THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 34 – Part VII

The Administration Of Assets Of The Solvent Estates Of Deceased Persons In The Payment Of Debts And Legacies

REPORT

JUNE 1988

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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This Report was prepared with the special assistance of Mr N H Crago, Barrister and Solicitor of the Supreme Courts of Victoria and Western Australia, Senior Lecturer in Law at the University of Western Australia and former member of the Commission. The Commission is much indebted to him for his valuable work on the reference.

To: **THE HON J M BERINSON QC MLC**

In accordance with the provisions of section 11(3)(b) of the Law Reform Commission Act 1972, I am pleased to present the Commission's report on the administration of assets of the solvent estates of deceased persons in the payment of debts and legacies.

C W OGILVIE
Chairman

28 June 1988

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Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission has been asked to consider and report on the administration of the assets of the solvent estates of deceased persons with regard to the payment of debts and legacies.

2. DRAFT REPORT

1.2 Because of the technical nature of the subject the Commission did not issue a discussion paper for general circulation. Instead it distributed this report in draft to government and other agencies concerned with the administration of estates, the Law Society of Western Australia and selected firms of solicitors for their comments. Responses were received from the Public Trustee, WA Trustees, Perpetual Trustees, the Probate Registrar, the Conveyancing Committee of the Law Society and a number of solicitors. All the commentators expressed their approval of the Commission's proposals. The Commission is indebted to them for their assistance.

Chapter 2

OVERVIEW OF THE PROBLEM

1. INTRODUCTION

2.1 The debts of a deceased person, including his or her funeral and testamentary expenses,[1] must be paid out of that person's property (or "estate") insofar as it is possible to do so. This is normally one of the most important duties of the deceased person's legal personal representative, who will either be an executor appointed by the will of the deceased, or an administrator appointed by the Supreme Court. In the ordinary case, the assets of the estate will exceed its liabilities, so that all the creditors can be paid in full: in short, the estate is solvent.[2] In such a case, the debts must be paid before any part of the balance of the estate is distributed by the personal representative to those persons who are entitled to it beneficially - whether they are so entitled under the provisions of the deceased's will, or under the provisions of the law relating to intestate succession.

2.2 It is obvious that the extent of a deceased person's debts may affect, in greater or lesser degree, the amount or value, and sometimes the very nature, of the assets of the estate available for final distribution to the beneficiaries. Some, or all, of them might very well not actually receive what the deceased may have intended, or what they themselves may have expected. The dispositions of the will may have been reduced (or "abated") in payment of the debts of the estate. Where, as is usually the case, a will gives property to more than one beneficiary, it is equally obvious that the law must provide a set of rules according to which the entitlements of the several beneficiaries as between themselves are to be adjusted downwards.

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1 In this report, unless the context indicates to the contrary, the word "debts" is intended to include the funeral and testamentary expenses of the deceased person, in addition to debts incurred by the deceased during his lifetime (whether secured or unsecured). The expression "testamentary expenses," broadly speaking, signifies expenses incidental to the proper performance of the duties of a legal personal representative of a deceased person.

2 As indicated in para 1.1 above, this report is concerned only with solvent estates. The rules governing the administration of insolvent estates were reformed by the *Acts Amendment (Insolvent Estates) Act 1984*, passed to implement the Commission's report on *Administration of deceased insolvent estates* (Project No. 34 Part III 1978).

2.3 One superficially attractive solution to the latter problem would be for the law to provide, simply, that the entitlements of all of the beneficiaries under the will (or those entitled upon intestacy)[3] should be reduced equally (or "rateably") by so many cents in the dollar in meeting the debts of the deceased. This approach, however, has never been the law, either in Western Australia or in any comparable jurisdiction in which the law has developed from English precedents. The reason is that such an approach would ignore the wishes of the testator contained in his will, either expressly or by implication; and in cases of intestacy it would ignore the policy of the law with regard to intestate entitlements which depend upon the legislatively presumed intentions of the intestate and the size and nature of his estate.

2.4 In this area, the law has always proceeded on the basis that the wishes of the deceased person, whether they are express or implied, should be given effect as far as possible. This is because of the very nature of the act of testation itself. The power to dispose of property by will upon death entails the power to dispose in accordance with the testator's wishes (so long as they are not unlawful or contrary to public policy). These naturally include wishes as to the identity of property out of which debts are to be paid; and gifts of property upon condition, including the condition that certain debts be paid out of certain property.

2. THE CONCEPT OF CLASSES OF ASSETS

2.5 The law governing this aspect of the law of succession varies within Australia from State to State, but all approaches to the problem are ultimately derived from English law, developed by courts in that country over several centuries. The area has also attracted the attention of legislatures throughout Australia and, indeed, the common law world. The present English legislation, from which much of the Australian legislation is derived, is contained in the *Administration of Estates Act 1925*. This Act, forming an integral part of the comprehensive statutory reforms of the English law of property enacted in that year, provides, in Part II of its First Schedule, for a statutory order of seven classes of assets which should be resorted to by the personal representative in the order in which they appear in the legislation in payment of the debts of solvent estates. The interests of persons entitled beneficially to the assets within each class abate rateably - that is, by so many cents in the dollar.

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[3] The word "intestacy" is used generally in this report to include partial intestacy (eg where a share of residue fails by reason of lapse), as well as total intestacy (eg by the failure of a deceased person to leave a valid will).

2.6 Thus, for example, Class 1 consists of property of the deceased person undisposed of by his will (subject to retention thereout of a fund sufficient to meet any pecuniary legacies). Class 2, broadly speaking, consists of the residuary estate of the testator. By this and similar legislation, then, the personal representative should first apply Class 1 assets in payment of debts, and if (but only if) they prove insufficient he should then resort to Class 2 assets, and so on, until all seven classes of assets have been exhausted. Beyond this point the estate is insolvent, and beneficiaries named in the will or entitled on intestacy will receive nothing.

2.7 Rules such as this setting out the order of application of assets contain the law insofar as it affects the entitlements of beneficiaries. They have nothing to do with the rights of creditors of the estate. A creditor (subject to special aspects of this problem which are discussed below)[4] usually neither knows nor cares which assets of the deceased's estate are applied in payment of his debt - so long as he is duly paid. Equally, a personal representative, either through ignorance of the law or by the exigencies of administration of the estate, may well not in fact apply the assets in the prescribed order. In such a case, the order must nevertheless ultimately prevail as between the beneficiaries when the estate has been fully administered, and they may need to have recourse to legal proceedings in order to enforce it.[5]

3. STATUTORY ORDERS AND THE "OLD ORDER"

2.8 The English statutory order of application of assets in payment of the debts of solvent estates has been adopted in more or less modified form in many common law jurisdictions, although by no means in all. It has not been adopted at all in Western Australia. The English provisions are derived from the pre-existing case law in that country, and in many respects they reflect that law. The pre-existing English law operated by reference to a list of some eight[6] classes of assets, and is known as the "old order", by which description it will hereafter be referred to in this report, and by which it is contrasted with the "statutory order" applicable in England and, in various forms, in most Australian jurisdictions.

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4 Para 3.32.

5 By the equitable doctrine of marshalling among beneficiaries, rateable equality of sacrifice must ultimately prevail as between those beneficially entitled to the last class of assets to which the personal representative has had to have recourse.

6 F W Maitland Equity (2nd ed 1936) 263 and E V Williams *Law of Executors and Administrators* (11th ed 1921) give the number as seven, omitting Class 8, donationes mortis causa. Other commentators give the number as eight. There is modern, but not recent, authority for the latter view: *Re Korvine's Trusts* [1921] 1 Ch 343. The matter is dealt with at para 4.37 below.

2.9 The significance of the old order is twofold. First, because the statutory order contained in the 1925 English legislation and its derivatives elsewhere is itself a derivative of the old order, much of the case law developed in relation to the old order remains relevant to the interpretation of the statutory orders. Second, and of greater importance for present purposes, is the fact that in those jurisdictions which were originally settled colonies of Britain and as such received English law insofar as it was reasonably applicable to their local conditions, and in which no statutory order of application of assets has ever been enacted, the old order (with such local ad hoc statutory enactments as may incidentally affect it) remains the present law. Of such jurisdictions, one example is Western Australia.

4. THE POSITION IN WESTERN AUSTRALIA

(a) The payment of debts

2.10 Much of the present law in this area in Western Australia is both archaic and of quite unjustifiable technicality. As the Queensland Law Reform Commission observed:[7]

> "[A] lawyer who attempted to satisfy the average client about the existence, let alone the justification, of some of the existing rules ... would have an unenviable task. Indeed, how could one justify the present rule that if a testator devises **realty** on trust to pay the debts of his estate, nevertheless that realty will not be used for that purpose until all the residuary **personalty** has been exhausted for the payment of debts? Or how could one justify the rule that a devisee of land is protected, as against a pecuniary legatee, from the obligation to pay debts, whereas, if there happens to be a general direction contained in the will that debts are to be paid, the rule is reversed and the pecuniary legatee is protected as against the devisee?"

2.11 The present unsatisfactory state of affairs in Western Australia is more particularly illustrated as follows.

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[7] Queensland Law Reform Commission *Report on the Law Relating to Succession* (QLRC R22 1978) 1.

(i) The old order confers a privileged position on a devisee of land

2.12 As has been seen, the old order, and the cases decided in relation to it, confers a special, and privileged, position upon a devisee of land. Historically, this was due to social conditions prevailing in England prior to 1925. In particular, the system of primogeniture frequently operated to ensure that freehold land descended either by way of entail, or by the law of intestate succession, from eldest son to eldest son to the exclusion of other children. Primogeniture was effectively abolished as a result of the 1925 United Kingdom property legislation, but it was never at any time which is significant for present purposes the rule in Western Australia. The distinctions embodied in the old order effectively conferring a privilege upon devisees of land are therefore quite anachronistic in this State in 1988.

(ii) The privileged position of land is in conflict with other legal rules

2.13 The present statutory law relating to the administration of estates of deceased persons in Western Australia, which is largely contained in the *Administration Act 1903*, rightly seeks to equate realty with personalty as far as possible for purposes of administration, including (specifically) the application of realty towards the payment of debts.[8] But the provisions of the *Administration Act* do not affect the distinctions between realty and personalty embodied in the old order which, as has been seen, confers a preference upon realty. In short, the implicit policy embodied in the present law is, to a significant degree, self-contradictory.

(iii) The present law is obscure

2.14 The fact that most Australian and other common law jurisdictions now have statutory orders of assets makes it increasingly difficult to determine what is the present law in Western Australia. At the date of this report, only one Australian legal textbook deals with the subject.[9] It could well be necessary for the Western Australian lawyer to have recourse to English or New Zealand treatises[10] and very old English cases in dealing with a current

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8 By s 10, realty is made equally available with personalty as assets for the payment of debts; by s 12, the personal representative enjoys the same rights, and has the same duties, with regard to realty as formerly with regard to personalty. These provisions derive ultimately from the *Administration of Estates Act 1833* (UK), otherwise known as Romilly's Act.

9 R A Woodman *Administration of Assets* (2nd ed 1978): the current edition is now ten years old.

10 Eg E V Williams *Law of Executors and Administrators* (11th ed 1921), D H Parry *The Law of Succession* (6th ed 1972), A R Mellows *The Law of Succession* (4th ed 1983) in the United Kingdom; J M Garrow and J D Willis *Law of Wills and Administration* (4th ed 1971) in New Zealand.

problem. These treatises take little or no account of Australian cases or statute law. The result is that many Western Australian lawyers find the present law in this State both inconvenient to ascertain and difficult to apply with confidence.

(iv) The present law is unduly technical

2.15 As will be seen, the law in this area is unduly technical and, because of that, uncertain.

(b) The payment of legacies

2.16 Similar considerations to those mentioned in the previous four paragraphs apply with regard to the payment of general legacies. Whereas a testator cannot, in the last resort, in any way control the payment or alter the incidence of his debts, he clearly can, by a sufficiently clear expression of intention, determine the property to be applied in payment of these legacies (subject to its abatement in the payment of debts). It follows that this is an area in which questions of the construction of a will can be of crucial importance. In many cases, however, no such expression of intention will be found in the will. In such a case, the law itself must provide a set of rules to determine the property to be applied in payment of general legacies, and hence to determine entitlements as between the general legatees and other beneficiaries under the will.

2.17 As will be seen, the basic rule here is that general legacies are payable primarily out of the general personal estate. To this extent the law is the same as that with regard to the payment of unsecured debts, and is therefore also the same in according a preferential position to residuary realty. With regard to general legacies, this preference is strongly entrenched in the law. But it operates within a context of technical rules, which are subject to the criticisms mentioned above,[11] and which would be capable of simplification by statutory means. These matters are considered in detail below.[12]

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11 Paras 2.12-2.15.

12 Paras 3.45-3.49.

Chapter 3

THE PRESENT LAW IN WESTERN AUSTRALIA

1. INTRODUCTION

3.1 The need for reform of the law in this area in Western Australia could hardly be more effectively illustrated than by the attempt to state comprehensively what the present law is. That law is to a large degree embodied in decisions of English courts prior to 1925. Relevant decisions of Australian courts in all jurisdictions are comparatively few. In addition, Part II of the *Administration Act 1903* contains several provisions which either expressly or by implication impinge upon the present problem, but without working any general reform of the old order.[1] Finally, the old order has always operated subject to the provisions of a testator's will. This raises not only questions of testamentary interpretation which must necessarily vary from case to case, but more importantly, it can raise difficult legal questions as to how such provisions in a will can be reconciled with the old order itself.

2. THE OLD ORDER IN WESTERN AUSTRALIA

3.2 Subject to the provisions (if any) of a will to the contrary, the assets of a deceased person being administered in Western Australia must be applied in the following order in payment of the debts of the estate -

Class 1 - the general personal estate, less a sum retained therefrom to meet the payment of general legacies;

Class 2 - real property specifically appropriated or devised upon trust for (not merely charged with) the payment of debts;

Class 3 - real property undisposed of by the will;

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[1] See s 10, which makes realty equally available with personalty as assets for the payment of debts; and see also s 8. By 1833 "... land came to be treated as merely one form of wealth among many, which were to be equally available for the discharge of the decedent's debts": T F T Plucknett *A Concise History of the Common Law* (5th ed 1956) 724.

Class 4 - real property devised (whether specifically or by way of residue) and personal property specifically bequeathed, which has been charged with the payment of debts;

Class 5 - the fund, if any, retained from Class 1;

Class 6 - real and personal property specifically devised and bequeathed (not having been charged with the payment of debts);

Class 7 - real and personal property the subject of a general power of appointment exercised expressly by the testator by the will;

Class 8 - property the subject of a donatio mortis causa by the testator.

Commentary and criticism

3.3 Several points, which are not necessarily exhaustive, need to be made in explanation of the content of each class of assets, and of the general effect of the order.

(a) Class 1 includes personal property undisposed of by the will

3.4 Class 1 includes, albeit not expressly, personal property undisposed of by the will.[2] Because Class 3 expressly covers real property for this purpose it follows that the old order provides a comprehensive scheme for the payment of the debts of intestate estates, whether the intestacy is total or partial, as well as for estates entirely disposed of by will.

(b) The order makes no mention of personalty bequeathed on trust for the payment of debts

3.5 The order makes no mention of personalty bequeathed on trust for the payment of debts, although it does expressly include realty given on trust (or "appropriated") for this

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[2] *Higgins v Dawson* [1902] AC 1; *Re Kempthorne* [1930] 1 Ch 268, 298. It seems to follow from these and other cases that undisposed of personalty is equally liable to be applied with residuary personalty (eg in the case of a lapsed share of residue) on the basis that there is no residue at all until after payment of debts, funeral and testamentary expenses, and legacies. See also *Trethewy* v *Helyar* (1876) 4 Ch D 53.

purpose.[3] In such a case, the law takes the view that the testator has effectively expressed an intention contrary to the order, with the result that the general personal estate has been discharged (or "ousted") from its position of primary liability.[4]

(c) The order confers a preference on real property

3.6 As has been seen, the order confers a preference on devisees of real property, and even upon those taking realty upon intestacy.

3.7 A simple example illustrates this aspect of the present law. Suppose a testator dies leaving Blackacre to X, Whiteacre to Y and his residuary estate consisting wholly of personalty valued at $25,000 to Z, and the debts of the estate amount to $25,000. In such a case, unless the will provides to the contrary, Z will receive nothing, whereas the beneficial entitlements of X and Y will be unaffected. Nothing in the *Administration Act* affects this result.

(d) The order is subject to an expression of contrary intention in the will

3.8 The fundamental rule that the order is subject to an expression of contrary intention in the will has always been the source of considerable uncertainty in the law. This is not so much due to problems of construction of the will as to the fact that the order itself, in Classes 2 and 4, takes account of the testator's own expressions of intention. But it does so in a curiously limited way. Classes 2 and 4 only exist, in a given case, by reason of a testator's expression of intention regarding the property to be applied in payment of his debts. But their place in the order can only mean that such an expression of intention must nevertheless be regarded as insufficient to displace the order itself.

3.9 If, in the example given above, Blackacre, valued at $25,000, had been devised to X upon trust to pay the debts of the estate and, subject to such payment, beneficially to Y, the devise of Blackacre would fall within Class 2. But application of the old order requires that the residuary personalty given to Z must nevertheless be applied in payment of the debts

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3 Personalty bequeathed on trust for the payment of debts would not be included within Class 4 due to the fundamental legal distinction between a gift subject to a charge on the one hand and a trust on the other.

4 *Re Smith* [1913] 2 Ch 216, 223.

first.[5] In this example Z would receive nothing, whereas Y would in fact retain Blackacre - the very property apparently intended by the testator to be sold in order to pay his debts.

3.10 This result is unsatisfactory because it permits the order to override the testator's intention. This matter is dealt with in detail below.[6]

(e) The content of Class 4 is uncertain

3.11 The content of Class 4, and the effect of an express charging of property with the payment of debts is, and has for a long time been, a matter of considerable uncertainty.[7] One view is that an express charging of personalty does not constitute part of Class 4 at all, but displaces Class 1, because it effectively expresses an intention contrary to the order.[8] Another, and contrary, view results from the consideration that a will which contains a general direction for the payment of debts out of certain property operates so as to create an equitable charge on that property for that purpose.[9]

3.12 In the not uncommon case of property expressly given "subject to" the payment of debts the assets in question fall within Class 4. For this view there is the authority of Isaacs J in the High Court in *Ramsay v Lowther*,[10] and of the Supreme Courts of New South Wales[11] and Queensland.[12] The result appears to be that a general direction to pay debts out of either specific realty or specific personalty does constitute Class 4, and does not displace Class 1 unless the general personalty is also expressly or by clear implication exonerated from its position of primary liability.[13]

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5 *Re Banks* [1905] 1 Ch 547; *Re Forsyth* (1929) SR (NSW) 411; *Kilford v Blaney* (1885) 31 Ch D 56. The result would be different if the testator had specifically exonerated the residuary personalty.

6 Paras 4.8-4.9, 4.22 and 4.29.

7 This matter is dealt with at length in R A Woodman *Administration of Assets* (2nd ed 1978) 20-22 (hereafter cited as "Woodman"), and needs only summarizing here.

8 *Webb v De Beauvoisin* (1862) 31 Beav 573, 54 ER 1261; *Re Smith* [1913] 2 Ch 216; *Vernon v Manners* (1862) 31 Beav 623, 54 ER 1281.

9 See para 3.12 below.

10 (1912) 16 CLR 1, 21-23.

11 *Re Forsyth* (1929) 29 SR (NSW) 411, 425.

12 *Calcino v Fletcher* [1969] Qd R 8, 22-23.

13 See footnote 5 above and the cases cited therein. As to "mixed funds", see *Bellairs v Bellairs* (1874) LR 18 Eq 510; *Roberts* v *Walker* (1830) 1 Russ & My 752, 39 ER 288; *Re Smith* [1913] 2 Ch 216.

(f) A general direction to pay debts removes assets from Class 6 to Class 4

3.13 A general direction to pay debts (not charged upon specific assets) has further been held to remove assets otherwise falling within Class 6 and to place them in Class 4 for present purposes.[14]

3.14 At first sight this seems to be a surprising result. The reason is said to be that a general direction given by a testator to his personal representative to pay debts must of its nature charge the whole estate, with the result that in such a case there can be no Class 6 assets at all.

(g) There are difficulties where the residue is charged generally with the payment of debts

3.15 What is the situation - in practice by far the most common case - where residue appears to have been charged generally with the payment of debts? If the residue consists only of personalty there is no problem because this constitutes Class 1 anyway.

3.16 But suppose the very common case in which the residue also includes realty. Here again there can be no problem as to the relative entitlements of the residuary beneficiaries, although the realty as such would fall within Class 4.

3.17 Sometimes, however, the residuary clause of a will gives residuary realty to one beneficiary (or class) and the residuary personalty to another. In this case it appears that the residuary personalty remains the primary class of assets liable to meet the debts unless the terms of the will clearly show a further intention either that the interests of the residuary devisees must abate rateably with those of the residuary legatees or, in the more unusual case, that the residuary realty is to be the primary asset liable. The latter would certainly require a clear expression of intention to exonerate the residuary personalty.[15]

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14 *Calcino v Fletcher* [1969] Qd R 8; *Ramsay v Lowther* (1912) 16 CLR 1, 24.

15 See the cases cited in footnotes 5 and 13 above.

(h) Points (f) and (g) only apply to some dispositive provisions

3.18 The law referred to in paragraphs 3.13 to 3.17 applies only to dispositive provisions showing an intention to displace the order by indicating "in what way" the order is to be displaced. In many cases it will appear that a general direction to pay debts is not dispositive in this sense at all, but is rather in the nature of an administrative direction to the personal representative to do what he is obliged by law to do anyway - namely, to pay the debts of the estate.

3.19 In *The University of Western Australia v The West Australian Trustee Executor and Agency Co Ltd*[16] Kitto J, in adverting to this distinction, held that an administrative direction of this kind will not, of itself, be sufficient to oust the order, a view expressly adopted by the New South Wales Court of Appeal in *Ebert v Healey*.[17]

(i) Class 7 involves assets which were originally not the testator's property

3.20 Class 7 assets appear low in the order on the ground that these are assets which originally were not the testator's own property at all, but which he in effect elected to treat as though they were his own by exercising the general power of appointment in his will. The policy of including these assets at this point in the order appears to reflect the view that a testator's debts should primarily be paid out of the testator's own property - not out of another person's. In cases of general dispositions of property falling within section 26(d) of the *Wills Act 1970*, however, the rule is that the property which is the subject of the power of appointment ranks equally with other property which is the subject of the general disposition in its liability for attachment in the payment of debts.[18] This may well constitute the overwhelming majority of cases. But the existing law appears to recognise a distinction which for present purposes depends upon whether the general power has been exercised expressly or by implication.[19]

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16 (1961) 105 CLR 71, 93-94.
17 [1969] 2 NSWR 68, 70 per Wallace P, 75-76 per Walsh J A.
18 *Re Hartley* [1900] 1 Ch 152.
19 See para 4.33 below.

(j) The existence of Class 8 is uncertain

3.21 Whether Class 8 exists as part of the present law in Western Australia appears to be not entirely certain. The cases are for the most part very old, and the authorities are not in entire agreement on the question. The desirability of including donationes mortis causa within a reformed order is discussed below.[20]

3. RELEVANCE OF STATUTORY ORDER DECISIONS

3.22 As will be seen, one of the most important features of legislation elsewhere reforming the old order has been the abolition of the distinction between realty and personalty. Although the statutory orders typically refer to various classes of assets which are in other respects more or less similar to those contained in the old order, the neutral words "property" (for example, in the English, Victorian and Queensland legislation[21]) and "assets" (for example, in the New South Wales legislation[22]) have been employed. For this reason alone, these various statutes have achieved a considerable measure of reform of the old law.

3.23 It would appear that decisions of courts in the "statutory" jurisdictions may in some cases be of persuasive authority in Western Australia. This would be so where, for example, the question arises whether a charge has or has not been created, or whether a testator has expressed a sufficient intention to displace the order. In short, Western Australian lawyers might well need to consider the relevance of the present (partially-reformed) law in other jurisdictions as authority in relation to certain kinds of local problems.

4. SECURED DEBTS - *LOCKE KING'S ACT*

3.24 The law under discussion in this report coincides at various points with that relating to the rights of secured creditors. In Western Australia this is a matter principally governed by section 28 of the *Wills Act 1970*, which enacts locally what was originally enacted in the United Kingdom as the *Real Estate Charges Acts 1854*, *1867* and *1877*. This legislation, known for historical reasons collectively as *Locke King's Act*, exists in more or less similar

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20 Para 4.37.

21 *Administration of Estates Act 1925* (UK) First Schedule Part II; *Administration and Probate Act 1958* (Vic) Second Schedule Part II; *Succession Act 1981* (Qld) s 59.

22 *Wills, Probate and Administration Act 1898* (NSW) Third Schedule Part II.

form throughout the common law world, and will be referred to by its usual designation in this report.

3.25 *Locke King's Act*, as judicially interpreted, [23] provides that where any property, real or personal, is charged either at law or in equity with the payment of money then, as between the persons claiming through the testator, it is that property itself which is primarily liable for the payment of the debt charged upon it. The section may be ousted by a sufficient expression of contrary intention by the deceased, in writing, either in his will or by deed or by some other document.[24]

3.26 Such a contrary intention will not be deemed to be signified by (a) a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or out of his residuary real and personal estate, or his residuary real estate, or (b) by a charge of debts on any such estate, unless signified by some further expression of intention.[25]

3.27 These provisions obviously modify the old order of assets in cases to which they apply. The legislation depends partly upon the theory that if, for example, the deceased person had intended his residuary beneficiaries to pay in order to give an unencumbered title to a devisee of mortgaged land, he would have said so expressly. But it appears also to depend upon the policy ground of wealth-equalization.

3.28 *Locke King's Act* is concerned only with the rights of the beneficiaries of the estate as between themselves, and does not affect the rights of secured creditors to recover their debts either against the secured property or against the estate generally.

3.29 It is noteworthy that the expression of an intention to oust the Act need not appear in the will itself. The phrase "other document signifying a contrary or other intention" would appear to include a note, memorandum or letter of a non-testamentary nature, whether or not signed by the testator, so long as the document could be proved to have been made by him. This matter is, in the Commission's view, an anachronism. It presents problems of proof, and it leaves open possibilities for fraud. There seems to be no good reason why such an

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23 See generally Woodman 86-99.
24 *Wills Act 1970* s 28(1).
25 Id s 28(2).

expression of what is essentially a testamentary intention should remain outside the normal rules relating to the form in which testamentary wishes must be expressed.[26]

3.30 It is also noteworthy that *Locke King's Act* may be ousted without the testator having specified some other fund or asset as that intended to be primarily liable to meet the charge. In short, a general exoneration of the property in favour of the beneficiary is sufficient. In such a case, the personal representative must treat the secured debt from the beneficiaries' point of view as though it were, in fact, unsecured, and pay it out of the general assets of the estate. If in such a case the secured creditor has actually realized against, or has in fact been paid out of, the secured property, then the beneficiary is entitled to marshal as against other beneficiaries.[27]

3.31 In order to oust *Locke King's Act* the testator's expression of a contrary intention must refer specifically to the exoneration of the charged property after his death: mere preparations made inter vivos to discharge it are not sufficient.[28]

3.32 If the testator has specified a fund or asset (other than those referred to above[29]) as that primarily liable, the charged property may nevertheless become liable if the specified fund or asset proves to be insufficient,[30] subject to some further expression of contrary intention. Whether such a shortfall is to be borne by the charged property, or whether it is to be met out of the general assets of the estate, is therefore a question of construction - namely, whether the asset charged has been exonerated for all purposes or whether it has merely been exonerated as the asset primarily liable.[31]

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26 Notwithstanding the flexibility introduced into the Wills Act requirements as to formality by the *Wills Act Amendment Act 1987* dealing with informal wills, it remains necessary that any will, including an informal will, must constitute an expression of **testamentary** wishes.

27 *Haimes* v *Goode* (1933) 33 SR (NSW) 1. See below paras 3.41-3.43.

28 *Re Horton (deceased)* [1969] NZLR 598; *Re Wakefield* [1943] 2 All ER 29.

29 Para 3.26.

30 *Re Fegan* [1928] Ch 45; *Re Birch* [1909] 1 Ch 787. If the specified fund or asset is insufficient to meet the total debts of the estate (both secured and unsecured) each class of debt should, unless the will provides to the contrary, be paid pro rata from the specified fund or asset, the unpaid portion of the secured debts being met by the respective securities, and the unpaid portion of the unsecured debts being met by the general estate in accordance with the old order.

31 *Wyatt v Wyatt* (1916) 16 SR (NSW) 455, 458. For examples of cases in which the section was not ousted for all purposes, see *Re Fegan* [1928] Ch 45 and *Re Birch* [1909] 1 Ch 787.

5. PROTECTED ASSETS

3.33 There are two kinds of assets which are rendered immune by legislation from attachment in payment of the ordinary unsecured debts of a deceased person. These are certain life insurance policy proceeds and superannuation benefits.

3.34 By section 92(2) of the *Commonwealth Life Insurance Act 1945* the proceeds of a life insurance policy effected by a person upon his or her own life and paid upon death may not, subject to the provisions of the *Bankruptcy Act 1966*, be applied or made available in payment of the debts of the deceased life insured. The general immunity of these funds is, however, subject to a contract or charge made with respect to them inter vivos, or to an express testamentary direction to the contrary, by the deceased life insured. In short, the policy holder may mortgage or charge the policy inter vivos, or may charge the proceeds by will with the payment of debts.[32] These charges must be expressly created. By section 92(3) it is provided that a mere direction to pay debts, or the creation of a charge or trust for the payment of debts upon any part of the deceased's estate, is not in itself sufficient to oust the protection afforded by section 92(2).

3.35 Where a life insurance policy or its proceeds has been mortgaged or charged by the deceased life insured inter vivos then the matter falls within the provisions of *Locke King's Act*.

3.36 By section 143 of the Commonwealth *Superannuation Act 1922* (Cth) it is provided that moneys paid out of superannuation funds on the death of an employee to whom the provisions of the Act apply are immune from liability to be applied in payment of the deceased employee's debts or liabilities.

6. MARSHALLING AMONG BENEFICIARIES

3.37 The creditors of a deceased's estate are entitled to be paid out of whatever assets are available for the purpose in the hands of the personal representative. Secured creditors may look to their securities. The mere existence of a security will not normally preclude the secured creditor from proving against the assets of the estate generally.

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[32] *Anderson* v *Egan* (1905) 3 CLR 269, 274 per Griffith C J; *Allen v Edmonds* (1886) 12 VLR 789. The protection afforded by s 92(2) does not extend to Crown debts or to funeral and testamentary expenses.

3.38 There can be no guarantee that a personal representative will actually apply assets in the payment of debts in the legally correct order. This may occur for a variety of reasons, including ignorance and the exigencies of administration such as the actions of creditors or difficulties of marketability in relation to certain assets.

3.39 The equitable doctrine of marshalling among beneficiaries, developed historically by the Court of Chancery, operates in this situation to ensure that, whatever assets are actually applied in payment of a deceased's debts, the entitlements of beneficiaries inter se may be properly adjusted according to law when the debts of the estate have finally been paid.[33]

3.40 It will be apparent that the order of application of assets in payment of debts (whether it be the old order as in Western Australia, or a statutory order as elsewhere) is really a statement about marshalling. It is, in fact, the law with regard to the ultimate entitlements of the beneficiaries as between themselves; and it is to this law that the beneficiaries may have recourse by way of proceedings for marshalling if the due order of application of assets has been upset by the exigencies of administration. Marshalling among beneficiaries is therefore in the last resort really a matter of executorship accounting, and may involve the sale of assets remaining in the estate in order to provide a fund from which cash adjustments as between the beneficiaries may be made.

3.41 Neither the old order nor the statutory orders are however in any sense a complete or comprehensive set of rules covering all cases of marshalling among beneficiaries. This is because account must always be taken of a testator's wishes, express or implied. One example of this stems from the effect of *Locke King's Act*. If, for example, mortgaged property has been exonerated by a testator such that the charge thereon is to be borne by residuary personalty (or other specified property), but the latter proves insufficient to meet both payment of general legacies and also to discharge the mortgage, the question arises how, as between the general legatees and the devisee of the mortgaged property, the shortfall is to be borne.

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33 See generally R P Meagher, W M C Gummow & J R F Lehane *Equity, Doctrines and Remedies* (2nd ed 1984) 314-317.

3.42 The difficulty here is that the whole of the testator's intention cannot be carried into effect. In such a case, the rule in *Lutkins v Leigh*[34] suggests that the devisee will not be entitled to be exonerated out of funds available for the payment of general legacies unless the legatees have been paid in full. If the mortgage has in such a case actually been discharged then the general legatees may be entitled to marshall against the exonerated property.[35] The reason for this rule is said to be that where a testator intends on the one hand merely to dispose of his equity of redemption, and on the other to give a pecuniary legacy in a specified amount, then in the case of a deficiency in the residuary personalty the legatee should be preferred to the devisee on the basis of presumed intention.

3.43 This rule has been the subject of criticism,[36] and in the view of the Commission is difficult to justify. An express intention to exonerate charged property should ordinarily be treated, in the absence of any other expression of intention, as of equal weight with an intention to give a general legacy. In the Commission's view, a better solution to this type of problem would be for the interests of beneficiaries of charged but exonerated property to abate rateably with those of general legatees.

3.44 Another example of a problem of marshalling not covered by the orders of application of assets occurs when Crown debts or the cost of funeral and testamentary expenses fall to be borne partly by the proceeds of an otherwise protected life insurance policy. What proportion of these debts is to be borne by the insurance policy proceeds is not clear because there is no legislative direction or judicial decision on the question.

7. PAYMENT OF LEGACIES

3.45 There is no statutory provision in force in Western Australia specifying the property of a testator out of which general legacies given by his will must be paid. Such a matter is, of course, within a testator's own competence. But where the will contains no sufficient expression of intention to this effect, then the law itself operates to determine the property to be so applied, and in consequence, the rights inter se of general legatees on the one hand and other beneficiaries under the will on the other.

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34 (1734) Cas t Talb 53, 25 ER 658.

35 See eg *Perpetual Trustee Co Ltd* v *Killick* (1951) 51 SR (NSW) 36, 38-39 per Roper CJ in Eq.

36 See *Re McIntosh No. 2; Perpetual Trustee Co Ltd v McIntosh* (1902) 2 SR (NSW) Eq 247, 252 per Simpson C J; and *Perpetual Trustee Co Ltd v McKenzie* (1917) 17 SR (NSW) 660, 674 per Harvey J.

3.46 The general rule is that, in the absence of a sufficient expression of intention to the contrary in the will, general legacies are payable only out of the general personal estate - that is, out of personalty undisposed of by the will and residuary personalty.[37] Except in cases of the kind referred to below, realty is not applicable for this purpose. It follows that general legacies are liable to fail in Western Australia to the extent to which the general personal estate following the payment of debts is insufficient to meet them.

3.47 The general rule is subject to contrary expressions of intention in the will, and also to an important rule judicially created in order to mitigate the effect of older decisions.[38] But expressions of contrary intention by a testator will not normally displace the liability of the general personal estate to meet general legacies.[39] Thus, for example, charging realty with the payment of general legacies merely has the effect of making the realty an auxiliary or secondary asset to be applied for the purpose after the general personal estate has been exhausted. In order to make specifically charged realty the primary asset liable to meet the payment of general legacies it is necessary that the will also expressly or by implication discharge or exonerate the general personal estate.[40] To this considerable extent, realty continues to occupy a position of privilege in Western Australia.

3.48 The well-known rule in *Greville v Browne*[41] mitigates the effect of the general rule in certain cases. This is where general legacies are followed by a disposition (usually in a residuary clause) of all the rest of the testator's estate, without distinction between realty and personalty. If the residue has been given "in one mass" then there is said to be an implication that nothing is intended to be given to the residuary beneficiaries until the general legacies have been paid in full. This is said to rest on the familiar ground that there can be no residue at all until legacies (and debts) have been paid in full. In this type of case - which is in practice the most common - the residuary realty is applicable in payment of the general legacies, but only after the residuary personalty has been exhausted.

3.49 In the Commission's view, these rules need to be reformed. They form an important subject of the recommendations contained in this report.

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37 *Robertson v Broadbent* (1883) 8 App Cas 812, 815; *Re Cameron* (1884) 26 Ch D 19, 25-26.
38 See para 3.48 below.
39 *Re Smith* [1913] 2 Ch 216.
40 Id 222.
41 (1859) 7 HLC 689, 11 ER 275; *Re Boards* [1895] 1 Ch 499; *Re Thompson* [1936] Ch 676.

Chapter 4

THE LAW IN OTHER JURISDICTIONS

1. INTRODUCTION

4.1 Any comprehensive legislative reform of the law in Western Australia relating to the present subject must take account of the existing law and its administrative experience in other socially and legally comparable jurisdictions. Various of these are now considered in turn. The Commission has studied in detail three different statutory approaches to reform: those operating, first, in England and New South Wales; second, in Victoria; third, in Queensland.[1]

2. UNITED KINGDOM AND NEW SOUTH WALES

4.2 These two important jurisdictions are considered together because their statutory reforms of the old order of assets are substantially similar. They are contained respectively in sections 32, 33 and 34 and Part II of the First Schedule of the *Administration of Estates Act 1925* (UK), and in sections 46A(1), 46C(2) and Part II of the Third Schedule of the New South Wales *Wills, Probate and Administration Act 1898*. The New South Wales order is as follows -

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[1] The South Australian legislation governing the administration of estates of deceased persons is principally contained in the *Administration and Probate Act 1919*. On the question in what order the assets of a solvent deceased estate must be applied in the payment of debts the Act is entirely silent. S 62 III equates legal and equitable assets for purposes of administration; *Locke King's Act* appears in s 52. The South Australian legislation is therefore of little assistance in relation to the subject of this report.
In Tasmania the relevant legislation is contained in ss 32 and 34, and Part II of the Second Schedule, of the *Administration and Probate Act 1935*. The order of application of assets contained in the Schedule is in all material respects identical with that contained in Part II of the First Schedule of the *Administration of Estates Act 1925* (UK), discussed in detail in paras 4.2-4.15 below.
In New Zealand there is no statutory order of application of assets, so that the old order prevails. By s 37 of the *Administration Act 1969* it is however provided that: "If any testator's estate primarily liable for the payment of his debts is insufficient for that purpose, each of his specifically devised or bequeathed estates (if more than one) shall be liable to make good the deficiency, in the proportion that the value of each of those estates bears to the aggregate value of the specifically devised or bequeathed estates of the testator." S 34 of the Act reproduces *Locke King's Act*. If the words "estate primarily liable" in s 37 were interpreted to refer solely to Class 1 assets, and to assets specifically charged falling within s 34, then the section as a whole would be a truly revolutionary piece of legislation. But they have never received such an interpretation. The section was first enacted in 1885. Its effect is not to reform the old order, and the law relating to it, but merely to "interpret" Class 6 of the old order by requiring that specific dispositions of all kinds must abate rateably: In *re Pharazyn (deceased)* (1897) 15 NZLR 709; *Tingey v Tingey* [1918] NZLR 618. This was, of course, the position at common law, and is still the position in Western Australia for that reason.

Class 1 - Assets undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

Class 2 - Assets not specifically disposed of by will 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 3 - Assets specifically appropriated or disposed of by will (either by a specific or general description) for the payment of debts.

Class 4 - Assets charged with or disposed of by will (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 - Assets specifically disposed of by will, rateably according to value.

4.3 The order applicable in England is similar, save that the word "property" is used instead of the word "assets", and that an additional class of assets (Class 7) is added applying to property appointed by will under a general power (including the statutory power to dispose of entailed interests) rateably according to value. Neither order includes property the subject of a donatio mortis causa. Both orders operate subject to expressions of contrary intention contained in the will.

4.4 By use of the words "assets" and "property" respectively, the legislation in both jurisdictions purports to abolish the distinction between realty and personalty - itself a major reform in both places at the time of enactment of the legislation.

4.5 In addition to the foregoing, both Acts are similar in their retention of *Locke King's Act* in its original form (as in Western Australia), and both sets of provisions cover cases of intestacy and partial intestacy.

Commentary and criticism

4.6 The many cases decided in relation to this legislation in both jurisdictions reveal the following as the principal difficulties arising out of it.

(a) Residue under Classes 1 and 2 is not clear

4.7 In relation to Classes 1 and 2, in some cases it may not be clear of what the residue of an estate consists. This is especially likely to be the case where a share of residue has lapsed. On one view, a lapsed share of residue is the property primarily liable to be applied in payment of debts because it falls within Class 1. The argument in favour of primary recourse to the intestate property is based upon the ground that a testator does not normally intend to make any testamentary provision at all for persons not named as beneficiaries in his will. On the other hand, it may appear that the very concept of "residue" is that property which remains **after** the payment of debts. If the latter appears from the terms of a will, then a lapsed share of residue will not be primarily liable because it is not a share of residue at all - lapsed or otherwise - until after the net residue has been ascertained. Such an interpretation of a will for purposes of Classes 1 and 2 treats the next-of-kin equally with the residuary beneficiaries. Neither the English nor the New South Wales legislation offers any guidance to courts called upon to deal with these not uncommon and difficult problems of law and of construction.[2]

(b) It is not clear what constitutes a sufficient expression of contrary intention

4.8 Given the existence of Classes 3 and 4, which in terms specifically refer to a testator's intention, it is not clear in many instances what constitutes a sufficient expression of contrary intention in a will to oust the statutory order. It has been pointed out[3] that this difficulty also exists under the old order. Neither the United Kingdom nor the New South Wales legislation has done anything to remove it. To the extent that this is a problem of construction of the provisions of a will (as in a sense it ultimately must be) the mere existence of Classes 3 and 4 compound the problem, and for no apparently good reason.

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2 For a fuller discussion of these matters, see Woodman 56-58.

3 At paras 3.8-3.12 above.

(c) The property falling within Classes 3 and 4 may not be clear

4.9 It follows from the foregoing that in many cases it may not be clear what property falls within Classes 3 and 4. On one view, the weight of authority both in the United Kingdom and in New South Wales is in fact to deprive Classes 3 and 4 of any content at all.[4] This is because their existence is self-negating. As has been said, they "can only operate as effective parts of the order if the testator uses terminology sufficient to bring property within either Class and at the same time does not exonerate, either expressly or by necessary implication, property included in the first and second Classes".[5] But this means that they do not operate at all "because by weight of authority, a charge of debts upon some particular property necessarily shows an intention to exonerate other property."[6]

(d) "Pecuniary legacies" in Class 5 must mean "general legacies"

4.10 The reference to "pecuniary legacies" in Class 5 must surely be intended to mean "general legacies", since not all general legacies are intended to be, or are administered as, pecuniary as such.[7]

(e) The distinction between realty and personalty may not have been totally abolished

4.11 The distinction between realty and personalty may not have been totally abolished for all purposes of Class 5, at least in New South Wales. This is said to be because general legacies "are impliedly charged upon realty which has not been disposed of by the will, or which has been disposed of in a residuary gift".[8]

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4 *Ebert v Healy* [1969] 2 NSWLR 68; *Permanent Trustee Co of NSW Ltd v Temple* [1957] SR (NSW) 301; *Perpetual Trustee Co Ltd v Walker* (1941) 41 SR (NSW) 174 (New South Wales); *Re Meldrum* [1952] Ch 208; *Re James* [1947] 1 Ch 256 (United Kingdom).

5 Woodman 49-50, and the cases cited in footnote 4 above. For circumstances in which the law is to the contrary, see *The University of Western Australia v The West Australian Trustee Executor & Agency Co Ltd* (1961) 105 CLR 71, 93-95.

6 Woodman 50.

7 An example is "I give 1000 BHP shares to X". It is true that the legatee may elect to take cash to the value of the shares: H S Theobald *Law of Wills* (14th ed 1982) 228. But if the estate actually contains such assets in specie which are available for distribution to the legatee, the personal representative may himself elect to transfer the shares rather than to pay the cash.

8 Woodman 7. See also *Re Foley; Channell v Foley* [1953] SR (NSW) 31.

(f) Class 6 may have no content in some cases

4.12 In some cases Class 6 will be deprived of any content. This will occur when the will contains a general direction to pay debts (not being of a merely administrative nature), because the effect of such a direction is to charge the whole of the assets, including those the subject of specific gifts.[9] This has been noted as a feature of the old order.[10]

(g) The realty/personalty distinction may survive as to residue

4.13 Shades of the realty/personalty distinction may also remain in relation to the question whether in a given case a disposition is residuary or otherwise. This is because of the continuing relevance of authorities for the proposition that a residuary gift of realty was formerly considered to be specific for all purposes.[11] Nothing in the legislation appears expressly to change this rule.

(h) Policy matters raised by the orders

4.14 Two significant policy matters are raised by these statutory orders -

(a) Specific legatees and devisees (Class 6) are preferred to general legatees (Class 5). In a given case, there may well be no good reason why this should accord with a testator's real intention. For example, a testator giving "the sum of $25,000 to X" does not apparently intend to make the gift any less strongly than a gift of "Blackacre to Y" (valued, say, at $25,000). But the effect of the orders in such a case is to prefer Y to X in application of these assets in the payment of debts. In short, the orders appear by their inherent content to override a testator's intentions in this type of case, just as much as does the old order.

(b) The phrase "rateably according to value" in Class 6 may have an undesirable operation where a legacy is charged upon a particular asset. In such a case it is not clear from the legislation whether the relevant "value" is the value of the asset charged (at the date of the testator's death) or whether it is the value of the legacy to the legatee. In at least two cases[12] it

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9 *Calcino v Fletcher* [1969] Qd R 8, 22-23..

10 See paras 3.13-3.14 above.

11 *Re Forsyth* (1929) 29 SR (NSW) 411, 418; *Jackson v Pease* (1874) LR 19 Eq 96.

12 *Re Sloan* [1943] VLR 63; *Re John* [1933] Ch 370.

has been held that the former is the correct interpretation. But this means that the legatee enjoying the benefit of the charge is preferred to the beneficiary of the asset charged, notwithstanding that both are in reality specific gifts and were, presumably, intended to be given equally as such by the testator.

(i) Conclusion

4.15 The foregoing considerations appear to demonstrate that the legislation in the United Kingdom and New South Wales has achieved only a very modest reform of the old order. It contains complexities, contradictions, and uncertainties, which in the Commission's view make it an inappropriate model for reform in Western Australia.

3. VICTORIA

4.16 The relevant Victorian statute law is contained in sections 38, 39 and 40 of the *Administration and Probate Act 1958*, and in Part II of the Second Schedule thereto in which the order of assets appears. Section 38 deals with the administration of assets in cases of intestacy and partial intestacy; section 39(2) deals with solvent estates and requires the application of the Schedule; and section 40 contains the *Locke King's Act* provisions in substantially similar terms to those applying in Western Australia, England and New South Wales.

4.17 The order contained in Part II of the Second Schedule is identical with that in the English legislation, save in one crucial respect: in Victoria, what is Class 2 in England (and in New South Wales) becomes Class 4. In short, residuary property is preferred to property either specifically appropriated for the payment of debts (in Victoria, Class 2) or charged with the payment of debts (in Victoria Class 3). This amendment, which dates from 1933,[13] is clearly designed to accord greater weight to the expressed wishes of testators.

Commentary and criticism

4.18 There can be no doubt that the Victorian order is a substantial improvement upon the orders applying in England and New South Wales: and it is an enormous improvement upon

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[13] *Statute Law Revision Act 1933* (Vic), Schedule, amending the original scheme set out in *Administration and Probate Act 1928* (Vic).

the old order. It gives primacy, and in logical order, to a testator's expressions of intention and, as a consequence, it eliminates the serious problems posed by the existence of Classes 3 and 4 in England and New South Wales.[14] Insofar as it is desirable that legislation of this kind should give the greatest possible weight to a testator's intentions, the Victorian approach appears to achieve that end to a substantial degree.

4.19 It also achieves it in a logical manner. Thus, property specifically appropriated - that is, property in effect given upon trust - for the payment of debts (Class 2) must be utilised for this purpose before property merely charged with their payment (Class 3). Any surplus of Class 2 assets is held upon a mere resulting or implied trust for the residuary beneficiaries (or those entitled upon intestacy, as the case may be) whereas the whole of Class 3 assets have been by definition specifically, and therefore intentionally, disposed of beneficially by the testator, albeit subject to the charge. By a simple re-arrangement of the classes what has been called "a remarkable amendment"[15] was achieved in the Victorian legislation.

4.20 Notwithstanding the foregoing, however, the Victorian law by no means covers all of the problems likely to arise in this area. For example, it does nothing to resolve the problem caused by lapsed shares of residue, and may in fact have compounded that problem by the existence of Class 4. Suppose a testator gives his residuary estate to X and Y as tenants in common in equal shares, but charged as a whole with the payment of debts. What is the position in Victoria if X's share were to lapse? On one view, X's lapsed share has become Class 1 and should be applied in payment of debts before Y's share (Class 3) is attached at all. On the other view, the express charging of the residue has evinced an intention to oust the order, with the result that both shares would be equally liable.[16]

4.21 The foregoing conundrum is rendered potentially more complicated in Victoria, however, by the consideration that in that State residuary assets fall within Class 4. If some other asset(s), not being part of residue, had been additionally appropriated for or charged with the payment of debts a further dimension would be added to the problem of the lapsed share of residue: a problem which would have several possible approaches and no clear solution.

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14 See paras 4.8-4.9 above.

15 *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1, 39 per Dixon J.

16 See paras 4.8-4.9 above and the authorities cited in the footnotes thereto.

4.22 In accordance with the apparent intention of the Victorian legislation to accord greater weight to the wishes of testators, Victorian courts have appeared if anything more willing to construe testamentary provisions for the payment of debts as intending to oust the statutory order than has been the case elsewhere. [17]

4.23 Because the Victorian legislation corresponds with the English and New South Wales models in all material respects other than those noted above, it follows that the critical comments made above[18] apply to Victoria in addition to the problem of lapsed shares of residue as compounded by the Victorian law.

4.24 In the Commission's view, therefore, the Victorian order of assets is not, as it stands, an ideal model for Western Australia.

4. QUEENSLAND

4.25 The Queensland legislation governing the present subject is contained in sections 29, 55(a) and 59-61 (inclusive) of the *Succession Act 1981*. Inasmuch as this legislation is by far the most recent and most comprehensive of all legislative attempts in Australasia and the United Kingdom to deal with the matters considered in this report it demands the closest attention.

4.26 The *Succession Act 1981* substantially enacts recommendations contained in a report of the Queensland Law Reform Commission issued in 1978[19] which was in its turn indebted to the considerable work done in this field by Dr W A Lee of the Faculty of Law in the University of Queensland.[20] The relevant provisions of the Queensland Act attempt to solve by a fresh approach, and by relatively simple means, the major problems that have been identified in the foregoing pages of this report.

4.27 The Queensland approach is more particularly relevant to Western Australia by reason of the fact that until the coming into operation of the *Succession Act 1981* the law in that State had been substantially the same as that applying in Western Australia at the present time - that

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17 See eg *Re Wilkins* [1950] ALR 751; *Re Jaeger* [1961] VR 14.

18 Paras 4.10-4.14.

19 Queensland Law Reform Commission *Report on the Law relating to Succession* (QLRC 22 1978).

20 See W A Lee *The Administration of Solvent Deceased Estates in Queensland* (1973); W A Lee *Manual of Queensland Succession Law* (1st ed 1975) ch 11.

is, the old order of assets unaffected by attempts at reform based upon the model of the *Administration of Estates Act 1925* (UK).

4.28 The relevant provisions of the Queensland Act are as follows:-

> **"29. Construction of residuary dispositions**
>
> Unless a contrary intention appears by the will -
>
> (a) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the residuary estate of the testator both real and personal; and
>
> (b) subject to this Act, where a residuary disposition in fractional parts fails as to any of such parts for any reason that part shall pass to that part of the residuary disposition which does not fail and if there is more than one part which does not fail to all those parts proportionately.
>
> . . .
>
> Division 2 - Administration of Assets
>
> **55. Interpretation**
>
> In this Division unless a contrary intention appears "residuary estate" means -
>
> (a) property of the deceased that is not effectively disposed of by his 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.

59. Payment of debts in the case of solvent estates

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

Class 1 - Property specifically appropriated devised or bequeathed (either by a specific or general description) for the payment of debts; and property charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;

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

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

Class 4 - Donationes mortis causa.

(2) Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, the payment of pecuniary legacies rateably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied rateably.

(3) The order in which the estate is applicable towards the discharge of debts and the incidence of rateability as between different properties within each class may be varied by a contrary or other intention signified by the will, but a contrary or other intention is not signified by a general direction, charge or trust for the payment of debts

or of all the debts of the testator out of his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

60. Payment of pecuniary legacies

Subject to a contrary or other intention signified by the will -

(a) pecuniary legacies shall be paid out of the property comprised in Class 2 referred to in section 59 after the discharge of the debts or such part thereof as are payable out of that property;

and

(b) to the extent to which the property comprised in Class 2 referred to in section 59 is insufficient the pecuniary legacies shall abate proportionately.

61. Payment of debts on property mortgaged or charged

(1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will disposes of, an interest in property, which at the time of his death is charged with the payment of any debt, whether by way of mortgage, charge or otherwise, legal or equitable (including a lien for unpaid purchase money), and the deceased has not by will signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the debt; and every part of the said interest, according to its value, shall bear a proportionate part of the charge of the whole thereof.

(2) A contrary or other intention is not signified by a general direction, charge or trust for the payment of debts or of all the debts of the testator out of his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

Commentary and criticism

(a) The concept of giving effect to a testator's intention is retained

4.29 The Queensland scheme retains generally the basic concept that it is a testator's intention with regard to the payment of debts and legacies that should be given effect to as far as possible - so long as that intention has been expressed with sufficient clarity. As in the case of all other comparable jurisdictions, the Queensland law does not seek to impose a regime for deceaseds' estates where a testator's wishes are clear. This accords with the traditional Anglo-Australasian legal philosophy of freedom of testation.

(b) The realty/personalty distinction is eliminated

4.30 By use of the word "property" (defined in section 5 of the Act to include "real and personal property or any estate or interest therein and any thing in action or any other right") in all relevant provisions, the realty/personalty distinction, which still bedevils the present law in Western Australia, is eliminated, a result reinforced with regard to residuary dispositions by section 29(a).

(c) Partial intestacies are generally avoided

4.31 Section 29(b) is designed to avoid partial intestacies and will in many (but by no means in all) cases have that effect. Furthermore, the considerable problems of reconciling classes of assets with expressions of contrary intention caused by unintentional partial intestacies[21] have been eliminated. For this reason, there is less chance in Queensland than in other jurisdictions, including Western Australia, of property passing to the Crown bona vacantia.

(d) Undisposed of property becomes residue

4.32 Partial intestacy may still result in Queensland either intentionally (very rarely) or, less rarely, where either an entire residuary disposition lapses or fails by operation of law or, in the case particularly of a home-made will, where the will contains no residuary clause at all. But

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21 Discussed in paras 4.7, 4.20-4.21 above.

in each of these cases the undisposed of property simply becomes "residue" by definition by force of section 55(a) for purposes of Class 2 of section 59. To this extent, section 55(a) interestingly repeats the existing law in Western Australia with regard to personal property (although not, it would seem, with regard to realty).

(e) The place of property the subject of a general power of appointment is rationalised

4.33 The combined effect of sections 55 and 59 is to create a proper scheme for the liability of property the subject of a general power of appointment to be attached in the payment of debts and legacies. If the power has been exercised by the donee-testator expressly the exercise is treated as a specific disposition by him (Class 3); if not, the property the subject of the power is treated as residue (Class 2). In the Commission's view, this is a wholly appropriate way of treating property of this description because for all practical purposes it is the absolute property of the donee-testator anyway, a fact which has been recognised by the High Court for other purposes of the law of succession.[22] The combined effect of sections 55 and 59 is therefore to rationalize the dubious distinction referred to above.[23]

(f) The view that intestate property should be applied first has been abandoned

4.34 The existence of Class 2 in Queensland embodies the philosophy that even those entitled upon partial intestacy for any of the reasons mentioned above[24] are preferred to those taking property beneficially under Class 1 as a result of a trust or charge of property for the purpose of paying debts. In short, in Queensland specific devisees or legatees of charged property must pay what under other systems would be paid out of intestate property. This means that Queensland has abandoned the viewpoint that intestate property should in all cases be first applied in payment of debts on the ground that a testator does not normally intend to make any provision at all for persons not named as beneficiaries in his will. Philosophically, there appear to be at least four reasons in favour of this aspect of the Queensland approach. They are -

(a) it is simple, straightforward, and intelligible to the layman;

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22 *Tatham v Huxtable* (1950) 81 CLR 639, 649 per Fullagar J, 653-654 per Kitto J.
23 Para 3.20.
24 Para 4.32.

(b) it accords with a testator's expressed, as distinct from strongly implied, intention;

(c) those next-of-kin entitled upon partial intestacy may well be closer, or at least as close, blood relations of the testator than residuary beneficiaries taking the surplus of trust property by operation of law, or specific legatees or devisees taking charged property;

(d) in Queensland, relations as remote as cousins (four degrees removed) may take on intestacy. There was therefore presumably not as much incentive in that State for legislators to place intestate property in Class 1 as there might be elsewhere. The reason is, of course, that in Queensland intestate property is less likely to pass to the Crown bona vacantia than it is in, say, New South Wales where the most remote takers are merely nephews and nieces and uncles and aunts (three degrees removed).

(g) Section 29 is not clear in one respect

4.35 In one particular respect the overall effect of section 29 is not clear. This is the case where a testator simply gives his residuary realty to X and his residuary personalty to Y - a common enough case where the testator is, say, a farmer survived by a widow and one child, or by two children. The question is whether the terms of such a residuary clause evince an intention to oust the section. It may well be that they would evince an intention to oust paragraph (a) of section 29, but not paragraph (b). This construction of the section is not, of course, beyond dispute and could well require judicial determination.

(h) Property given on trust for and property charged with the payment of debts are treated equally

4.36 Class 1 treats property given on trust for the payment of debts on an equal footing with property given beneficially but charged for this purpose: both abate rateably together. This is a departure from the philosophy hitherto applying both under the old order and under the abovementioned statutory orders. In practice, it is rare for a will both to designate trust property for the payment of debts and also to create a charge over other property for the same purpose. Should this occur, it is a question of policy whether the donee of property subject to

a charge should be preferred (as, for example, in Victoria) to the residuary beneficiaries (or next-of-kin as the case may be) taking the surplus of trust property appropriated for the payment of debts by way merely of resulting trust. In either case, the testator's supposed expression of intention is given preference in Queensland over "residuary" beneficiaries, including (under section 55(a)) those next-of-kin entitled on partial intestacy, falling within Class 2.

(i) Donationes mortis causa are included

4.37 The inclusion of donationes mortis causa in Class 4 of the Queensland order is a departure from other statutory orders. It is difficult to understand the reason for this class in modern legislation. The subject-matter of such a gift vests directly in the donee immediately upon the death of the donor and the donee's title to the property relates back to the date of the donor's inter vivos action in making the gift. It is not clear whether such property is covered by section 8 of the *Administration Act 1903* (WA). Even if it is, the practical reality is that the donee of such a gift might well have spent it, converted it, or otherwise disposed of it, well before the donor's estate has reached the stage of administration at which assets must be applied in payment of debts. It could work considerable injustice for the donee of such a gift, accepting it in good faith, and unaware of its potential for attachment in payment of the donor's debts, to find himself, perhaps long afterwards, in the position of having to disgorge it, or a sum of money equal to its value at the date of the donor's death. In addition, the very question whether a gift has as a matter of law been made inter vivos, or is a donatio mortis causa, is in the nature of things rarely susceptible of a clear-cut answer on the facts. To this extent Class 4 of the Queensland order also appears to have potential for encouraging litigation.

(j) Section 59(2) requires clarification

4.38 It is apparent that section 59(2) of the Queensland Act is designed to achieve equality of sacrifice as between a beneficiary of charged property and a chargee-legatee, but the language of the subsection is not completely clear. In the Commission's view, the subsection could be clarified by re-drafting it as follows:

> "Property within each class as aforesaid shall be applied in the discharge of the debts and, where applicable, **the payment of general legacies either in full or rateably according to their value as the case may be**; and where a legacy is charged on specific property the legacy and the property shall be applied rateably." [25]

(k) Section 59(3) defines expressions which oust the statutory order

4.39 Section 59(3) embodies a much-needed reform of the law. Its effect is to define negatively expressions sufficient to oust the statutory order. Reflection upon this matter shows that, whereas it is in general very difficult to legislate with regard to questions of the construction of wills, it is possible to identify various commonly-employed drafting devices intended to be covered by the policy of the legislation. That is what has been done here, with the result that the difficult problems of construction discussed above[26] appear to have been overcome, or at least very much reduced, in Queensland.

(l) Section 60 should refer to general legacies

4.40 Section 60 of the Queensland Act would be more felicitously expressed in terms of "general", rather than "pecuniary" legacies, for the reasons set out above.[27] Perhaps of more importance is the fact that nothing in the Queensland legislation appears to deal with the policy matters raised earlier.[28] It is arguable that there may well be no good reason why a gift of "the sum of $10,000" (general) should be treated differently for the purpose of abatement under section 60(b) from a gift of, say, "my Western Mining shares" (specific), valued at $10,000, or indeed at any other figure.

(m) *Locke King's Act* has been reformed

4.41 By Section 61 of the Queensland Act *Locke King's Act* has been reformed. Its language has been tightened up and modernized in several respects. The most important substantive change to the section is the requirement that a testator's expression of intention to

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25 S 59(2) does not appear to cover cases falling within the rule in *Lutkins v Leigh* (1734) Cas t Talb 53, 25 ER 658. This is discussed in detail at para 5.16 below.

26 Paras 4.7-4.9.

27 Para 4.10. S 5, the general definition section of the Act, defines "pecuniary legacy" so as to include, inter alia, general legacies and demonstrative legacies to the extent to which the latter must be treated as general.

28 Para 4.14.

oust the effect of the section must have been made by his will, and not alternatively (as in Western Australia) by "any other document". In the Commission's view, these changes should be adopted in Western Australia.

(n) Section 61 requires amendment

4.42 In one significant respect section 61 appears not to be well drafted. Suppose a testator specifically appropriates Blackacre for the payment of his debts, Blackacre being worth $50,000. Suppose also that he has specifically devised Whiteacre to X: Whiteacre is worth $100,000, but is subject to a mortgage of $20,000. Does the trust to pay debts out of Blackacre constitute a contrary intention for purposes of section 61? Section 61(2) merely provides that a contrary intention is not signified by a general direction to pay debts "out of his estate or out of his residuary estate". In the present problem the direction to pay debts is to pay them out of a specific asset, Blackacre. It is, in the Commission's view, highly arguable that when in Queensland a testator creates a Class 1 asset, then by that very fact he has expressed an intention contrary to section 61, and that if he wishes to retain the effect of the section he must say so - as, for example, in the present case by providing that Blackacre be applied to pay his unsecured debts. Further, in the present example, if Blackacre proved insufficient to pay all the debts it would be necessary to apply the remaining classes in section 59 in turn because it would appear that section 61 had been ousted. In the Commission's view this is a matter of policy. One sensible approach to it on the Queensland model would be for the legislation to provide that the trust property pay all unsecured debts insofar as possible, and then the secured debts insofar as possible, but to the extent that the latter proved not to be possible then the secured debts should be paid primarily out of their respective securities.

(o) Conclusion

4.43 In the Commission's view, the *Succession Act 1981* (QLD) represents a very considerable advance on all previous statutory attempts in Australia, New Zealand and England to deal with the matters considered in this report. It could well serve as a model for the reform of the law in Western Australia, subject to the several points made with regard to it above.[29] Its principal virtues lie in the simplification, clarification and modernization of a

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[29] Paras 4.34-4.38, 4.40, 4.42.

technical yet important area of the law which in Western Australia is presently characterized by the converse of these attributes.

5. SUMMARY

4.44 The comparative study of Australian, New Zealand and English law relating to the subject undertaken in this report shows that these various jurisdictions fall into four categories for present purposes. These are -

1. Jurisdictions in which there is no statutory order of assets. These are Western Australia, South Australia and New Zealand. In these places the law remains unreformed, save that realty has in each of them been made available equally with personalty as assets for the payment of debts. But subject to this, the old order prevails. That this situation is unsatisfactory has been, in the Commission's view, amply demonstrated in this report.

2. Jurisdictions possessing statutory orders of assets based upon that contained in the *Administration of Estates Act 1925* (UK). These are England, New South Wales and Tasmania. In these places the law has been reformed to the extent that it is partially embodied in statutory form. But, as has been shown, the Commission believes the English model to be a poor one, which has proved to be far from ideal in practice, and which should not be adopted in Western Australia.

3. Victoria. In this State the statutory order avoids many of the problems inherent both in the old order, and in the statutory orders referred to in category 2 above. The Victorian law was significantly reformed by the 1933 amendment,[30] but various vices remain. In addition, the Victorian order (save for the ordering of the classes) so fundamentally resembles the orders based upon the United Kingdom legislation that the vast body of case law decided with regard both to the old order, and to these statutory orders, remains relevant to Victoria. If a fresh approach to these matters is needed, the Victorian model is not, in the Commission's view, an entirely suitable one.

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30 See para 4.17 above.

4. Queensland. In this State an entirely fresh approach has been adopted in comparatively recent times. The extent to which this model should be adopted in Western Australia is discussed below.

Chapter 5

THE REFORM OF THE LAW IN WESTERN AUSTRALIA

1. OPTIONS FOR REFORM

5.1 Three major policy issues lie at the heart of any comprehensive reform of this area of the law. They are -

1. Whether the law should attempt, insofar as possible, to give effect to the wishes of testators, express or implied, with regard to the assets to be applied in the payment of debts and legacies, or whether, on the contrary, the law should seek to impose a statutory regime for this purpose to apply regardless of a testator's wishes.

2. Whether, if the law is to attempt to give effect to a testator's wishes, some form of statutory order of assets is the best mode of dealing with the problem as a whole, or whether some other legislative form would be more appropriate.

3. Whether, in any event, property as to which there exists an unintentional intestacy should be applied first in the payment of debts, whatever other provisions for this purpose may have been made by the will.

These matters are now considered in turn.

(a) Should the law attempt to give effect to the wishes of testators?

5.2 In the Commission's view, the law should attempt to give effect as far as possible to the wishes of testators with regard to the payment of debts and legacies. The reason is that these matters are so closely associated with the act of testation itself as to be, in reality, inseparable from it.

5.3 The considerable problems which have always existed under the old order, and to a lesser degree under the statutory orders based upon the English model, exist because these orders have embodied policy rules applying, to a greater or lesser degree, regardless of a testator's expressions of intention. The two cannot sit happily together in a legislative context. It has been precisely this conflict that has been the source of so much confusion, legal technicality, and litigation. In the Commission's view, perhaps the principal virtue of the Queensland approach is that it accords absolute primacy to a testator's expressions of intention, without in any way attempting to be wiser than the testator himself has been. Such an approach is inherently likely to reduce the uncertainty, undue technicality and litigation that have proved to be characteristic of other approaches.

(b) Is a statutory order of assets necessary?

5.4 Is a statutory order of assets necessary? In the Commission's view it is. The reason is that whatever form is employed for legislation on this subject, one thing is clear: it must be appropriate to deal with all kinds of cases. There are really three main types of cases. First, those in which a testator has expressed a clear enough intention as to the payment of debts and legacies; second, those in which he has not; third, cases of intestacy or partial intestacy. The most obvious feature of both the old order, and of all of the statutory orders, is that they are apt to deal with all cases. They provide a set of alternatives to which recourse must be had, but depending upon the nature of the particular case. The question is, therefore, not whether the law must recognise the inevitability of a diversity of cases by identifying various classes of assets, but in which order they should appear and what the content of each should be.

(c) The place of intestate property

5.5 Any law, statutory or otherwise, governing the administration of assets of a deceased person must deal with the subject of property as to which the deceased died intestate. As has been seen, all systems of law examined in this report deal, in one way or another, with this matter.

5.6 The policy issue which must be considered in this context relates to cases of unintentional partial intestacy. In reality, this is the most common occasion in relation to the

administration of modern wills for the existence of conflict of the kind identified in para 5.3 above.

5.7 Except in Queensland, intestate property[1] must be applied first in the payment of debts, unless the will expressly and with unequivocal clarity provides to the contrary. This is on the ostensible ground that a testator's bounty to named beneficiaries will thereby be maximized, and at the expense of those for whom (presumably) he had no particular intention of providing.

5.8 The Queensland approach is very different. It is based on the ground that where a testator has expressly appropriated or charged property with the payment of his debts there is no good reason at all why the law should impose some other rule - namely, that intestate property be nevertheless applied first. In short, the Queensland approach is to take the testator at his word. Other approaches attempt to answer a theoretical question on behalf of a testator which, because he is dead, he cannot answer for himself. But they do so on the real basis that it is somehow "better" to maximize benefits to named beneficiaries. At this point, the Queensland rule reflects the reality that takers on partial intestacy are likely to be at least as closely related by blood to the testator as are named beneficiaries, who could be anything from charities to mere acquaintances.

5.9 The Commission does not pretend that the best solution to this problem is obvious. It is itself a policy matter. But in determining policy the Commission believes that the law should be clear and simple. This the Queensland law appears substantially to achieve, and to a greater degree than any other system operating in a jurisdiction socially and legally comparable to Western Australia.

(d) General legacies

5.10 It remains to consider the subject of the payment of general legacies. The Commission believes not only that this is a subject overdue for statutory reform, but that such reform could be achieved relatively simply. The matter has proved to be one of continuing difficulty, even in jurisdictions possessing statutory orders of assets, except in Queensland. The reason is that in no jurisdiction other than Queensland does a statutory rule exist which

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1 In some jurisdictions, as has been noticed, Class 1 does not include realty.

expressly and unequivocally deals with the question. Elsewhere, the position is confused by the need to reconcile implications as to the payment of legacies to be derived from statutory orders for the payment of debts with the old law relating to the payment of legacies: and the old law on the subject, as has been shown, is itself unsatisfactory.

5.11 The Queensland provision, which is contained in section 60 of the *Succession Act 1981*, is in the Commission's view, clear, straightforward, and desirable. It accords full weight to a testator's intentions, and it provides a simple and workable rule where these have not been expressed. It abolishes the distinction between realty and personalty that has always plagued this area; it provides, simply, for the payment of general legacies out of residue; and it provides for their pro rata abatement where the residue proves insufficient.

(e) Conclusion

5.12 For the foregoing reasons, the Commission believes that the scheme for the payment of debts and legacies set out in the *Succession Act 1981* (QLD) is fundamentally a good one, and preferable to all other existing models in jurisdictions comparable to Western Australia.

5.13 However, certain specific matters requiring further consideration arising in and out of the Queensland legislation have been identified.[2] The remaining question is as to the manner in which these difficulties can be overcome.

2. SUGGESTED AMENDMENTS TO THE QUEENSLAND REFORM

5.14 In the Commission's view, the aspects of the Queensland law which require further consideration, are, with three exceptions, merely drafting matters, not matters of fundamental policy. The policy matters requiring consideration relate to the preference given to specific dispositions over general dispositions, the abolition of the rule in *Lutkins v Leigh*,[3] and the question whether donationes mortis causa should have any place in a modern reformed statutory order of assets. These several matters are now dealt with in turn, commencing with the policy matters.

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2 See paras 4.35, 4.37, 4.38, 4.40 and 4.42 above.

3 (1734) Cas t Talb 53, 25 ER 658.

(a) Preferential treatment of specific dispositions

5.15 This matter has been briefly considered above.[4] The preferential treatment of specific dispositions has been retained in the Queensland legislation by a combination of the provisions of sections 59 and 60. The point of policy is whether it is desirable that the law require that the subject-matter of a general legacy (for example, "I give the sum of $50,000 to X") be applied in the payment of debts before the subject-matter of a specific disposition (for example, "I give Blackacre to Y"). From these examples it could hardly be said that the testator intended to give the legacy to X any less strongly than the devise to Y. Obviously, the legal distinction between the two kinds of disposition is essential to the Queensland scheme. On balance, the Commission is of the view that in many cases general legatees will not in point of fact have been intended to be benefited by a testator quite as strongly as specific beneficiaries: the reverse will not as often be the case, especially in regard to valuable property. The Commission therefore does not object to the Queensland legislation on this ground.

(b) The rule in *Lutkins v Leigh*

5.16 This matter has been foreshadowed earlier in this report.[5] Nothing in the Queensland legislation appears expressly to reverse the rule, or to deal specifically with the question of the relationships inter se between general legatees on the one hand, and beneficiaries of charged but exonerated property under *Locke King's Act* (in Queensland, section 61) on the other, where the residuary property (as defined in section 55 of the Queensland Act) proves insufficient both to discharge the secured debt and also to pay the general legacy. The rule in *Lutkins v Leigh*[6] prefers the legatee in this situation and requires payment to him in full prior to any application of the residue in discharge of the security. The Commission is of the view that this rule does not reflect the normal intentions of testators in modern life and should be changed by legislation so that, in the case given, the interests of both beneficiaries would abate rateably. This could be achieved by a relatively simple addition to the form of words employed in either section 59(2) or, alternatively, section 60 of the Queensland Act.

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4 Para 4.14.
5 Paras 3.41-3.43.
6 (1734) Cas t Talb 53, 25 ER 658.

(c) Donationes mortis causa

5.17 For the reasons given above[7] the Commission is of the view that, on policy grounds, the property the subject-matter of this type of gift should not be capable of being applied in payment of the debts of the donor. The Commission would therefore not wish to include what is Class 4 in the Queensland order in Western Australian legislation.

(d) Various other matters

5.18 First, in the Commission's view, the problem of the effect of section 29 of the Queensland Act discussed above[8] should be resolved by redrafting paragraph (b) to make it clear that the section is not ousted in a case where a testator gives his residuary realty to one person and his residuary personalty to another. The Commission recommends that this paragraph be redrafted so as to read:

> "Subject to this Act, where *there is* a residuary disposition *either* in fractional parts **or which operates by reference to a distinction between real and personal property and that disposition** fails as to any of such parts **or property** for any reason, that part **or property** shall **form part of** and pass under that part of the residuary disposition which does not fail, and if there is more than one part which does not fail then **that part or property shall form part of and pass under** all those parts proportionately."

5.19 Second, the Commission regards the form of words suggested above[9] as appropriate to clarify the meaning of section 59(2) of the Queensland Act.

5.20 Third, for the reasons given earlier,[10] the Commission prefers the use of the phrase "general legacies" rather than the phrase "pecuniary legacies" in any legislation dealing with this subject.

5.21 Fourth, the Commission agrees with the reform of *Locke King's Act* embodied in section 61 of the Queensland Act, namely, that any intention to oust the section must be

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7 Para 4.37.
8 Para 4.35.
9 Para 4.38.
10 See para 4.40 above.

expressed in a testamentary instrument. But the question whether a trust to pay debts out of a particular asset constitutes an intention to oust the section[11] remains to be dealt with. In the Commission's view, the legislation reforming *Locke King's Act* should be drafted in such a way that the creation of what under the Queensland Act is a Class 1 asset (the creation of a trust or charge for the payment of debts) be deemed to constitute an ouster of the section, unless the will otherwise expressly provides to the contrary. But the section should also provide that in such a case Class 1 assets be first applied in the payment of *unsecured* debts, and only when they have been so discharged, in the exoneration of secured debts charged against specific property. To the extent that Class 1 proved insufficient for the latter purpose, the security would have to carry the balance of the charge against it. This is a matter that should also be considered in the light of the matters discussed in relation to the rule in *Lutkins v Leigh.*[12]

11 See para 4.42 above.

12 (1734) Cas t Talb 53, 25 ER 658: see para 5.16 above.

Chapter 6

THE COMMISSION'S RECOMMENDATIONS

6.1 In this report, the Commission has critically examined systems of law operating in Australia, England and New Zealand for the payment of debts and legacies of the solvent estates of deceased persons. The Commission has concluded that the existing statute law applying in the State of Queensland should serve as a model for Western Australia, as modified by the proposals made in this report.[1]

6.2 The Commission therefore recommends that -

(1) the law embodied in sections 5 (as to the definition of "property"), 29, 55 and 59-61 of the *Succession Act 1981* (QLD) be enacted as part of the *Administration Act 1903*, subject to the following additional recommendations;

Paragraphs 4.25-4.43, 5.1-5.12

(2) the legislation should provide that the interests of general legatees and of beneficiaries of charged but exonerated property abate rateably, so changing the rule in *Lutkins v Leigh*;

Paragraphs 3.41-3.43, 5.16

(3) donationes mortis causa should not be capable of being applied in payment of the debts of the donor;

Paragraphs 3.21, 4.37, 5.17

(4) the uncertainty concerning the effect of section 29 of the Queensland Act should be resolved by redrafting it as suggested in paragraph 5.18;

Paragraphs 4.35, 5.18

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1 Paras 5.16-5.21 above.

(5) Section 59(2) of the Queensland Act should be clarified by redrafting it as suggested in paragraph 4.38;

Paragraphs 4.38, 5.19

(6) the phrase "general legacies" should be used instead of "pecuniary legacies";

Paragraphs 4.40, 5.20

(7) *Locke King's Act* (in Western Australia, section 28 of the *Wills Act 1970*) should be reformed so as to provide that the creation of a trust or charge for the payment of debts ousts the Act unless the will provides to the contrary, but that Class 1 assets should be first applied in the payment of unsecured debts.

Paragraphs 3.24-3.32, 4.41-4.42, 5.21

C W OGILVIE,
Chairman

R L LE MIERE

M E RAYNER

G SYROTA

J A THOMSON

28 June 1988