) 469. In *Re Albert*, Lush J at 879-880 cited a number of anomalies that would result if the presumption about survival of the younger were applied to cases where one of the deaths was presumed.

⁵⁷² [1981] 2 NSWLR 659 at 667-668.

⁵⁷³ *Re Albert* [1967] VR 875 at 879.

⁵⁷⁴ See notes 581 and 587 of this Discussion Paper.

If the presumption that a beneficiary predeceased a testator were adopted, and extended to cases where there was a presumed death, the person who had disappeared many years earlier would be presumed to have predeceased the testator who died later, notwithstanding that the testator may be the older of the two.

Even if the Queensland provision were extended to cases where there was a presumed death, the effect - having regard to the thirty day survivorship rule - would be that, except in relation to property held as joint tenants, there would have to be evidence that the younger survived the elder for thirty days to give the result outlined by Lush J. In the absence of that evidence, the estate of the elder would be distributed as if the younger had predeceased him or her.

(e) Alternative statutory schemes for the distribution of estates

In order to avoid possible injustice resulting from the statutory presumption of survivorship according to seniority, some jurisdictions have adopted alternative approaches for the distribution of property where there is doubt as to who survived whom, in lieu of or in addition to the statutory presumption of survivorship by seniority.

(i) Spouses - distribution of estates separately

In South Australia, in relation to an intestate and his or her spouse who die within 28 days of each other, and where it is uncertain which spouse survived the other, the estate of each is to be distributed as if the spouse had not survived the intestate.⁵⁷⁵ Thus the estate of each would be distributed separately. In South Australia there is no statutory presumption of survivorship. Section 72E of the *Administration and Probate Act 1919 (SA)* provides:

Presumption of survivorship not to apply

Where an intestate and his spouse die within twenty-eight days of each other this Part applies as if the spouse had not survived the intestate.

There is a similar provision in the Northern Territory - again operating only in relation to an intestate and his or her spouse - but not limited to a non-survival period such as the 28 day period in South Australia.⁵⁷⁶

⁵⁷⁵ *Administration and Probate Act 1919 (SA)* s 72E.

⁵⁷⁶ *Administration and Probate Act (NT)* s 64.

(ii) General provision - two or more persons dying, property to devolve as if each testator/intestate survived the other person for a time

In New Zealand⁵⁷⁷, Western Australia⁵⁷⁸ and the Australian Capital Territory⁵⁷⁹ the legislation includes provisions which are more general than those in South Australia and the Northern Territory, but which have the same effect. They cover testate and intestate estates and are not limited to circumstances in which spouses die. For example, section 120(a) of the *Property Law Act 1969* (WA) reads:

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; ...

Instead of a presumption that the younger survived the older, property of the "benefactor" devolves as if the benefactor had died immediately after the "beneficiary".⁵⁸⁰

(iii) General provisions - beneficiary not surviving testator/intestate for 30 days, property to devolve as if beneficiary died before testator/intestate

Section 32 of the *Succession Law Act 1981* (Qld) reads:

Lapse of benefit where beneficiary does not survive testator by 30 days

- (1) Unless a contrary intention appears by the will, where any beneficial disposition of property is made to a person who does not survive the testator for a period of 30 days the disposition shall be treated as if that person had died before the testator and, subject to this Act, shall lapse.
- (2) A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purposes of this section.

A similar provision in relation to intestate estates appears in section 35(2) of the *Succession Law Act 1981* (Qld).

⁵⁷⁷ *Simultaneous Deaths Act 1958* (NZ) s 3(1)(a).

⁵⁷⁸ *Property Law Act 1969* (WA) s 120(a).

⁵⁷⁹ *Administration and Probate Act 1929* (ACT) s 49P.

⁵⁸⁰ The Western Australian and New Zealand provisions allow an expression of a contrary intention to be effective.

With the exception of property held by persons as joint tenants, the effect of the thirty day rule - which the National Committee has previously recommended be adopted⁵⁸¹ - is that where two people die in circumstances covered by the provision, and each is a beneficiary under the will of the other, the younger will not take unless there is evidence that he or she survived the elder by thirty days.

(iv) Property held under joint tenancy - to devolve as if held by tenants in common

In Western Australia,⁵⁸² the Australian Capital Territory⁵⁸³ and New Zealand⁵⁸⁴ property held by persons as joint tenants⁵⁸⁵ is to devolve as if it had been held by them in equal shares as tenants in common. For example, section 120(d) of the *Property Law Act 1969 (WA)* reads:

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 - ...

- (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; ...

The effect of these provisions is that the estate of the younger person does not receive the windfall that results from the presumption of survivorship by seniority in Queensland under section 65 of the *Succession Act 1981 (Qld)* and in jurisdictions with a similar provision.

In Queensland, there is no thirty day rule in relation to the vesting of property in a surviving joint tenant. The effect of the Queensland survivorship provision is that the younger person is deemed to survive the elder, with the result that any property held by them as joint tenants will automatically vest in the estate of the younger of them.

581 National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997) at 76; New South Wales Law Reform Commission, Report, *Uniform Succession Laws: The law of wills* (R 85, 1998) at para 6.47.

582 *Property Law Act 1969 (WA)* s 120(d).

583 *Administration and Probate Act 1929 (ACT)* s 49P(2).

584 *Simultaneous Deaths Act 1958 (NZ)* s 3(d).

585 The transfer of property upon death to the surviving joint owner of property is not a testamentary act on the part of the deceased person. Where the joint owner dies, the survivor is not regarded as having succeeded to the property of the deceased person. See Hardingham IJ, Neave MA and Ford HAJ, *Wills and Intestacy in Australia and New Zealand* (2nd ed 1989) at para 106.

(f) The devolution of property in specific situations

Section 120 of the *Property Law Act 1969* (WA) contains a number of provisions relating to the devolution of property in particular situations where two or more persons have died in a common calamity or in circumstances where it is not certain who survived the other or others.

(i) The devolution of property the subject of gift made in anticipation of death

Section 120(b) of the *Property Law Act 1969* (WA) provides:

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 - ...

- (b) every *donatio mortis causa* made by a person so dying to another person so dying is void and of no effect; ...

(ii) The devolution of proceeds of insurance

Section 120(c) of the *Property Law Act 1969* (WA) provides:

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 - ...

- (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; ...

A similar provision is in section 3(c) of the *Simultaneous Deaths Act 1958* (NZ).⁵⁸⁶

(iii) Devolution of property that is left to the survivor of a class of persons

Section 120(e) of the *Property Law Act 1969* (WA) provides:

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*

⁵⁸⁶

Note that in Ontario a provision to the same effect is in separate legislation (*Insurance Act*, RSO 1980 c 218, ss 192 and 272, referred to in Ontario Law Reform Commission, Report, *Administration of Estates of Deceased Persons* (OLRC 1991) at 129, note 5).

1837 of the United Kingdom Parliament 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; ...

Section 120(e) of the *Property Law Act 1969* (WA) covers the situation where a testator leaves 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 the last to survive. If A predeceases the testator and B and C survive the testator for more than 30 days but die in a common calamity, section 120(e) provides that the estates of B and C take in equal shares, whereas the effect of section 65 of the *Succession Act 1981* (Qld) would be that the estate of the younger of B and C would take the entire estate.

Section 3(e) of the *Simultaneous Deaths Act 1958* (NZ) is in virtually identical terms to section 120(e) of the *Property Law Act 1969* (WA).

(iv) Devolution of the right to exercise a power of appointment where the power is conferred on the survivor of a class of persons

Section 120(f) of the *Property Law Act 1969* (WA) reads:

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 had been the survivor of those persons, but this paragraph does not apply in any case to which paragraph (c) applies; ...

This provision relates to powers of appointment which could have been exercised by any of two or more persons. A similar provision is found in section 3(f) of the *Simultaneous Deaths Act 1958* (NZ).

(v) Antilapse

Section 120(h) of the *Property Law Act 1969* (WA) provides:

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 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 dies 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; ...

4. ISSUES CONSIDERED BY THE NATIONAL COMMITTEE

The National Committee considered whether:

- (1) it is necessary or desirable to change the common law presumption of death to fix the date of a presumed death;
- (2) in light of the thirty day survivorship rule recommended by the National Committee and the availability of *Benjamin* orders, there is a need to deal with the order of deaths of people who die or are presumed to have died in circumstances where it is uncertain as to who survived the other (apart from dealing with the deaths of joint tenants);
- (3) if yes to (1):
 - there should be a presumption of survivorship in the model legislation to the effect that the younger is presumed to have survived the elder by a day as in section 65 of the *Succession Act 1981* (Qld); or
 - the property of each person should devolve as if he or she had survived the other person so dying and had died immediately afterwards (in which case the beneficiary is presumed to have predeceased the testator);

- (4) if a statutory presumption of survivorship according to seniority is to be included in the model legislation, it should be extended to cover presumed deaths, as well as actual deaths;
- (5) the model legislation should specify that, where the persons who have died in these circumstances held property as joint tenants, the property devolves as if they had owned it as tenants in common in equal shares as in section 120(d) of the *Property Law Act 1967 (WA)* and section 49P(2) of the *Administration and Probate Act 1929 (ACT)*;
- (6) if yes to (5), a thirty day rule should apply, so that the property will devolve as if the persons had held it as tenants in common in equal shares unless it is proved that one joint tenant survived the other by thirty days (to avoid arguments that one survived the other by a matter of minutes);
- (7) the model legislation should include a provision relating to the devolution of the proceeds of an insurance policy under section 120(c) of the *Property Law Act 1969 (WA)*;
- (8) the model legislation should include a provision relating to the devolution of property that is left to the survivor of a class of persons, to the effect of section 120(e) of the *Property Law Act 1969 (WA)*;
- (9) the model legislation should include a provision relating to the devolution of a power of appointment that is conferred on the survivor of a class of persons, to the effect of section 120(f) of the *Property Law Act 1969 (WA)*;
- (10) the model legislation should include an antilapse provision to the effect of section 120(h) of the *Property Law Act 1969 (WA)*;
- (11) the provisions discussed in this chapter should be expressed to be subject to a contrary intention, whether in the will or elsewhere.

5. THE NATIONAL COMMITTEE'S PRELIMINARY VIEW

(a) Fixing the date of presumed deaths

In light of the National Committee's views on other aspects of the presumption of death, it did not consider further the possibility of altering that presumption in favour of a legislative provision which would fix the date of a presumed death.

(b) Survival period of 30 days

The National Committee considered that it may be appropriate that any presumption should include the requirement that to take under a will or under the relevant intestacy rules, the person must “survive the testator by a period of 30 days”, rather than simply presuming the person to be “living at the time of the death of the other person”. This would correspond with the thirty day survivorship period that the National Committee has already recommended in relation to beneficiaries’ entitlement to take under a will.⁵⁸⁷

(c) Thirty day survivorship rule and *Benjamin* orders

The National Committee was of the view that there should be a statutory enactment of the *Re Benjamin* principle to overcome the situations where *Benjamin* orders are not sought through ignorance of their availability. It was suggested that it might be desirable for *Benjamin* orders to be subject to some of the restrictions that apply to distributions made where a grant of probate has been made on the presumption of death.⁵⁸⁸

In relation to the situation where people die or have died in circumstances where it is uncertain who survived the other, the National Committee was of the view that a provision to the effect of section 120(a) of the *Property Law Act 1969* (WA) was not necessary given that the same result could be achieved by a 30 day survivorship rule and a statutory enactment of the rule in *Re Benjamin*. The 30 day survival provision simplifies the problem of proof where it is not clear whether a beneficiary survived the testator by a few minutes or even a few days. Where the beneficiary is issue of the testator any surviving issue of that issue will take as long as they survive for a period of thirty days.

The National Committee queried, but did not decide, whether a statutory enactment of *Re Benjamin* should also cover the situation where the date of death of the beneficiary was known, but not that of the testator or intestate.

(d) Presumption of death based on seniority

Despite the availability of *Benjamin* orders and the 30 day rule, the National Committee was of the view that there is still a need to deal with the order of deaths of people who die or are presumed to have died in circumstances where it is uncertain as to who survived the other.

⁵⁸⁷ National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997) at 76.

⁵⁸⁸ See pp 22-23 of this Discussion Paper.

The National Committee was of the view that there should be a presumption of survivorship to the effect that the younger is presumed to have survived the elder by a day such as appears in section 65 of the *Succession Act 1981* (Qld).

(e) Presumed deaths and actual deaths

The National Committee did not consider further whether, if a statutory presumption of survivorship is to be retained, it is to be extended to cover presumed deaths, as well as actual deaths.

(f) The devolution of property where deceased persons held property jointly

The National Committee considered whether legislation should specify that, where persons who have died in circumstances where it is uncertain who survived the other or others held property as joint tenants, the property devolves as if they had owned it as tenants in common in equal shares as in Western Australia under section 120(d) of the *Property Law Act 1969* (WA). The National Committee believed that the Western Australian approach could lead to a fairer result.

(g) The devolution of the proceeds of an insurance policy

The National Committee was of the view that it would be necessary to consult with the insurance industry before adopting a position on the adoption of such a provision in the model legislation.

(h) The devolution of property that is left to the survivor of a class of persons

The National Committee was in favour of adopting a provision to the effect of section 120(e) of the *Property Law Act 1969* (WA).

(i) The devolution of a power of appointment that is conferred on the survivor of a class of persons

The National Committee was in favour of adopting a provision to the effect of section 120(f) of the *Property Law Act 1969* (WA).

(j) Antilapse

The National Committee did not consider a provision to the effect of section 120(h) of the *Property Law Act 1969* (WA) necessary in light of its previous recommendations. Previously, the National Committee recommended the adoption of the modern form of

the anti-lapse rule with a few refinements.⁵⁸⁹ Queensland already has the modern anti-lapse rule in section 33 of the *Succession Act 1981* (Qld).

6. PROPOSALS

- (1) The model legislation should not include a provision altering the common law presumption of death.
- (2) The model legislation 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.
- (3) There should be consultation with the insurance industry before making recommendations relating to the issues covered by section 120(c) of the *Property Law Act 1969* (WA).
- (4) The model legislation should include a provision relating to the devolution of property in situations where two or more persons who own property jointly between them have died in circumstances where it is uncertain who survived the other or others to the effect that the property held by them as joint tenants should devolve as if they had owned it as tenants in common in equal shares as in Western Australia under section 120(d) of the *Property Law Act 1969* (WA).
- (5) The model legislation should include a provision to the effect of section 120(e) of the *Property Law Act 1969* (WA).
- (6) The model legislation should include a provision to the effect of section 120(f) of the *Property Law Act 1969* (WA).
- (7) The model provision should not include a provision to the effect of section 120(h) of the *Property Law Act 1969* (WA).
- (8) The model legislation should include a provision, based on section 65 of the *Succession Act 1981* (Qld) or section 120(i) of the *Property Law Act 1969* (WA) encompassing the seniority rule, that is, that the younger is presumed to have survived the elder, to cover situations not covered by the operation of the provisions referred to above.

⁵⁸⁹

National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997) at 90.

- (9) The model legislation should include a provision to the effect that the above suggested provisions are to be subject to a contrary intention that appears, whether in the will or elsewhere.

7. QUESTIONS FOR DISCUSSION

- 17.1 If a statutory presumption of survivorship is to be retained, should it be extended to cover presumed deaths, as well as actual deaths?
- 17.2 Should the model legislation include a provision to the effect of section 120(b) of the *Property Law Act 1969 (WA)*?
- 17.3 Should the model legislation include a provision to the effect of section 120(c) of the *Property Law Act 1969 (WA)*?
- 17.4 Should the provision in the model legislation based on section 120(d) of the *Property Law Act 1969 (WA)* be subject to the 30 day rule?
- 17.5 Should the provision in the model legislation based on section 120(e) of the *Property Law Act 1969 (WA)* be subject to the 30 day rule?
- 17.6 Should the provision in the model legislation based on section 120(f) of the *Property Law Act 1969 (WA)* be subject to the 30 day rule?
- 17.7 Should a gift to the survivor of a class of persons be deemed to be a gift to all such persons in equal shares? If so, should it be subject to the 30 day rule?
- 17.8 Should the statutory enactment of *Re Benjamin* be expressed to apply in a case where the order of deaths is uncertain because the date of death of the testator (or intestate), rather than that of a beneficiary, is unknown?

CHAPTER 18

PROCEDURAL MATTERS

1. APPLICATION FOR PROBATE OR ADMINISTRATION TO BE MADE IN ACCORDANCE WITH THE RULES

(a) Introduction

New South Wales provides for the procedure to be followed in applying for probate or administration in its administration and probate legislation as well as in its rules of court. Other jurisdictions have located procedural matters such as these either in their rules of court or their probate rules.

Section 42 of the *Wills, Probate and Administration Act 1898* (NSW) reads:

Application for probate or administration

- (1) All applications for probate or letters of administration may be made to the Court in such manner as may be prescribed by the rules.
- (2) Notice of such intended application shall be published in such newspaper or newspapers as may be prescribed by the rules at least fourteen days before such application is made.
- (3) Application for probate of a will not deposited as in section 32 provided or for letters of administration shall be supported by an affidavit that a search has been made in the proper office for a will of the deceased, and stating whether any such will remains deposited with the officer for the time being authorised to have the custody of deposited wills, or by a certificate from the Registrar to the like effect.
- (4) The Court may by order direct that any partial or total failure to comply with the requirements of subsections (2) and (3) shall not bar the granting of probate or letters of administration.
- (5) The Court may refuse to revoke a grant of probate or letters of administration notwithstanding that in respect of the application for the grant there was any partial or total failure to comply with the requirements of subsections (2) and (3).

(b) Issues considered by the National Committee

The National Committee considered whether:

- (1) a provision dealing with the manner in which applications for probate and letters of administration are to be made should be included in the model legislation;
- (2) if yes to (1), it would be more appropriate for provisions to the general effect of section 42(2) to (5) of the *Wills, Probate and Administration Act 1898* (NSW) to be located in rules of court, rather than in the model legislation.

(c) The National Committee's preliminary view

The National Committee has adopted the policy that procedural matters should, as far as possible, be located in rules of court rather than in administration and probate legislation. The reasons for this policy are threefold:

- Rules are better able to be moulded to the unique requirements of, and facilities available in, individual jurisdictions.
- The alteration of procedures, particularly at short notice, may be more easily achieved by the amendment of rules rather than Acts of Parliament.
- If rules are promulgated by the courts, issues relating to the separation of powers would arise if it was perceived that the executive was imposing its will on the courts by legislating in this area.

The National Committee has agreed that substantive matters which must be treated uniformly should be included in the model legislation. Although the process of uniformity cannot extend to rules, it may be appropriate, in certain circumstances, to recommend that certain principles be considered when rules are promulgated.

(d) Proposal

Individual jurisdictions should consider introducing a provision to the effect of section 42(2) to (5) of the *Wills, Probate and Administration Act 1898 (NSW)* in their relevant rules. However, a "signposting" provision based on section 42(1) of the *Wills, Probate and Administration Act 1898 (NSW)* should be included in the model legislation to place personal representatives on notice as to the jurisdiction and powers of the court in relation to the administration of estates.

2. PRACTICE

(a) Introduction

Section 70 of the *Succession Act 1981 (Qld)* reads:

Practice

The practice of the court shall, except where otherwise provided in or under this or any other Act or by rules of court for the time being in force, be regulated so far as the circumstances of the case will admit by the practice of the court before the passing of this Act.

(b) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 70 of the *Succession Act 1981* (Qld) should be included in the model legislation, in order that the practice of the court retain continuity with the law before the passing of the model legislation.

(c) The National Committee's preliminary view

The National Committee was of the view that transitional provisions such as section 70 of the *Succession Act 1981* (Qld) should be left to each jurisdiction to consider in light of each jurisdiction's particular circumstances.

(d) Proposal

A provision to the effect of section 70 of the *Succession Act 1981* (Qld) should not be included in the model legislation.

3. SERVICE

(a) Introduction

Section 72 of the *Succession Act 1981* (Qld) reads:

Service

In any case where any person desires to effect within a prescribed time service of any proceedings against, or of any notice or other document required or permitted to be served in respect of the estate of a deceased person and that person is uncertain as to the person upon whom service should be effected the court may, if application for directions is made to it within the time prescribed for service, direct the mode of service in that case and, if it thinks fit, allow an extension of the time within which service may be effected.

(b) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 72 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(c) The National Committee's preliminary view

The National Committee has adopted the policy that procedural matters should, as far as possible, be dealt with in each jurisdiction's rules rather than in the model legislation. The National Committee was of the view that the provisions relating to service dealt with matters primarily related to practice and procedure and would be better placed in each jurisdiction's rules.

(d) Proposal

A provision to the effect of section 72 of the *Succession Act 1981* (Qld) should not be included in the model legislation.

4. DEEMED RESIDENCE

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
	69		97		53	101			

(a) Introduction

Section 97 of the *Wills, Probate and Administration Act 1898* (NSW) reads:

Every executor etc. to be deemed resident in New South Wales**(1) Every executor or administrator:**

(a) named in any probate or letters of administration granted by any court of competent jurisdiction in any portion of Her Majesty's dominions and making application under the provisions of Division 5 for the sealing of such probate or administration; or

(b) appointed under this Part;

shall be deemed to be resident in New South Wales.

(2) Where not actually so resident, the executor or administrator shall, before the issue or sealing of any probate or administration, file with the Registrar an address, as prescribed by the rules, within New South Wales, at which notices and processes may be served upon the executor or administrator; and all services at such registered address shall be deemed personal service.

(b) Issue considered by the National Committee

The National Committee considered whether the model legislation should include a provision to the effect of section 97 of the *Wills, Probate and Administration Act 1898* (NSW) or whether such a provision would be more appropriately located in rules of court.

(c) The National Committee's preliminary view

The National Committee has adopted the policy that procedural matters should, as far as possible, be dealt with in each jurisdiction's rules rather than in the model legislation. The National Committee was of the view that it is more appropriate to place a provision to the effect of section 97 of the *Wills, Probate and Administration Act 1898* (NSW) in each jurisdiction's rules than in the model legislation.

(d) Proposal

A provision to the effect of section 97 of the *Wills, Probate and Administration Act 1898* (NSW) should not be included in the model legislation. If any jurisdiction considers it necessary, it should be placed in that jurisdiction's rules.

5. COURT TO MAKE FINDING WITH RESPECT TO DOMICILE OF DECEASED PERSON

(a) Introduction

Section 8C of the *Administration and Probate Act 1929* (ACT) provides that the court is to make a finding with respect to the deceased's domicile. Section 8C(1) reads:

The Court to make finding with respect to the domicile of deceased person

- (1) On an application made under this Act -
- (a) for the grant of probate of the will, or administration of the estate, of a deceased person;
 - (b) to have probate of the will, administration of the estate, or an order to collect and administer the estate, of a deceased person granted by a court of competent jurisdiction in a State or other Territory sealed with the seal of the Court; or
 - (c) by the Public Trustee for an order to collect and administer the estate of a deceased person,

the Court shall not grant the application or the Registrar shall not issue the grant of probate or administration, seal the probate, administration or order of the court, or grant an order to the Public Trustee, as the case requires, unless the Court or the Registrar has made a finding with respect to the domicile of the deceased person at the time of death, and, if the Court or Registrar has found that the deceased person was, at that time, domiciled in a State under the law of which death duty is payable out of the estates of deceased persons, the Court shall not grant the application or the Registrar shall not issue the grant of probate or administration, seal the probate, administration or order of the court or grant an order to the Public Trustee, as the case requires, unless -

- (d) the Court or Registrar is satisfied that an assessment has been made, in accordance with the law of that State, of the amount of death duty that is, under that law, payable out of the estate of the deceased person; or
- (e) the appropriate officer of that State has consented in writing to -
 - (i) the grant of probate or administration;
 - (ii) the sealing with the seal of the Court of the probate, administration or order; or
 - (iii) the grant of the order to the Public Trustee, as the case requires.

(b) Issue considered by the National Committee

The National Committee considered whether it is necessary to include in the model legislation a provision to the effect of section 8C of the *Administration and Probate Act 1929 (ACT)*, or whether the question be reconsidered only if death duties are reintroduced.

(c) The National Committee's preliminary view

The purpose of the section 8C of the *Administration and Probate Act 1929 (ACT)* section is to close an avenue for avoidance of death duties. The National Committee is of the view that this is not a matter which is relevant to succession legislation.

(d) Proposal

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

6. THE REGISTRAR

(a) Introduction

Section 69 of the *Succession Act 1981* (Qld) reads:

The registrar

Subject to this Act the registrar of the Supreme Court is invested with and shall and may exercise with reference to proceedings in the court under this Act all such powers and authorities as may be conferred on the registrar from time to time by the court and by the rules of court and otherwise all such powers and authorities as the registrar exercised before the passing of this Act.

(b) Issue considered by the National Committee

The National Committee considered whether a provision to the effect of section 69 of the *Succession Act 1981* (Qld) should be included in the model legislation.

(c) The National Committee's preliminary view

A provision to the effect of section 69 of the *Succession Act 1981* (Qld) would ensure that the powers of the Registrar retain continuity with the law before the passing of the model legislation. Further, the Registrar may not otherwise have the powers relating to the grants contemplated here. The power to award a grant vests in the Court and, as a Probate Registrar mentioned to the National Committee, it is uncertain whether a judge is able to delegate that power to a registrar without statutory authority.

Nevertheless, the National Committee was of the general view that the powers of the Registrar should generally be a matter for each jurisdiction to determine.

Initially, the National Committee formed a preliminary view that the model legislation not include a provision to the effect of section 69 of the *Succession Act 1981* (Qld). However, in the light of the concern expressed as to the validity of delegation of court powers to a Registrar, it considered that further submissions may be of assistance in deciding this matter.

(d) Question for discussion

18.1 The National Committee specifically seeks submissions on whether it is necessary to include a provision to the effect of section 69 of the *Succession Act 1981* (Qld) in the model legislation in order to put beyond doubt the powers of the Registrar.

7. CREATION OF OFFICE OF REGISTRAR OF PROBATE, DEPUTY REGISTRARS OF PROBATE AND REGISTRAR'S SEAL AND STAMPS

(a) Introduction

Sections 7, 7A and 7B of the *Administration and Probate Act 1929* (ACT) provide for the creation of the office of Registrar of Probates, Deputy Registrars of Probates and Registrar's seal and stamps.

(b) Issue considered by the National Committee

The National Committee considered whether it is necessary to include a provision to the effect of sections 7, 7A and 7B of the *Administration and Probate Act 1929* (ACT) in the model legislation, given that each jurisdiction has made its own arrangements for these matters.

(c) The National Committee's preliminary view

The National Committee is of the view that procedural matters, including the establishment of offices and infrastructure to support the legislation, should be a matter for individual jurisdictions to pursue given their own particular circumstances.

(d) Proposal

Provisions to the effect of sections 7, 7A and 7B of the *Administration and Probate Act 1929* (ACT) should not be included in the model legislation.

8. RECORD OF GRANT

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
	125		152		140	148			

(a) Introduction

Section 140 of the *Administration Act 1903* (WA) reads:

Records of grants, etc.

- (1) The Principal Registrar shall cause entries to be made in a book to be kept for that purpose of -
 - (a) all grants of probate and administration, and all orders to collect;
 - (b) the filing, passing, and allowance of the accounts of all executors and administrators; and of
 - (c) any special order extending the time for passing such accounts.
- (2) Such book shall set forth -
 - (a) the dates of such grants;
 - (b) the names of the testators or intestates;
 - (c) the place and time of death;
 - (d) the names and description of the executors or administrators;
 - (e) [deleted.]
 - (f) the dates of the filing, passing, allowance of, and special orders with reference to the said accounts.
- (3) Where a grant of probate or administration is made or resealed by the Court, a copy of that grant may be obtained from the Court with or without the annexes thereto of a copy of the will (if any) to which it relates, and such copy may be issued under seal for all purposes as an office copy, and when so sealed and issued is sufficient evidence of that grant without further proof.

(b) Issue considered by the National Committee

The National Committee considered whether it is necessary to include a provision dealing with the recording of grants in the model legislation, or whether it is a matter that can be left to individual jurisdictions to deal with in their rules of court.

(c) The National Committee's preliminary view

The National Committee has adopted the policy that procedural matters, as far as possible, should be included in each jurisdiction's rules of court rather than in the model legislation. The National Committee is of the view that a provision dealing with the recording of grants is procedural in nature and would be better placed in each jurisdiction's rules.

(d) Proposal

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

CHAPTER 19

DEALING WITH WILLS

1. INTRODUCTION

The administration and probate legislation in a number of jurisdictions⁵⁹⁰ has specific provisions which deal with the Court's power to order a person in possession or control of a will to produce it to the Registrar or Court as the case may be. Some jurisdictions have also addressed ancillary matters in their legislation. Section 127 of the *Administration and Probate Act 1929* (ACT), section 65 of the *Administration and Probate Act 1935* (Tas) and section 66 of the *Administration and Probate Act 1958* (Vic) each create a statutory cause of action for damages resulting from certain kinds of conduct in relation to a will. The latter provision also creates a criminal offence of concealing a will with intent to defraud.

2. WHO MAY SEE A WILL

The National Committee has previously recommended, in its report on the law of wills, that certain persons should be entitled to see a will. The draft provision based on that recommendation reads.⁵⁹¹

Persons entitled to see will

- (1) Any person having the possession or control of a will including a revoked will, or a copy of any such will and any part of such a will (including a purported will) of a deceased person must allow any or all of the following persons to inspect and, at their own expense, take copies of it:
- (a) any person named or referred to in it, whether as beneficiary or not,
 - (b) the surviving spouse, any parent or guardian and any issue of the testator,
 - (c) any person who would be entitled to a share of the estate of the testator if the testator had died intestate,
 - (d) any creditor or other person having any claim at law or in equity against the estate of the deceased,
 - (e) any beneficiaries of prior wills of the deceased,

⁵⁹⁰ *Wills, Probate and Administration Act 1898* (NSW) s 150; *Administration and Probate Act 1919* (SA) s 25; *Administration and Probate Act* (NT) s 147; *Administration and Probate Act 1929* (ACT) s 124; *Supreme Court Act 1981* (UK) ss 122, 123.

⁵⁹¹ National Committee for Uniform Succession Laws, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills* (QLRC MP 29, 1997) at 109-112 and draft *Wills Bill 1997* cl 52; New South Wales Law Reform Commission, Report, *Uniform Succession Laws: The law of wills* (R 85, 1998) at paras 9.1-9.11.

- (f) a parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate.
- (2) Any person having the possession or control of a will, including a revoked will, or a copy of any such will and any part of such a will (including a purported will), of a deceased person must produce it in Court if required to do so.

Section 50 of the *Wills Act 1997 (Vic)*,⁵⁹² which was based on the National Committee's recommendation in its report on the law of wills, reads:

Who may see a will?

A person who has possession and control of a will, a revoked will or a purported will of a deceased person must allow the following persons to inspect and make copies of the will (at their own expense) -

- (a) any person named or referred to in the will, whether as beneficiary or not;
- (b) any person named or referred to in any earlier will as a beneficiary;
- (c) any spouse of the testator at the date of the testator's death;
- (d) any de facto spouse of the testator;
- (e) any parent, guardian or children of the deceased person;
- (f) any person who would be entitled to a share of the estate if the deceased person had died intestate;
- (g) any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate of the testator if the testator had died intestate;
- (h) any creditor or other person who has a claim at law or in equity against the estate of the deceased person and who produces evidence of that claim.

3. CONCEALMENT OF A WILL

QLD	ACT	VIC ⁵⁹²	NSW	SA	WA	NT	TAS	UK	NZ
		50	150						

Section 150 of the *Wills, Probate and Administration Act 1898 (NSW)* deals specifically with concealment of a will. Section 150 reads:

⁵⁹² Clause 52(2) of the draft *Wills Bill 1997 (Vic)* was not included in s 50 of the *Wills Act 1997 (Vic)*. However, the *Administration and Probate Act 1958 (Vic)* gives the Court express power in certain circumstances to order the production of testamentary instruments. The relevant power is conferred on the Court by s 15 of the *Administration and Probate Act 1958 (Vic)*.

⁵⁹³ *Wills Act 1997 (Vic)*.

Order to produce an instrument purporting to be testamentary

- (1) The Court may, on the application of any person, whether any proceedings are or are not pending in the Court with respect to any probate or administration, order any person to produce and bring into the registry any paper or writing; being or purporting to be testamentary, or otherwise material to the matter before the Court, which may be shown to be in the possession or under the control of such person.
- (2) If it is not shown that any such paper or writing is in the possession or under the control of such person, but it appears that there are reasonable grounds for believing that the person has the knowledge of any such paper or writing, the Court may direct such person to attend for the purpose of being examined in open Court or upon interrogatories respecting the same.
- (3) Such person shall be bound to answer such questions or interrogatories, and (if so ordered) to produce and bring in such paper or writing, and shall be subject to punishment for contempt in case of default in not attending or in not answering such questions or interrogatories, or not bringing in such paper or writing.

4. FRAUDULENTLY DEALING WITH A WILL AND STATUTORY CAUSE OF ACTION

QLD	ACT	VIC	NSW	SA	WA	NT	TAS	UK	NZ
	127	66					65		

Section 127 of the *Administration and Probate Act 1929* (ACT) creates a statutory cause of action by providing that a person who fraudulently deals with a will is liable in damages. The section reads:

Person fraudulently disposing of will liable in damages

Where a person suffers damage as a result of the stealing of a will or a part of a will, or as a result of the fraudulent destroying, cancelling, obliterating or concealing of a will or a part of a will, the person may recover damages in respect of the damage by action in a court of competent jurisdiction from the person who stole, destroyed, cancelled, obliterated or concealed the will or part, as the case may be.

Section 65 of the *Administration and Probate Act 1935* (Tas) also creates a statutory cause of action. The section reads:

Concealment &c., of will actionable

If any person retains or conceals, or is privy to the retention or concealment of, a will with intent to defraud any person, the person defrauded and any person claiming under him, shall have an action for damages against such first-mentioned person for any loss sustained by reason of such retention or concealment.

Section 66 of the *Administration and Probate Act 1958* (Vic) creates an offence of concealing a will with intent to defraud as well as providing a statutory cause of action to a person who sustains loss by reason of the concealment of a will.

Section 66 of the *Administration and Probate Act 1958* (Vic) reads:⁵⁹⁴

Concealment of will a misdemeanour

- (1) Every person who retains or conceals or endeavours to retain or conceal any will or codicil or aids or abets any person in such retention or concealment with intent to defraud any person interested under such will or codicil, shall be guilty of an indictable offence; and shall be liable to a fine of not more than 100 penalty units or to imprisonment for a term of not more than two years or to both fine and imprisonment; and shall also be liable to a proceeding for damages at the suit of the persons defrauded or those claiming under them for any loss sustained by them or any of them in consequence of such retention or concealment.
- (2) No prosecution for any such offence shall be commenced without the sanction of a law officer; and no such sanction shall be given unless such previous notice of the application for leave to prosecute as the law officer directs has been given to the person for whose prosecution such sanction is sought.

5. ISSUES CONSIDERED BY THE NATIONAL COMMITTEE

The National Committee considered whether:

- (1) the model legislation should include a provision to enable the court to order the production of testamentary instruments;
- (2) the model legislation should include provisions creating criminal offences relating to concealing, stealing or "editing" a will, or whether those matters should be dealt with in criminal legislation;
- (3) the model legislation should include a provision creating a statutory cause of action by providing that a person who fraudulently deals with a will is liable in damages.

⁵⁹⁴

This section is similar to s 400 of the *Criminal Code* (Qld) in so far as it creates an offence. Section 400 of the *Criminal Code* (Qld) provides:

Concealing wills

Any person who, with intent to defraud, conceals any testamentary instrument, whether the testator is living or dead, is guilty of a crime, and is liable to imprisonment for 14 years.

See also s 135 of the *Crimes Act 1900* (NSW).

6. THE NATIONAL COMMITTEE'S PRELIMINARY VIEW

The National Committee considered that the model legislation should include a provision to enable the court to order the production of testamentary instruments. This would be a further elaboration of section 6 of the *Succession Act 1981* (Qld).

Section 150 of the *Wills, Probate and Administration Act 1898* (NSW) has benefits additional to the benefits of the provision recommended in the draft *Wills Act 1997* in that:

- subsection (2) allows for examination of a person in court, and for persons to answer interrogatories;
- subsection (3) provides that failure to comply with such an order is a contempt.

The National Committee noted that subsections 150(2) and (3) of the *Wills, Probate and Administration Act 1898* (NSW) are used frequently and are useful, for example, where the will is held in a safety deposit box. The National Committee considered that it would be beneficial to include provisions to the effect of sections 150(2) and 150(3) of the *Wills, Probate and Administration Act 1898* (NSW) in the model legislation.

A provision to the effect of section 127 of the *Administration and Probate Act 1929* (ACT) would also be a useful inclusion in the model legislation.

The National Committee has adopted a policy that statutory provisions are more appropriately placed in the principal legislation covering the subject matter of the provisions. Consequently, any jurisdiction which wishes to enact a provision creating a criminal offence relating to concealing, stealing or "editing" a will should do so in its criminal law.

7. PROPOSALS

- (1) The model legislation should include a provision to enable the court to order the production of testamentary instruments.
- (2) The model legislation should include provisions to the effect of sections 150(2) and 150(3) of the *Wills, Probate and Administration Act 1898* (NSW).
- (3) The model legislation should include a provision to the effect of section 127 of the *Administration and Probate Act 1929* (ACT).

- (4) The model legislation should not include a criminal offence relating to concealing, stealing or "editing" a will. This should be left to each jurisdiction's criminal law.