



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 88**

**The Administration Act 1903**

**REPORT**

**AUGUST 1990**

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:* **HON J M BERINSON QC MLC**  
**ATTORNEY GENERAL**

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 of the *Administration Act 1903*.

**J THOMSON, *Chairman***

14 August 1990

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# Chapter 1

## INTRODUCTION

### 1. TERMS OF REFERENCE

1.1 The Commission has been asked to review the *Administration Act 1903*, ("the Act").

### 2. PREVIOUS REPORTS OF THE COMMISSION

1.2 In a number of earlier reports the Commission has dealt with important areas of the law relating to probate and the administration of estates of deceased persons. These are its reports on -

- (a) **Distribution on intestacy;**<sup>1</sup>
- (b) **Administration bonds and sureties;**<sup>2</sup>
- (c) **Administration of deceased insolvent estates;**<sup>3</sup>
- (d) **Recognition of interstate and foreign grants of probate and administration;**<sup>4</sup> and
- (e) **The administration of assets of the solvent estates of deceased persons in the payment of debts and legacies.**<sup>5</sup>

1.3 The recommendations made in the first three of these reports have been implemented<sup>6</sup> by amendments to the *Administration Act*. To date, there has been no legislative implementation of the recommendations in the remaining reports.

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1 Project No 34 Part I 1973.

2 Project No 34 Part II 1976.

3 Project No 34 Part III 1978.

4 Project No 34 Part IV 1984.

5 Project No 34 Part VII 1988.

6 The recommendations made in the first two reports were implemented by the *Administration Act Amendment Act 1976*; those in the third report were implemented by the *Acts Amendment (Insolvent Estates) Act 1984* which amended the *Administration Act* and certain other enactments.

1.4 The present report should be read against the background that the Commission has already dealt with much of the material that would otherwise have formed part of it. Ideally, it should be read together with the unimplemented reports on *Recognition of interstate and foreign grants of probate and administration* and *The administration of assets of solvent estates of deceased persons in the payment of debts and legacies*. With them it forms a comprehensive treatment of the provisions which, in the Commission's view, should be contained in the *Administration Act*. The Commission believes that the recommendations in the two unimplemented reports are important and are essential to any comprehensive reform of the *Administration Act*. They are mentioned here for purposes of completeness, but will not be further discussed in this report.

### **3. DRAFT REPORT**

1.5 The report was distributed in draft form to the Chief Justice, officers of the Supreme Court, trustee companies, the Law Society of Western Australia, a number of solicitors and others with experience in the area. The draft report was also made available to the public.<sup>7</sup> The comments received were of great assistance to the Commission in preparing its final report, and the Commission thanks the commentators for the time and trouble they took. Their names are listed in the Appendix.

### **4. DEVELOPMENTS ELSEWHERE**

1.6 The Commission has considered the content of corresponding legislation in other Australian jurisdictions, in England, and in New Zealand. In only one of these places, has the relevant legislation been comprehensively modernised in recent times. This is Queensland, where the *Succession Act 1981* was enacted following a detailed review of the law relating to wills, intestacy, probate, administration of estates, and family provision contained in a report of the Queensland Law Reform Commission in 1978.<sup>8</sup> Inevitably, therefore, that report, and the content of the *Succession Act 1981* (Qld), have influenced the writing of the present report to a significant degree, bearing in mind that the present terms of reference are more limited

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<sup>7</sup> Because of the technical nature of much of the subject, the Commission did not issue a discussion a paper, as it does in most projects, seeking public comment on the issues before proceeding with the preparation of its report. However, the draft report was available to the public and public comment on it was sought with the aid of an advertisement published in "*The West Australian*".

<sup>8</sup> Queensland Law Reform Commission *Report on the Law relating to Succession* (QLRC R22 1978).

than was the case in Queensland, and the current requirements of this State's laws are different from those of Queensland in 1978.

## 5. THE ACT AND THE RULES

1.7 Much of the day-to-day operation of the Act in non-contentious matters is governed by the *Non-Contentious Probate Rules 1967*, which are made under the authority of the Act. The operation of the Act in contentious matters is governed by the *Rules of the Supreme Court*, and especially by Order 73 of those Rules. However, the Commission's present terms of reference do not extend to either of these pieces of subordinate legislation.<sup>9</sup>

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<sup>9</sup> The power to amend these rules is vested in the judges of the Supreme Court: see, for example, *Supreme Court Act 1935* ss 167 and 168; *Administration Act 1903* s 144. In para 4.22 below, the Commission recommends that a review be undertaken of the *Non-Contentious Probate Rules 1967*.

## Chapter 2

### OVERVIEW OF THE ACT

#### 1. INTRODUCTION

2.1 Every society which recognises rights of inheritance to property must provide a legal regime for the orderly winding-up of a deceased person's affairs and the administration of his or her property in the interests of creditors and beneficiaries. This will normally involve the proving of the deceased's will (if there is one), and the collection and payment of his or her debts, followed by the distribution of surplus assets of the deceased to the persons legally entitled to them, whether under a will or on intestacy. In Western Australia, the principal statute governing probate and administration is the *Administration Act 1903*.<sup>1</sup> A statute of such obvious relevance to every citizen, and which governs the final administration of assets that it may have taken a person a lifetime to acquire, should be simple, clear and comprehensive.

2.2 The present Act is none of these things.<sup>2</sup> As will be seen in this report, it presents various practical problems to persons concerned with probate and the administration of estates, whether they be lawyers, executors of wills or administrators of estates, or laypersons, such as beneficiaries or creditors of a deceased person. The defects of the Act stem both from the form and substance of what it contains and from what is omitted from it. Many defects in the contents of the Act are identified specifically in this chapter. For the expert reader a more comprehensive discussion of defects in matters of legal substance pertaining both to what the

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1 The *Administration Act 1903*, although it is the principal statute dealing with matters of probate, is by no means the only Western Australian statute relevant to the administration of estates of deceased persons. In the latter area, the provisions of the *Trustees Act 1962* are particularly important, as will be seen in this report. Other relevant statutes include the *Wills Act 1970*, governing the making, altering and revoking of wills and related matters; the *Inheritance (Family and Dependants Provision) Act 1972* containing provisions designed to ensure that, within limits to be determined by the Court, a deceased person's family and/or dependants need not be left without adequate provision for their proper maintenance, education or support; and the *Property Law Act 1968*. The *Public Trustee Act 1941* and the *Trustee Companies Act 1987* contain provisions that are especially relevant to the administration of small estates. The abovementioned statutes are discussed in this report only to the extent to which they are directly relevant to the *Administration Act* and its proposed reform.

2 Having been enacted in the immediate post-colonial era, many of its provisions are drawn directly from the *Wills, Probate and Administration Act of 1898* (NSW), and some from that State's *Probate Act* of 1890. In turn, many of the provisions of the former Act were drawn directly from much older statutes - some from earlier Victorian colonial legislation, and some from earlier nineteenth-century English statutes. These enactments reflected or modified the then-existing case law: they were also in many instances responses to the perceived requirements of nineteenth-century English society in an age of legal and social reform. The *Administration Act* continues to embody much of this nineteenth-century material, and in its original nineteenth-century terminology.

Act contains, and to what it omits, is found in Chapters 3 and 4, together with the Commission's recommendations for reform.

2.3 These matters of substance include, where they are dealt with in the Act, entitlements to administration; administration sureties; various problems relating to small estates; the erosion of financial entitlements - especially in relation to inheritance following intestacy - by reason of inflation;<sup>3</sup> the passing of accounts; and the general jurisdiction of the Supreme Court. Where not dealt with in the Act, they include the position of persons acting informally; executorship by representation; the effect of the revocation of a grant of representation; personal applications for grants of representation; the question whether the Act binds the Crown; temporally proximate deaths; and several other matters.<sup>4</sup>

## 2. THE ARRANGEMENT OF PARTS AND SECTIONS

2.4 Legislative changes to the *Administration Act* over nearly nine decades<sup>5</sup> have resulted in a statute that, in 1990, is unsuitably arranged. In its original form the Act comprised 138 sections divided into seven systematically laid out Parts. The Act presently consists of 65 sections numbered 1 to 144 (seven others being insertions bearing a Roman capital letter) divided into six Parts. It now bears little physical resemblance to its original form, and is structurally unbalanced in a way that makes it difficult to understand. Part II, headed Probate and Administration, and which is the main Part of the Act, consists of 50 sections, but without further subdivision. Its provisions do not follow one another in a sequence that would be considered legislatively logical at the present day. This is partly due to historical

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3 Earlier this year, the Commission drew the Attorney General's attention to the fact that the amount of the basic entitlement allowed to the surviving spouse by s14 of the *Administration Act* which deals with distribution on intestacy was now inadequate due to the effects of inflation. It suggested that rather than wait for the completion of the Commission's report on the full range of issues being dealt with in this project, the amount be increased to a more realistic figure. The Government has since announced its intention to have the basic entitlement increased: para 3.26 below. As to other basic entitlements under s 14, see paras 3.27 and 3.28 below.

4 As to the recognition of inter-State and foreign grants of probate and administration, and the order of application of assets in the payment of debts and legacies, see paras 1.2 - 1.4 above.

5 Although it has been amended on no less than 48 separate occasions, the Act has never been comprehensively reviewed. The Act's amendment history has largely been one of the ad hoc repeal of many of its original provisions in order to accommodate changes in government policy. For example, the present Part V was originally inserted into the Act as Part VI in 1934. It was renumbered as Part V in the 1943 reprint. All of its provisions, except the present section 71, were repealed upon the enactment of the *Death Duty Assessment Act 1973*. Part IV of the original Act, comprising sections 60-82, was repealed in its entirety by the *Curator of Intestate's Estates Act 1918*. The present numbering of Parts and sections reflects that adopted for the various reprints of the Act from 1934 onwards. With the important exception of the intestacy provisions introduced into the Act in 1976 following the Law Reform Commission's report on *Distribution on Intestacy* (Project No 34 Part I 1973), few amendments to the Act have embodied substantive reforms of the law.

considerations, but also to the fact that some sections deal with more or less routine procedural matters that might more appropriately be contained in the Rules.

2.5 Parts III (Foreign Probates and Administration) and IV (Caveats) each consist of two sections. The Commission has already recommended the enactment of new legislation with regard to Part III in its report *Recognition of interstate and foreign grants of probate and administration*; the subject of caveats (Part IV) hardly warrants a separate Part of the Act, especially when the provisions of Part II are undifferentiated, and when some of the material contained in its two sections might in any case more appropriately be located in the Rules. Part V (Duties on Deceased Persons' Estates and Succession Duties) consists of one section only, which says nothing about the supposed subject of the Part: instead, it deals with the admissibility in evidence of wills in court proceedings generally. The historical reasons for these peculiarities explain, but do not justify, the present curious arrangement of the Act.

2.6 The vice of the present arrangement of the Act is twofold. First, the lack of a logical division of its material into appropriate Parts and Divisions means that nobody other than a reader already very familiar with the Act as a whole can ever be sure that he or she has identified its relevant provisions (or the absence of them), as required, without reading almost the entire Act. Second, the fact that the Act exhibits an unhelpful and untidy appearance creates the impression that it is a neglected piece of legislation, both unimportant and out-of-date, and bearing an uncertain relationship with the general law. Its appearance of neglect does not inspire confidence in the reader, the implication being that there must be many, and probably arcane, rules of the general law applicable to its interpretation.

### 3. DRAFTING STYLE AND TERMINOLOGY

2.7 The Act exemplifies a variety of drafting styles that reflect the date of a particular insertion or amendment. In some older provisions, for example, a long-winded distinction is made between executors and administrators in cases in which it appears that little of current legal substance turns on the distinction. More recently enacted provisions employ the simple, all embracing term 'personal representative'.<sup>6</sup> Similarly, many older provisions distinguish real from personal property, whereas more recent amendments refer simply to 'the property'

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6 Compare ss 8, 10(1), 10(3), 12 and 21, with ss 17A(1), 17A(2), 17A(4), 17A(5), and 20.

of the deceased.<sup>7</sup> A significant vice of divergent drafting styles is, of course, that litigation may be encouraged, being based in a given case on the presumed internal homogeneity of statutes. The lack of such homogeneity is one of the principal stylistic characteristics of the Act.

2.8 The various provisions of the Act expressly distinguishing real from personal property<sup>8</sup> are largely unnecessary today, and are therefore confusing. They are in most cases survivals from legislation enacted following the English *Land Transfer Act 1897*, by which, for the first time, the jurisdiction of the Probate Court was extended to real estate, which was thereafter vested in the personal representative. Redrafted jurisdictional provisions as recommended by the Commission in its report of 1984 on *Recognition of interstate and foreign grants of probate and administration*, together with implementation of the Commission's proposals contained in its report of 1987 on *Administration of assets of the solvent estates of deceased persons in the payment of debts and legacies*, would render any distinction of this kind almost entirely irrelevant in Western Australia for the future.

#### 4. MISLEADING PROVISIONS

2.9 Four sections of the Act contain provisions that either are inconsistent with the provisions of other, and more specific, rules of law, or have for practical purposes fallen into desuetude, and are therefore misleading, at least to the non-expert reader of the Act. These are sections 8, 43, 44 and 47A.

2.10 Section 8 purports to 'vest', as from the date of the grant of representation, all of the property of the deceased person in his or her personal representative, the vesting being backdated to the date of death.<sup>9</sup> In relation to land under the *Transfer of Land Act 1893* and to certain corporate securities this, at least for many purposes, appears not to be so. With respect to land under the *Transfer of Land Act* a personal representative appears only to acquire title by transmission upon registration of his or her title under section 187 of that Act. With regard to company shares, although the personal representative becomes a shareholder by virtue of section 8, he or she only becomes a member of the company (and thereby able to exercise

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7 See footnote 8 below in this ch and contrast ss 12B, 13 and 14.

8 For example, ss 8, 9, 10, 10A, 11, 12 and 21.

9 In the period between the date of death and the grant of representation, title to the whole of a deceased person's property vests in the Public Trustee by force of s 9 of the *Public Trustee Act 1941*.

rights vis-a-vis the company) by having his or her name entered on the company's share register following an appropriate application to the company.

2.11 Section 43(1)(b) requires a personal representative, inter alia, to pass his or her accounts relating to the deceased's estate 'within such time . . . and in such manner as may be prescribed by the rules . . .'. The relevant rule is rule 37 which, by sub-rule 1, affirms the prescription of the Act and requires the personal representative to attend before the Registrar for the purpose 'at such time as the Registrar may appoint to have the accounts passed and allowed'. Sub-rule 3 fixes the time for this purpose as being 'within twelve months after the grant, or within such further time as . . . the Registrar may allow . . .'. In fact it is the practice of registrars not to 'appoint' any time at all for the passing of accounts in the normal course of events. Similarly, section 44(1), requiring notification by the Principal Registrar of a failure to pass accounts within one month of 'the period fixed by the rules', appears to have fallen into desuetude. These matters, which are of some substance, are more extensively discussed in paragraphs 3.30 to 3.32 below.

2.12 Section 47A(3) appears to conflict with a well-known rule of equity relating to the tracing of trust funds, without evincing an intention to override the equitable doctrine. The section purports to save an illegitimate's right (or other person's derivative right) to follow wrongly distributed property, or its proceeds, into the hands of 'any person, other than a purchaser, who may have received it'. In equity, such a purchaser must also both be bona fide and have purchased without notice of the equitable interest of the plaintiff.<sup>10</sup> It is impossible to believe that section 47A(3) is intended to override this rule. It appears to conflict with it, and is to that extent a misleading provision.

## 5. OBSCURE PROVISIONS

2.13 The meaning of several provisions of the Act is obscure. In some cases the obscurity arises from textual inadequacy: in others, it arises from an allusion to an obscure rule of the general law.

2.14 Examples of provisions that are in themselves obscure are found in section 3, relating to the definition of a 'will'; and, more importantly, in sections 25, 36 and 37. The latter

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10 See, for example, the discussion in Meagher, Gummow & Lehane *Equity, Doctrines and Remedies* (2nd ed 1984) 241-250.

sections deal with entitlement to administration in cases of intestacy (section 25) and with the will annexed (sections 36 and 37). In both cases they fail adequately to identify the order of persons so entitled, and the conditions of their entitlement. Sections 36 and 37 make no attempt to prescribe an order of entitlement at all. In practice, these problems are resolved by the administration of the Rules and application of the rules of the general law. These are important matters directly affecting many citizens and should be more clearly dealt with in the Act than they are at present.

2.15 Allusions to obscure rules of the general law are found in sections 12 (assimilating a personal representative's rights and duties with regard to realty with those 'heretofore' applying to personalty); section 13(3) (executors' 'rights' with regard to intestacies of residue); section 16 (abolition of rights of courtesy and dower); section 21 (executor's ability to represent realty); and section 35 (distinguishing 'administrators' of personalty from 'receivers' of realty pending litigation). These are matters that require a clearer form of legislative treatment.

## 6. MEANINGLESS PROVISIONS

2.16 Two provisions of the Act are, for practical purposes, meaningless. These are sections 9, which clearly cannot mean what it says,<sup>11</sup> and 141(2), in which the kind of executor or administrator referred to in the provision is not identified. Even if the heading to the section ("Court may appoint an attorney for an absent executor") could be regarded as part of the Act, the concept of an "absent" executor is, without further qualification, itself almost meaningless.<sup>12</sup>

## 7. TITLE OF THE ACT

2.17 The title of the Act does not reflect its substance in that its provisions deal at least as much with matters pertaining to probate and executors, as with administration and administrators. A more accurate and helpful title would be "Probate and Administration Act".

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<sup>11</sup> "9. All real estate held by any person in trust shall vest as aforesaid, subject to the trusts and equities affecting the same." A literal reading of this provision would require that every trust of land in Western Australia, however created, would require to be administered partly in accordance with the provisions of the *Administration Act*. This cannot be the case.

<sup>12</sup> In any event, under s 32(2) of the *Interpretation Act 1984* (WA), the heading cannot be taken to be part of the Act.

## 8. CONCLUSIONS

2.18 The foregoing overview suggests that the *Administration Act* is inadequate and outmoded. This conclusion is reinforced by a more detailed consideration of the various matters of substantive law in respect of which the Act is currently defective. These are discussed in detail in the following chapters of this report, together with recommendations for reform.

2.19 The Commission is of the view that reform should not be limited to amendment of the existing Act. It recommends that the *Administration Act* should be repealed and replaced by a new statute entitled the *Probate and Administration Act*.

## **Chapter 3**

### **SUBSTANTIVE DEFECTS OF THE ACT**

#### **1. ENTITLEMENT TO ADMINISTRATION**

3.1 As has been seen, sections 25 and 36 of the Act respectively govern entitlement to administration in cases of intestacy and of administration with the will annexed. These provisions are supplemented by rules 8, 9, 22 and 25 of the *Non-Contentious Probate Rules*. The order of priority of persons entitled to administration in either case is not altogether clear from the text of these provisions. In practice, substantial discretions may be exercised by a Registrar in relation to grants in both cases. Section 25 refers to 'one or more of the persons entitled in distribution to the estate of the intestate' (which is a reference to the Table in section 14 of the Act) and 'any other person, whether a creditor or not' in default of a person of the former description. Section 36 merely provides that 'the Court may appoint an administrator' where a person dies leaving a will but did not appoint an executor, or where there is nobody able or willing to act in that capacity. The practice of the Registrar in relation to entitlements to administration therefore derives partly from these provisions, partly from the general law, and partly from the exercise of discretion. The Commission believes that the Act should clearly specify the order of priority in entitlement of persons to a grant of administration in both cases.

3.2 A threshold question which arises here is whether the law should in fact distinguish for this purpose between cases of administration upon intestacy, and cases of administration where the deceased has left a valid will but either has not appointed an executor or none is able or willing so to act. The general law clearly recognises such a distinction in priority to entitlement, a distinction that is currently applied to the interpretation of both sections 25 and 36. The reason for the distinction is that in the latter type of case the deceased has at all events left a valid will intentionally giving property to beneficiaries who are likely to have a considerable personal interest in the efficient administration of the estate. In addition, a testator may well have expressly appointed a trustee of the residuary estate. If the latter is the case, then under the general law such a trustee (or trustees) has first priority to apply for a grant of administration with the will annexed, precisely because the testator has reposed 'trust' and confidence in that person as trustee: if he or she is to protect the residue then the estate as a whole must be efficiently administered. If there is no express trustee of residue, then the

residuary beneficiaries are next entitled to administration with the will annexed, and if the residue is divided between life tenant and remainderman, the former is preferred. If there is no disposition of residue, then the persons entitled thereto by operation of law are preferred. In the absence of any of the foregoing, a legatee may apply - again upon the principle of efficient administration. Finally, the Public Trustee, trustee companies, and creditors may apply if no other person has taken out a grant.<sup>1</sup>

### *The order of priority*

3.3 The Commission considers that the principle of efficient administration should continue to govern the question of priority in entitlement in cases both of administration on intestacy and of administration with the will annexed. It therefore recommends that -

- (a) *in cases of administration upon intestacy* the order of priority in entitlement under section 25 should directly reflect existing statutory and general law entitlements, and should therefore be:

Class 1: the surviving spouse, if any; followed by

Class 2: other persons, either separately or conjointly,<sup>2</sup> entitled (according to the facts of the particular case) to participate, under the Table in section 14 of the Act, in distribution of the estate of the intestate; followed by

Class 3: any creditor of the estate, or any other person who has an interest therein (such as, for example, as the purchaser of an interest of a distributee).

- (b) *in cases of administration with the will annexed* the order of priority in entitlement under section 36 should be:

Class 1: expressly appointed trustees of the residuary estate, if any; followed by

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<sup>1</sup> See W A Lee *Manual of Queensland Succession Law* (1st ed 1975) 81-82.

<sup>2</sup> But not more than four in total: see paras 4.13-4.15 below.

- Class 2: residuary beneficiaries (either separately or conjointly)<sup>3</sup> and where residue is divided between life tenant and remainderman, the life tenant being preferred; if no residuary clause in the will, then
- Class 3: those entitled (either separately or conjointly) to the residue under the Table in section 14 of the Act in cases in which the Will has failed to dispose of the residue; failing application by which
- Class 4: any legatee; failing which
- Class 5: any creditor of the estate, or any other interested person.<sup>4</sup>

3.4 Where more than one person is entitled, each person should have an equal entitlement to receive a grant notwithstanding that their shares are not of equal value.<sup>5</sup> If not intending or able to apply, they would need to be cleared off in accordance with the Rules.<sup>6</sup> It is assumed that in respect of any of the classes mentioned in (a) and (b) above a grant would only be made to an applicant who is sui juris at the time of the application for the grant.

#### *Residual discretion*

3.5 The legislative enactment of orders of priority in entitlement to a grant of administration raises the question whether the Court (or a Registrar) should have a residual discretion to override the order. It can be argued that situations will arise where it could be of advantage for there to be such a discretion, for example, where the person first entitled is

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<sup>3</sup> See footnote 2 above in this ch.

<sup>4</sup> In its report on *Recognition of interstate and foreign grants of probate and administration* (Project 34 Part IV 1984) the Commission recommended that a uniform code of procedure proposed by it should contain rules which give express guidance as to the persons to whom a grant of administration may be issued, or in whose favour a grant of administration may be resealed, when the deceased was not domiciled in the jurisdiction in question: report, 116. This recommendation was aimed at the question of which law should govern entitlement to apply for a grant or reseal when the deceased was not domiciled in the jurisdiction in question and thus is not inconsistent with the recommendations made in para 3.3 above.

<sup>5</sup> In paras 4.13 to 4.15 below the Commission has considered the question of the maximum number of persons who should be entitled to receive a grant at any one time.

<sup>6</sup> Para 3.7 below.

engaged in itinerant work in a remote part of the State or where there is persuasive evidence suggesting that he or she will act against the interests of one or more of the beneficiaries.

3.6 Although one commentator on the Commission's draft report doubted whether there should be discretion to depart from the order of priority, other commentators (including several experienced in the day-to-day administration of estates) expressly made the point that such a discretion was necessary. The Commission agrees with the latter point of view. This is because it considers that situations will inevitably arise in which the statutory order of priority should, in accordance with the requirements of the due administration of justice, be departed from. The Commission therefore considers that the Court should retain a discretion to make a grant otherwise than in accordance with the statutory order, but it is also of the view that such a discretion should not be uncontrolled. Accordingly, the Commission recommends that the Court (or a Registrar) should have a general discretion to make a grant otherwise than in accordance with the statutory order in cases in which it is impracticable or undesirable for a person first entitled to a grant to receive it. In the latter case, the test to be applied should be whether a grant so made would be more beneficial to the estate or desirable to protect the interests of persons beneficially interested therein, and particularly of infants.

#### *Clearing off*

3.7 The existing law requires that where a person applies for administration on intestacy or with the will annexed then those persons having a prior or equal entitlement to that of the applicant should first be cleared off. The procedure for clearing off is governed by Rules 8(ix), 9(ii), (vi), (vii) and (viii), 22 and 25. It requires, inter alia, the attaining and filing of consents of all persons having a prior or equal right to the grant to that of the applicant or the adducing of evidence that they were served with notice of the application or that they cannot be found. The Commission is of the view that, although the order of priority in entitlement to administration, both in cases of intestacy and with the will annexed, should be set out in the Act itself, the procedure for clearing off, which is a routine procedural matter, should continue to be governed by the Rules.

### *The Public Trustee and the trustee companies*

3.8 Under the present law, the Public Trustee may obtain an order to administer any deceased person's estate in the circumstances set out in section 10 of the *Public Trustee Act 1941*. These include cases in which a grant of administration, with or without the will annexed, would otherwise need to be obtained. In addition, section 10 of the *Trustee Companies Act 1987* makes special provision for approved trustee companies to elect to administer certain small estates. These provisions are designed to place the Public Trustee and the relevant trustee companies in a special position for the purpose of ensuring the efficient administration of estates, and the protection of assets, in a wide variety of more or less exceptional circumstances which the Commission recognizes and endorses. They operate side by side with the provisions of the *Administration Act* and, in the case of the *Public Trustee Act*, have done so for many years. In the Commission's view this situation should continue. In consequence, the Commission sees no need specifically to include the Public Trustee or trustee companies in either of the proposed orders of entitlement, nor for any amendment to either the *Public Trustee Act 1941* or the *Trustee Companies Act 1987*, which will continue to operate alongside the provisions of the *Administration Act* as they have done hitherto.

3.9 The existing priority of the Public Trustee over creditors in entitlement to administration is embodied in section 11 of the *Public Trustee Act 1941*. This priority exists unless the creditor can prove to the satisfaction of the Court that his or her administration would be more beneficial to the estate than that of the Public Trustee. The Commission endorses the notion that there could conceivably be cases in which it would indeed be desirable that a creditor enjoy such a priority over the Public Trustee,<sup>7</sup> and it therefore recommends that this possibility be provided for in the *Administration Act* in similar terms to section 11, and that section 11 itself be repealed.

## **2. ADMINISTRATION SURETIES: SECTIONS 26 AND 62**

3.10 Sections 26 and 62, together with rule 27, represent the surviving legislative provisions in Western Australia governing the system of administration bonds and sureties

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<sup>7</sup> Such a case could arise where, for example, the total value of the estate was practically equal to substantial debts owed to a company in which the deceased had a significant shareholding: the more efficient and reliable administration of the estate in such a case might well lie with the creditor company, rather than with the Public Trustee or other trustee company.

that, prior to 1976, were required of administrators generally. In that year the Act was amended<sup>8</sup> to give effect to the Commission's report *Administration bonds and sureties*<sup>9</sup> in which it recommended the abolition of administration bonds, but the retention of sureties in some cases.<sup>10</sup> The question is now whether, after the lapse of fourteen years, and in the light of experience in the administration of estates during that time, the retention of the surety provisions of the Act remains desirable. The Commission is of the view that the arguments against the retention of these provisions outweigh those in favour.

3.11 In its earlier report, the Commission identified six cogent arguments against the system of administration sureties. These were as follows -

First, the cost to the estate of preparing the surety documentation;

Second, the cost to the estate where application was made to the Court to dispense with the surety requirement;

Third, the cost to the estate of insurance premiums charged by approved insurance companies which, in many cases, were the only available sureties;<sup>11</sup>

Fourth, the absence of any persuasive reason why an administrator, who must produce a surety, was any less to be trusted than an executor, who need not: indeed, given that an administrator would usually be a person having a financial interest in the due administration of the estate (whereas an executor need not be such a person) any argument could well be to the contrary;

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8 *Administration Act Amendment Act 1976* ss 5 and 6.

9 Project No 34 Part II, 1976.

10 In the report, the Commission concluded that, notwithstanding the cogency of arguments against sureties generally, it was desirable that they be retained in some cases. The present position is that under ss 26 and 62, and rule 27, sureties are required where administration is sought (i) for the benefit of a person other than the applicant, or where the grant is otherwise limited; (ii) by an applicant outside Western Australia; (iii) where a beneficiary is not of full age; (iv) where a beneficiary is resident outside Western Australia and has no agent or attorney within the State; or (v) where the Registrar considers that there are special circumstances making it desirable to require a guarantee. There are some exceptions: s 26 and rule 27(2) and (4). Even in the circumstances described in (i)-(iv), the Registrar retains a power to dispense with sureties under a discretion granted by s 6(1).

11 The Commission pointed out that it is often very difficult for an administrator to find a private surety, not least because each surety must have net assets at least equal to the amount of the liability assumed under the bond. The Commission reported that, in 1974, there were 419 grants of administration to applicants other than the Public Trustee, and that an insurance company had acted as surety in 65 of these cases. The proportion is probably much higher today.

Fifth, the fact that legal proceedings were rarely, if ever, taken upon an administration bond suggested that the system of administration sureties was in practice unnecessary;<sup>12</sup> and

Sixth, the fact that in some cases the protection afforded to a beneficiary by the system was illusory because some companies which acted as surety required an immediate release from adult beneficiaries, thus collecting a premium without being at risk of action by those beneficiaries.

3.12 In addition to these considerations, the Commission notes that -

Seventh, the cost of the surety system is borne most heavily by estates in which there are infant beneficiaries - those who are likely to have the greater need of the financial resources of the estate;<sup>13</sup>

Eighth, the system is in any case only potentially effective where a defaulting administrator is bankrupt or unable to pay or cannot be found;

Ninth, if persons have been wrongly paid by an administrator acting under a mistake, then protection to all concerned is afforded by section 65 of the *Trustees Act 1962*;

Tenth, there may be technical legal difficulties in ascertaining the point at which an administrator's duties may be said to have determined;<sup>14</sup>

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<sup>12</sup> In about 1975 the then Master of the Supreme Court informed the Commission that he could recall only one case in the previous fifteen years where a creditor or beneficiary had applied to have the bond assigned to him in order that he could take action on it. As early as 1970 the English Law Commission had already concluded that it was 'extremely rare' for action to be taken on administration bonds. A very experienced probate practitioner has recently informed the Commission that he can recall no case in his twenty years of practice in which action has been brought against an administration surety: in his view, the system of sureties is a waste of time and money. Two Registrars of the Court have recently informed the Commission that, in their opinion, the system of sureties is unnecessary and burdensome on all parties.

<sup>13</sup> The Commission has been informed of a case in which an insurance company declined to act as surety where the beneficiaries were a widow and young children since the company, because of the age of the children, would remain contingently liable for too long.

<sup>14</sup> See, for example, the judgment of Evershed MR in *Harvell v Foster* [1954] 2 QB 367. See also the discussion on this point in the report of the Queensland Law Reform Commission on the *Law relating to succession* (1978) at 35 and in A R Mellows *The Law of Succession* (4th ed 1983) 277-282 and J B Clark *Parry and Clark on the Law of Succession* (8th ed 1983) 366-373.

Eleventh, the Commission is not aware that any litigation has in fact been brought against an administration surety in Western Australia since its previous report; and

Twelfth, in the only comprehensive reform of legislation governing the administration of estates of deceased persons so far carried out in Australia in recent decades, Queensland's *Succession Act 1981* abolished entirely the system of administration bonds and sureties. This legislation followed the 1978 report of the Queensland Law Reform Commission which concluded that the system was very costly to the community, and that it was simply not cost-effective. Subsequent experience in Queensland has apparently confirmed this conclusion.

3.13 Taking all of the abovementioned factors into account, the Commission now recommends that the system of administration sureties should be entirely abolished in Western Australia.

### **3. SMALL ESTATES - ESTATES NOT EXCEEDING \$10,000 IN TOTAL VALUE**

3.14 Sections 55 to 60 of the Act make provision for the Principal Registrar in Perth, and for district agents in country centres, to provide direct assistance to executors and those entitled to administration in cases where the value of the estate does not exceed \$10,000.<sup>15</sup> This figure was last reviewed by Parliament in 1977. It is not clear whether this figure refers to gross or net value: it is presumably the former, because net value is only ascertainable after the creditors of an estate have been identified (often by advertisement) or their claims proven within the limitation period.

3.15 Section 55 provides that in such cases application may be made 'direct' to the Principal Registrar or district agent; section 56 requires that such an applicant be furnished, free of charge, with all information necessary for him or her to 'fill up the affidavits and documents' in order to obtain a grant of representation; and sections 57-60 contain machinery provisions intended to give effect to sections 55 and 56, although there is nothing in the former sections which expressly limits their operation to the latter. It is fairly clear that these provisions as a whole were originally intended as a service funded by government which was

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<sup>15</sup> S 54(1) provides that the magistrate of every Local Court held at a town more than 80 kilometres from Perth is a district agent of the Principal Registrar.

designed to offset the disproportionate legal costs that would otherwise have to be borne by small estates in a large State in the days of poor communications.<sup>16</sup>

3.16 Present practice in the Probate Registry differs to some extent from the requirements of section 56, which limit assistance to the provision of 'information'. In fact officers of the Registry go beyond the call of duty by actually preparing the necessary documentation to enable a grant to be made to an applicant: such applications are colloquially known as 'office personals'. It appears that this practice is, in its net effect, a more efficient means of dealing with these cases than would be likely to follow from the mere provision of information to an applicant.

3.17 The Commission considers that the system provided for by sections 55 and 56 is a valuable service in respect of relatively small estates, but it recommends that the legislation itself should conform to what has by reason of its efficiency, become the practice. In addition, however, it is suggested that much of the content of sections 56-58 would more appropriately be contained in the Rules. Further, the sum of \$10,000 prescribed by section 55 as the basis of this procedure has not been reviewed since 1977. If the system in question is to continue to apply in accordance with its original conception then that figure is currently in need of further review, and the Commission recommends that it now be increased to \$30,000.

3.18 Information received by the Commission from several different sources suggests that the Probate Registry is currently maintained at an inadequate staffing level. Although this matter is not generally relevant to the Commission's present terms of reference, it is made incidentally relevant by the foregoing recommendation that the sum in section 55 be increased to \$30,000. Such an increase would result in an automatic, and considerable, increase in the number of personal applications that would have to be directly processed by the staff of the Registry. If the Commission's recommendation that the sum in section 55 be increased to \$30,000 is implemented, it would be necessary for the Registry to be given the staff to cope not only with its existing work load but with the additional work directly resulting from the increase.<sup>17</sup>

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<sup>16</sup> These provisions appear to have been modelled directly on the then recently enacted provisions relating to small estates contained in Division 4 of Part II of the *Wills Probate and Administration Act 1898* (NSW).

<sup>17</sup> The Commission has been informed that sample statistics gathered from 1988 and 1989 by the Executive Officer of the Supreme Court indicate that increases of the sum of \$10,000 in s 55 to the figures shown below would result in increases in the present number of applications of the order of the percentages shown opposite each of the figures:

#### 4. SMALL ESTATES - FUNDS NOT EXCEEDING \$6,000 IN A BANK

3.19 Another provision of the Act designed to facilitate the administration of small estates is section 139. Under this section, on the death of a person leaving not more than \$6,000 standing to his or her credit in a bank, the money can be released without the necessity for a grant of representation to be produced, but subject to the safeguards mentioned in the section.<sup>18</sup> The section empowers the bank to apply the funds, first in defraying the funeral expenses of the deceased customer (or in reimbursing a person who has already paid them) and second, in paying the balance to any person who appears to the satisfaction of the manager to be the surviving spouse, or a parent or child of the deceased. Payment of the money is a valid discharge to the bank against the claims of any other person. The system is not dissimilar to that more extensively provided for in the United Kingdom's *Administration of Estates (Small Payments) Act 1965*.

3.20 Section 139 contains safeguards designed to avoid abuse of the facility for which it provides. In particular, the funds to which it refers may not be released under that section unless no grant of representation is produced to the bank within one month of the customer's death, and no notice in writing of any will and of an intention to prove it or of an intention to apply for any grant of representation is given to the bank within the same period.

3.21 The figure specified in section 139 is unique in the *Administration Act* in being reviewable by proclamation, and was last reviewed in 1983. In line with inflation since its last review, the Commission recommends that the figure now be increased to \$15,000.

3.22 Section 139 applies to amounts standing to the credit of a person in 'any bank'. The word 'bank' is defined in subsection (3) to mean 'a person carrying on the business of banking and includes a building society'. It is not clear, however, how far this definition is intended to extend and, in the Commission's view, this should be clarified. In view of modern commercial practice whereby financial institutions other than banks as traditionally

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Increase to \$20,000 -	90%
Increase to \$30,000 -	230%
Increase to \$40,000 -	340%
Increase to \$50,000 -	450%

<sup>18</sup> Para 3.20 below.

understood, such as credit unions, fulfil a role as de facto banker for many persons, the Commission recommends that the facility provided by section 139 should be extended so that it has application not only in the case of banks and building societies but also in the case of credit unions and similar institutions.<sup>19</sup>

3.23 Section 139 clearly leaves open the possibility that its provisions might apply to estates containing funds in more than one bank. A small estate for purposes of section 139 might have a total value of tens of thousands of dollars represented by several small deposits. A commentator on the Commission's draft report pointed out that in this situation the system established by section 139 could be open to abuse, and submitted that there should be an upper limit applied to the total value of funds falling within section 139. Under this proposal, where the total value of the funds exceeded a specified figure, say \$30,000,<sup>20</sup> it should not be possible for any of the funds to be released without a grant of representation being produced. A difficulty with the suggestion is that whenever application was made under section 139 to a financial institution for the release of money standing to the credit of the deceased in that institution it would be necessary to satisfy the institution that all money left by the deceased in that and any other institution did not exceed the upper limit. Although this could be done by a statutory declaration made by the applicant, a statutory declaration would be required in every case in which it was sought to have funds released under section 139, even though in fact they might be the only funds left by the deceased. The Commission doubts whether the additional work involved in such a case can be justified and has decided not to adopt the suggestion.

## 5. EFFECT OF INFLATION ON VARIOUS PROVISIONS

3.24 As has been noticed, some provisions of the Act operate by reference to a specified sum of money, or percentage. In each case, the effect of inflation has been steadily to reduce the real entitlements of persons claiming under these provisions since the date when the

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<sup>19</sup> The Commission made a similar recommendation in its report on *Recognition of interstate and foreign grants of probate and administration* (Project No 34 Pt IV 1984) paras 8.2-8.4.

The Commission gave consideration to recommending that the facility provided by s 139 should be extended so that it applies not only to amounts of money as at present but to other small investments, such as units in a property or other trust. In some cases, this would save the expense of obtaining a grant. The Commission decided not to make such a recommendation because if the deceased had an investment of this type, often there would be some other asset in the estate in respect of which it would be necessary to obtain a grant. Furthermore, the investment will often be of a kind that title to it has to be transmitted into the name of the executor or administrator. There could in some cases also be difficulty in determining the value of the asset at the date of death in order to verify that the value was within the figure specified in s 139.

<sup>20</sup> The amount recommended in paragraph 3.17 above, as the upper limit that should be applicable to small estates for the purposes of ss 55 to 60 of the Act.

provision in question was last reviewed. In the case of entitlements of surviving spouses upon intestacy set out in the Table in section 14 of the Act, the last review was in 1982, when the basic sums of \$50,000 where there are children and \$75,000 where there are no children were fixed. In the case of section 17, which empowers the Court to authorise the expenditure of the whole or part of an infant's share in the estate on the infant's advancement where the value of the share does not exceed \$10,000, the last review was in 1965. In the case of small estates dealt with in sections 55-57, the sum of \$10,000 was fixed in 1977.<sup>21</sup> In the case of section 139 which authorises the release by banks and building societies of certain deposits, the sum of \$6,000 was fixed by proclamation in 1983.<sup>22</sup> The rate of interest on legacies under section 143A, fixed at 5% in 1965, has not been reviewed since that year.

3.25 The mechanism for review of these figures also varies as between section 139 and the other relevant provisions. In the case of section 139, the review is an executive matter, and the amount may be declared from time to time by proclamation; in all other cases, a variation in the amount requires a legislative amendment to the Act. It is obvious that, given the almost entirely non-political nature of these provisions, and the pressure which exists upon parliamentary time, regular review is difficult to achieve.

3.26 Earlier this year, the Commission drew the Attorney General's attention to the fact that the amount of the basic sum allowed to the surviving spouse under the Table in section 14 of the Act was now inadequate due to the effects of inflation. It suggested that rather than wait for the completion of the Commission's report on the full range of issues being dealt with in this project, the amount be increased to a more realistic figure. On 6 August 1990, the Premier of Western Australia issued a press release in which she said that the Government intended to introduce legislation seeking to have the basic sum allowed to the surviving spouse increased from \$50,000 to \$125,000 where the deceased was survived by children and from \$75,000 to \$175,000 where there were no children. The press release said that it had always been recognised that the basic sum to which the surviving spouse was entitled was a means through which that spouse could acquire the matrimonial home. Since 1982 when the sum was last amended the value of residential properties had increased by 133 per cent. This increase had been applied to the existing basic sums to obtain the figures mentioned.

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<sup>21</sup> Paras 3.14 and 3.17 above.

<sup>22</sup> Paras 3.19 and 3.21 above.

3.27 The other basic sum under the Table in section 14 is that of the deceased's parents where the particular facts of the case are such that they are entitled to a share in the estate. At present, the basic sum for parents is \$6,000, an amount which has not been increased since 1976.

3.28 The Commission believes that the basic sum allowed to parents and also the sum of money mentioned in section 17 and the rate of interest specified in section 143A should be substantially increased. After taking into account inflation, high interest rates over the past two decades and the comments received by the Commission from experienced practitioners in the field, the Commission has reached conclusions on the amount by which these figures should be increased. In the view of the Commission -

- (a) the basic sum allowed to the deceased's parents in situations where they are entitled to a share in the estate under the Table in section 14 should be increased from \$6,000 to \$18,000;
- (b) the sum mentioned in section 17 should be increased to \$50,000; and
- (c) the rate of interest on legacies fixed by section 143A should be increased to 8 per cent per annum.<sup>23</sup>

3.29 The Premier's statement of 6 August 1990 also said that the Government intended to introduce legislation seeking to amend the *Administration Act* so that future changes to the basic sums in the Table in section 14 can be prescribed by regulation. The Premier's announcement did not in terms apply to the amount in section 17, at present \$10,000, which is the value the infant's share in the estate may not exceed if the Court is to be able to authorise the expenditure in question. The announcement also did not extend to the amount in section 55, at present \$10,000, which the value of the estate may not exceed if the Principal Registrar or district agent is to provide direct assistance, or to the rate of interest on legacies under section 143A. Reference has already been made to the difficulty of achieving regular parliamentary review. However, review by regulation cannot be guaranteed to be more regular than review by Parliament. The Commission considers that the same method of amendment should apply to the amounts specified in sections 17 and 55 and the rate of

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<sup>23</sup> The Commission has already recommended increases in respect of the sums specified in ss 55 and 139: paras 3.17 and 3.21 above.

interest under section 143A as applies in the case of the basic sums under section 14. It therefore recommends that the Act be amended so that changes to these amounts and that rate of interest can be prescribed by regulation. In the case of section 139, the limit on the amount of the deposit which may be released without the production of a grant is already fixed by proclamation. In the opinion of the Commission the review of the amount should continue to be an executive matter.

## 6. PASSING OF ACCOUNTS

3.30 As has been noticed,<sup>24</sup> section 43(1)(b) of the Act provides that every person to whom probate or administration is granted shall be under a duty to file an inventory of the estate of the deceased and pass accounts relating thereto within such time, and from time to time, and in such manner as may be prescribed by the rules or as the Court may order. Rule 37(1) provides that every executor and administrator (other than the Public Trustee) shall file in the Registry accounts relating to the estate of the deceased in accordance with Form 4, and shall attend before the Registrar at such time as the Registrar may appoint to have the accounts passed and allowed. Rule 37(3) specifies a date within twelve months after the grant for this purpose, or such further time as a Judge or the Registrar may allow. These provisions appear to be mandatory. In practice, however, it is only in exceptional cases that either the requirement that an inventory and accounts be filed, or that the personal representative attend upon the Registrar to have accounts passed and allowed, is ever observed. These are cases in which the Registrar requisitions the passing of accounts in relation to an estate, and are very infrequent. In short, for almost all practical purposes, section 43(1)(b) and rule 37 have fallen into desuetude.

3.31 This apparent discrepancy between law and practice is explicable on the basis that there appears to be little point to either section 43(1)(b) or rule 37 as they stand. The requirement to file an inventory and to pass accounts in every case has never been the law in any jurisdiction comparable to Western Australia for the very good reason that the administrative burden of so doing would be out of all proportion to the requirements of the administration of justice. At common law, the rule is that a personal representative must exhibit on oath a full inventory of the estate and render an account of his administration

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<sup>24</sup> Para 2.11 above.

thereof *when required to do so by the Court*, but not otherwise.<sup>25</sup> It appears that a large part of the difficulty flowing from section 43(1)(b) is that while purporting to embody the substance of the legislation now contained in section 25 of the *Administration of Estates Act 1925* (UK), it does not in fact exactly reproduce the English model, which is drafted in a critically different way. The English legislation requires that a personal representative shall be under a duty, but only when required to do so by the court, to exhibit on oath in the court a full inventory of the estate and when so required to render an account of the administration of the estate to the court. There are currently no provisions in the English *Non-Contentious Probate Rules* dealing with this matter.

3.32 The Commission sees no good reason why every executor and administrator in Western Australia should comply with the apparent requirements of section 43(1)(b) or rule 37, except when required so to do by order of the Court or pursuant to a Registrar's requisition, as is in fact the existing practice. It is therefore recommended that section 43(1)(b) be reformed so as to reflect that practice, and the law in other comparable jurisdictions.

## 7. JURISDICTION OF THE COURT

3.33 An important defect in the form of the Act relates to its many provisions conferring separate specific kinds of jurisdiction on the Supreme Court in respect of matters that could readily be covered by one single provision, or (where they relate to routine practice matters) dealt with in the rules. There are, in fact, no less than 18 separate sections of the Act that expressly confer jurisdiction on the Court.<sup>26</sup> These are in addition to the general jurisdictional provisions contained in sections 16(1)(d)(i) and 18 of the *Supreme Court Act 1935*<sup>27</sup> and

<sup>25</sup> *Myddleton v Rushout* (1797) 1 Phillim 244; *Taylor v Newton* (1752) 1 Lee 15; *Re Thomas' Estate* [1956] 3 All ER 897, [1956] 1 WLR 1516.

<sup>26</sup> These are ss 4 (saving jurisdiction as 'heretofore'); 6 (jurisdiction to grant probate and administration where property is within Western Australia); 7 (jurisdiction to grant to one or more executors); 17 (jurisdiction to authorise personal representative to expend funds on the maintenance of certain infants); 19 (jurisdiction to order partition of realty); 20(1) (jurisdiction to permit personal representative to relinquish trust); 29(1) (jurisdiction to revoke grants of administration - but not of probate); 33 (jurisdiction where an infant is personal representative); 34 (jurisdiction where personal representative is out of the State); 35 (jurisdiction to appoint managers and receivers pending litigation); 36 (jurisdiction to grant administration with will annexed); 37 (jurisdiction where executor is absent or neglects to prove); 38 (jurisdiction to grant special letters of administration); 39(1) (jurisdiction on return of personal representative to the State); 42 (jurisdiction to make orders on neglect of personal representative); 45 (jurisdiction to settle all questions arising during administration); 61 (jurisdiction to reseal grants); and 141(2) (jurisdiction to appoint attorney for an absent executor).

<sup>27</sup> By s 16(1)(d)(i) the Supreme Court is a court of equity with the same powers and authority as the Lord Chancellor had at the commencement of the *Supreme Court Ordinance 1861*.

jurisdictional provisions relevant to the administration of estates of deceased persons contained in other statutes such as the *Trustees Act 1962*<sup>28</sup> and the *Public Trustee Act 1941*.<sup>29</sup>

3.34 Although there is some overlap between these various provisions,<sup>30</sup> the Commission sees no need for the reform of other statutes in relation to the Court's jurisdiction in matters of probate and administration. Both the *Trustees Act 1962* and the *Public Trustee Act 1941*, for example, contain relevant provisions that, on the whole, sit well with the general scheme of the *Administration Act*. However, some of the jurisdictional provisions of the *Administration Act* deal with comparatively minor matters (for example, sections 29(1) and 33) or with matters of routine practice (for example, sections 34, 37, 38 and 39(1)) that could well be contained in rules of court, where they might, in accordance with present day legislative practice, more naturally be expected to be found.

3.35 In the Commission's view, a modern *Administration Act* should not exhibit the present mishmash of jurisdictional provisions, but should contain only a few broad and facilitative provisions of this kind. A suitable model is found in the provisions of section 6 of the *Succession Act 1981 (Qld)*<sup>31</sup> and the Commission recommends its adoption. This would

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Section 18 grants the Supreme Court -

- (a) voluntary and contentious probate jurisdiction and authority in relation to the granting or revoking of probate of wills and letters of administration of real and personal property of the deceased within Western Australia;
- (b) the powers and authorities in respect of such jurisdiction as were given to the Court by the *Administration Act 1903* and any other Act in force in Western Australia immediately before the commencement of the Act, with authority to hear and determine questions relating to testamentary causes and matters.

<sup>28</sup> Section 6 of the *Trustees Act 1962* defines the words 'trust' and 'trustee' wherever appearing in that Act so as to include the duties incidental to the office of personal representative, and the office itself (unless the context otherwise requires). There are a great many provisions of the *Trustees Act 1962* that impinge directly upon personal representatives and their duties. In particular, the provisions of Parts IV, V, VI and VII each have this effect. The matter is considered below at paras 4.2-4.5.

<sup>29</sup> Sections 8 to 19, and the provisions of Part IV, of the *Public Trustee Act 1941* apply to the Public Trustee as executor and administrator of estates of deceased persons.

<sup>30</sup> For example, between s 45 of the *Administration Act* and ss 92 and 94 of the *Trustees Act 1962* (Court's jurisdiction to make orders relating to administration); and s 17 of the *Administration Act* and ss 58-60 of the *Trustees Act 1962* (maintenance and advancement of infants).

<sup>31</sup> S 6 provides as follows:

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

(2) The Court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that he left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.

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

mean that most of the jurisdictional provisions in the Administration Act could be dropped from the legislation. They would fall within the ambit of the new section and, as already indicated, some of them basically deal with matters of practice and would be appropriately located in rules of court and not in the Act.<sup>32</sup>

## 8. PROPERTY WITHIN THE STATE

3.36 By section 6 of the Act, the Court may make a grant of representation only where the deceased has left property situated in Western Australia. The realities of modern commercial and social life suggest that there may be cases in which a grant may be sought solely for the purpose of the personal representative bringing, or defending, legal proceedings, particularly proceedings that, although nominally in the name of the personal representative, are in reality by or against an insurance company.<sup>33</sup> The Commission sees no reason why the Court's jurisdiction must necessarily depend upon the fact of property being within the State, and it recommends that the property requirement be dropped from the Act. It notes that there is no such property requirement in modern legislation in Queensland,<sup>34</sup> or in New Zealand. It notes also that a previous recommendation to this effect contained in its report on *Recognition of interstate and foreign grants of probate and administration* submitted in November 1984, has to date not been implemented.<sup>35</sup>

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(4) Without restricting the generality of the foregoing provisions of this section the Court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the *Trusts Act 1973*.

(5) This section applies whether the death has occurred before or after the commencement of this Act."

<sup>32</sup> The equivalent legislation in Western Australia to Queensland's *Trusts Act 1973* is the *Trustees Act 1962*. The Commission has not examined in depth the questions of which of the jurisdictional provisions should be dropped and which should be relocated in rules of court. However, it seems to the Commission that ss 7, 29(1), 33, 34, 37, 38, 39(1) and 42 which basically deal with matters of practice are provisions which would be appropriately located in rules of court. It also seems to the Commission that ss 4 and 6 which would no longer be required could be repealed.

As to the position under the rules in Queensland, see the *Rules of the Supreme Court (Qld)* in K W Ryan, H A Weld and W C Lee *Queensland Supreme Court Practice* (Vol 1).

<sup>33</sup> See, for example, *Kerr v Palfrey* [1970] VR 825. See also the discussion of this point in the report of the Queensland Law Reform Commission on *The law relating to succession* (1978) at 5, and the subsequent enactment of s6(2) of the *Succession Act 1981* (QLD).

<sup>34</sup> Footnote 31 above in this ch.

<sup>35</sup> Report, 115. The Queensland provisions also state that a grant may be resealed notwithstanding that the person to whom the grant is made is not resident in Queensland. In its report *Recognition of interstate and foreign grants of probate and administration* (Project No 34 Pt IV) the Commission recommended that the executor or administrator need not be within the jurisdiction of the granting or resealing court. The Commission affirms that recommendation.

## Chapter 4

### OMISSIONS FROM THE ACT

#### 1. INTRODUCTION

4.1 The provisions of the *Administration Act*, as has been seen, are supplemented by a large body of case law generated by English courts over hundreds of years<sup>1</sup> as well as by courts in this country, and also by the relevant provisions of modern Western Australian legislation contained in other statutes. The case law and the other relevant statutes, at least in legal theory, fill in the gaps that exist in the provisions of the *Administration Act*. This chapter deals principally with the extent to which a reformed Act should incorporate or modify case law rules, or legislate for matters not currently dealt with elsewhere in the statute book. It does not deal with the possible reform of other statutes,<sup>2</sup> with minor or incidental matters, or with rules of practice and procedure.

4.2 Apart from the *Administration Act* itself, other Western Australian statutes relevant to this area of the law are comparatively modern and, on the whole, comprehensive pieces of legislation. The *Trustees Act* dates from 1962, the *Wills Act* from 1970, the *Property Law Act* from 1969, and the *Inheritance (Family and Dependants' Provision) Act* from 1972. The first three of these statutes have also been regularly amended to incorporate substantive reforms of the law. The *Administration Act* must be read with each of these, and other statutes as occasion requires; but by far the most important statute relevant to the day-to-day administration of estates of deceased persons in Western Australia is not the *Administration Act* at all, but the *Trustees Act 1962*.

4.3 By its definition, in section 6, of the word 'trust' so as to include the duties incidental to the office of a personal representative, and the word 'trustee' to include a personal representative (where the context admits), the *Trustees Act 1962*, brings to bear upon the office and duties of a personal representative all of its many provisions that apply to trustees generally. These include comprehensive provisions relating to the general powers of

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<sup>1</sup> For accounts of this complicated subject, see T F T Plucknett *A Concise History of the Common Law* (5th ed 1956) 709-746; Soward and Willan *Taxation of Capital* Ch II.

<sup>2</sup> The present report does not deal with the possible reform or rearrangement of the existing provisions of other Western Australian statutes to form something like a 'Succession Code': this would be beyond the Commission's present terms of reference.

trustees (Part IV), the maintenance of beneficiaries (Part V), the indemnity and protection of trustees (Part VI) and powers of the Court in relation to trusts and trustees (Part VII). The importance of these provisions for all personal representatives can hardly be overemphasised.<sup>3</sup>

4.4 But a consideration of these matters forms, as has been said, no part of this report. The Commission does not see the relevant provisions of other statutes as, in some sense, 'omitted' from the *Administration Act*. On the contrary, they form, on the whole, a harmonious body of legislation that generally sits well with the provisions of the latter Act. To the extent to which they do not, by reason of duplication or overlapping, then normal rules of statutory interpretation are usually sufficient to resolve the difficulty.

4.5 This chapter, then, does not consider specifically the possible reform or rearrangement of existing provisions of other legislation. It deals only with other matters that, in the Commission's view, should be included in the *Administration Act*, and for which neither that Act, nor any other Western Australian legislation, currently makes provision.

## 2. ACT TO BIND THE CROWN

4.6 Apart from section 10A(2) relating to the payment of the debts of insolvent estates, the Act does not expressly bind the Crown. In a given case, therefore, the question may arise whether a particular provision of the Act, or the Act as a whole, is intended to bind the Crown.<sup>4</sup> The answer to this question is not clear, especially in view of the express terms of section 10A(2). The Commission believes that there may be situations other than the payment of debts in respect of insolvent estates in which the Crown could be an interested party. These are where, for example, the benefit of a contract remains subsisting against the Crown; where a Crown lease forms an asset of an estate; or where the Crown holds a security in respect of an unpaid debt. In any of these, and similar, cases the Crown should,

<sup>3</sup> It is noteworthy that, by the terms of its section 6, the relevant provisions of the *Trustees Act 1962* apply to an executor who has not proved the Will, as well as to one who has. This is because an executor, unlike an administrator, derives his or her authority to act as personal representative not from the grant, but from the will: *Smith v Milles* (1786) 1 TR 475, 480; *Comber's Case* (1721) 1 P Wms, 766; *Woolley v Clark* (1822) 5 B & A 744. This fact alone calls into question the appropriateness in the present day of the various provisions of the *Administration Act* that apply only to an executor 'to whom probate has been granted': for example, ss 10(3), 12, 21, 38, 39, 42 and 43.

<sup>4</sup> As to which, see *Bropho v State of Western Australia and another* (1990) 93 ALR 205.

in the Commission's view, be treated like any other party in the administration of assets and should therefore be bound generally by the provisions of the Act.<sup>5</sup>

### 3. POSITION OF PERSONS ACTING INFORMALLY

4.7 In the emergency that frequently follows upon a person's death various actions, which may technically amount to acts of 'administration' of the deceased's estate, may be taken by various persons, including the surviving spouse, the executor appointed by the will, or by a person who might later obtain a grant of administration of the estate. Such actions might include dealing with property belonging to the deceased in order to place it in a state of security, paying various pressing debts (including the funeral account) and, possibly, selling assets to provide carry-on finance for the surviving spouse or other dependants. Because there is likely to be a lapse of many weeks, and perhaps of months, before a grant of representation is obtained, it is obvious that the law must provide a regime to govern the rights and liabilities of persons acting informally in this situation. In very limited circumstances, an Imperial Act of Parliament, Act 43 Elizabeth I ch 8, may apply.<sup>6</sup> The *Administration Act* itself has nothing to say on the subject, except that under section 20(2) an executor who proceeds to administer the estate but relinquishes office with the leave of the Court before a grant is made continues to be liable for "acts or neglects whilst he was acting as executor". Apart from these statutory provisions, the law in this State governing the rights and liabilities of persons acting informally is the case law dealing with the *executor de son tort*<sup>7</sup> and with executors themselves prior to their obtaining a grant of probate.<sup>8</sup>

4.8 The Commission believes that persons acting informally should be entitled to know where they stand, and that the situation should be the subject of express provision in the

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<sup>5</sup> This is already the case in respect of, for example, the *Trustees Act 1962* (s 5(5)), and the *Charitable Trusts Act 1962* (s 3). It is not the case in respect of the *Public Trustee Act 1941* or the *Property Law Act 1969*.

<sup>6</sup> By this statute a person entitled to administration who fraudulently procures administration to be granted to a stranger "of mean estate" as agent or attorney in order that the former might take the assets free from the deceased's liabilities renders himself liable to be charged as executor of his own wrong (*de son tort*). However, he is to be allowed all just debts owing to him by the deceased and all payments made by him which a lawful representative might have made.

<sup>7</sup> See generally J H G Sunnucks, J G Ross Martyn and G M Garnett: *Williams, Mortimer and Sunnucks - Executors, Administrators and Probate* (16th ed 1982) 92-102.

<sup>8</sup> *Id* 85-92.

*Administration Act*. Legislation on this matter already exists in Queensland.<sup>9</sup> Section 54(1) of the *Succession Act 1981* provides that where a person, not being one to whom a grant is made, obtains, receives or holds the estate or any part of the estate of the deceased otherwise than for full consideration or effects the release of any debt or liability due to the estate of the deceased, that person shall be charged as executor in his or her own wrong to the extent of the estate received or coming into his or her hands, after deducting any payment made by that person which might properly be made by a personal representative to whom a grant is made.<sup>10</sup> The Commission recommends that the provision be incorporated into the *Administration Act*.

4.9 A related problem that is sometimes encountered in this area involves an executor, properly appointed by the deceased's will, who duly proceeds to administer the estate, but who later, prior to obtaining a grant of probate, wishes to renounce. Under the existing case law, such an executor cannot do this. Deriving authority to act from the will, and having accepted the office by conduct, the executor cannot thereafter renounce,<sup>11</sup> but by section 20 of the *Administration Act* may only relinquish the office by leave of the Court, and on such conditions as the Court may impose. The Commission sees no good reason why the estate should be put to the expense of an application to the Court under section 20 of the Act where no grant of probate has yet been obtained. Accordingly, it is recommended that an executor acting informally should be given power to renounce the office before obtaining probate. A provision dealing with this is found in the *Succession Act 1981* (Qld).<sup>12</sup>

4.10 An executor or administrator after obtaining a grant may wish to ratify actions previously taken on behalf of the estate by some other person. Section 54(3) of *Succession Act 1981* (Qld) empowers a personal representative to ratify and adopt any act done on behalf of the estate by another if the act was one which the personal representative might properly have done. The Commission recommends that the provision be adopted in the *Administration Act*.

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<sup>9</sup> There is also legislation in England (*Administration of Estates Act 1925* s 28) and Victoria (*Administration and Probate Act 1958* s 33(1)).

<sup>10</sup> It is to be noted that this provision only protects those into whose hands a part of the deceased's estate actually comes or who effect the release of a debt or liability due to the estate of the deceased.

<sup>11</sup> Such an executor is technically an 'intermeddler', and having intermeddled, cannot renounce: *Re Badenach* (1864) 3 Sw & Tr 465; *Mordaunt v Clarke* (1868) LR 1 P & D 592.

<sup>12</sup> S 54(2).

#### 4. EXECUTORS BY REPRESENTATION

4.11 Where a sole or last surviving proving executor of a testator dies having by will appointed an executor, the latter executor, on proving the will, also becomes the representative of the original testator.<sup>13</sup> The rule goes back over several centuries. Executorship will be transmitted from proving executor to proving executor, such executors being called executors by representation. The chain of representation, as it is called, will be broken if a sole or sole surviving executor by representation dies intestate or without appointing an executor, or if the executor whom he or she appoints fails to prove. If when the chain of representation is broken, any part of the original testator's estate remains unadministered, the Court will grant letters of administration with the will annexed of the unadministered estate (known as a grant *de bonis non*). The rule as to the chain of representation is thus a convenient one as when it applies it provides an automatic mode of dealing with a problem that otherwise necessitates an application to the Court with its attendant costs and possible delays. In Victoria the common law position has been substantially enacted in section 17 of the *Administration and Probate Act 1958*. This is also the case in some other Australian jurisdictions.<sup>14</sup> In the Commission's opinion, a similar enactment is desirable in this state, so that the law on the topic will be more accessible than at present.

4.12 It can be objected that executorship by representation may cast upon the representing executor duties which, although perfectly willing to perform for a friend, he or she is unwilling to perform for a total stranger. This situation may arise when an executor is not aware that his deceased testator was, at the time of death, also an executor of an estate not then fully administered. The Commission considers it fair and reasonable that such a person should be able to renounce the executorship by representation, subject to the usual safeguards, without also renouncing the principal executorship. The ability so to renounce, which currently does not exist in England, Victoria and New Zealand, should in the Commission's view be conferred by provisions similar to those contained in section 47(3)(d) and (5) of *Succession Act 1981* (QLD). The Commission recommends accordingly.

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<sup>13</sup> *Barr v Carter* (1797) 2 Cox 429; 30 ER 199; W A Lee *Manual of Queensland Succession Law* (1st ed 1975) 76-77. See also statute 25 Edward III St V c 5 of 1351.

<sup>14</sup> *Succession Act 1981* (Qld) s 47; *Imperial Acts Application Act 1969* (NSW) s 13; *Imperial Acts (Substituted Provisions) Ordinance 1986* (ACT) Part 3. There is also a similar provision (s 13) in the *Administration Act 1969* (NZ).

## 5. LIMIT ON THE NUMBER OF PERSONAL REPRESENTATIVES

4.13 Western Australian law currently does not limit generally the number of persons who may conjointly act as executors or administrators. The Commission considers it desirable that the Act should so provide. This is because, at least to the extent to which they are or become trustees, personal representatives must act jointly and unanimously: the greater the number of persons involved, the greater is the likelihood that this rule will not be observed, by reason of disagreement or by failure of communication, and that an estate will be maladministered in consequence.

4.14 The Commission recommends that the number of personal representatives be limited to four persons at any one time. This is a number which allows reasonable freedom to testators in the appointment of executors, but which is not unwieldy. It is the number adopted for the purpose in the *Supreme Court Act 1981* (UK)<sup>15</sup> and by the *Trustees Act 1962* (WA) in the type of case mentioned in subsections (2)(a) and (4) of section 7 of that Act. It is also the number adopted by the Queensland Act.<sup>16</sup> As in Queensland, the Commission recommends that where more than four executors are appointed by a will, then their entitlement to a grant of probate should be in the order in which their names appear in the will, this order possibly reflecting the testator's own order of preference as between them.

4.15 In the case of applications for grants of administration, with or without the will, by more than four persons all having an equal entitlement to a grant, the Commission recommends that the Court (or a Registrar) should be expressly enabled to make the grant to the four applicants who, in the Court's or Registrar's opinion, would be the administrators most beneficial to the estate from the point of view of its proper and efficient administration.

## 6. EFFECT OF REVOCATION OF GRANT

4.16 Jurisdiction to revoke grants of probate and administration is conferred on the Supreme Court by section 18 of the *Supreme Court Act 1935*. Section 29 of the *Administration Act* duplicates this conferral of jurisdiction, but only with respect to grants of

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<sup>15</sup> S 114.

<sup>16</sup> *Succession Act 1981* s 48.

administration.<sup>17</sup> There is an ever-present possibility that proceedings may be brought to revoke probate or administration, especially where a later will of the testator is discovered or, where a grant has been made upon a presumption of death, it later appears that the testator was alive at the date of the grant. No Western Australian legislation deals expressly with the legal consequences of revocation of grants. These consequences relate particularly to acts performed by a personal representative during the currency of his or her grant, including the receipt and payment of money and other assets to creditors and beneficiaries, and dealings with assets belonging to the estate generally.

4.17 Part VI of the *Trustees Act 1962* contains several provisions that are relevant to this type of situation. These include section 65 governing the following of assets distributed by a personal representative, and section 75 empowering the Court to relieve a personal representative from liability where he or she has acted honestly and reasonably and ought fairly to be excused. There is, however, no general provision validating acts properly done during the currency of a grant and of the type to be found, for example, in sections 27 and 37 of the *Administration of Estates Act 1925* (UK), in section 42 of the *Administration and Probate Act 1958* (Vic) and in section 53 of the *Succession Act 1981* (Qld). These provisions typically operate so as to validate receipts, payments, transfer of property, and other actions performed by a personal representative in good faith during the continuance of a grant, notwithstanding its subsequent revocation. They should, in the Commission's view, be included in Western Australian legislation and it so recommends.<sup>18</sup>

4.18 In New South Wales, several provisions of the *Wills Probate and Administration Act 1898* deal with the making and revocation of grants upon a presumption of death.<sup>19</sup> In the Commission's view, legislation of the kind recommended in paragraph 4.17, together with the existing provisions of Part VI of the *Trustees Act 1962*, would, when read as a whole, provide a satisfactory regime governing the various types of problems consequent upon the revocation of a grant of representation, including the problems that can arise in respect of grants made upon a presumption of death. Accordingly, the Commission does not recommend the enactment of provisions expressly dealing with the revocation of grants which had been made upon a presumption of death.

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<sup>17</sup> As to s 18 of the *Supreme Court Act 1935* and s 29 of the *Administration Act*, see paras 3.33-3.35 above.

<sup>18</sup> S 20 of the Act does not appear to apply to revocations of grants.

<sup>19</sup> Ss 40A-40C.

## 7. PERSONAL APPLICATIONS FOR GRANTS OF REPRESENTATION

4.19 The system of personal applications for a grant of representation in cases of estates not exceeding \$10,000 in value has already been considered.<sup>20</sup> The question further arises whether, and if so to what extent, provision should be made to facilitate the making of grants of representation by the Probate Registry (whether or not transmitted to it by district agents for the Principal Registrar) upon personal applications generally in non-contentious matters, and regardless of the value of the estate.

4.20 There is, of course, no reason why any citizen may not currently act in person in order to obtain a grant in such a case in Western Australia, but no facilitative provisions of either the Act or the *Non-Contentious Probate Rules* exist expressly to govern such applications. The real question that is raised by this matter, however, concerns the extent of assistance that might be provided by the Probate Registry under a more regularized system of personal applications. This would clearly become relevant where, for example, the required documentation sought to be lodged by an applicant in person was found not to be in order, or where such an applicant were to request or demand that officers of the Probate Registry 'do it for him'.

4.21 These considerations in turn necessarily raise the more general question whether the Rules themselves require review, with a view to their possible simplification, and the streamlining of applications for grants by, for example, the use of simple printed forms to be provided by the Registry itself, or by eliminating some of the steps currently required for obtaining a grant in some simple or straightforward cases. The Commission considers that implementation of its recommendations made in paragraphs 3.3 and 3.5 above in relation to entitlements to grants of probate and administration could pave the way for simplified procedures to be embodied in the Rules in cases where there are no complicating factors.<sup>21</sup>

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<sup>20</sup> Paras 3.14-3.18 above.

<sup>21</sup> Well-established procedures for dealing with personal applications for grants of representation have existed in England for many years. The matter is governed by rule 5 of the *Non-Contentious Probate Rules 1987*, and is fully dealt with in *Tristram & Coote's Probate Practice* (27th ed) at 30-32. Rule 5 provides as follows:

5. Personal applications. (1) A personal applicant may apply for a grant at any registry or sub-registry.

(2) Save as provided for by rule 39 a personal applicant may not apply through an agent, whether paid or unpaid, and may not be attended by any person acting or appearing to act as his adviser.

4.22 The Commission considers, however, that these matters so directly raise the questions of the content, and possible reform, of the *Non-Contentious Probate Rules* and of staffing levels in the Probate Registry, as to be beyond its present terms of reference. It recommends, however, that a review of the Rules, and of their impact upon staffing levels, be undertaken by a suitably qualified person at an early date to determine whether there is scope for simplifying and streamlining applications for at least certain kinds of grants where there are no complicating factors, and upon the basis of personal application; and also whether it would be possible to operate the Rules in this manner with additional staff, either upon the payment of existing court fees or, alternatively, upon an economic fee-for-service basis.

## 8. MISCELLANEOUS MATTERS

4.23 There are three matters that have not historically fallen within the purview of legislation governing the administration of estates of deceased persons but which, by reason of modern conditions of life, and of judicial decisions, could now usefully be included in this legislation notwithstanding that they might with equal appropriateness be contained in other legislation such as for example, the *Property Law Act 1969*. In each case their direct impact upon the duties of a personal representative justifies their inclusion in a reformed *Administration Act*. These relate to temporally proximate deaths, testamentary gifts to unincorporated associations, and the granting of testamentary 'mere' powers of appointment.

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- (3) No personal application shall be proceeded with if -
    - (a) it becomes necessary to bring the matter before the court by action or summons;
    - (b) an application has already been made by a solicitor on behalf of the applicant and has not been withdrawn; or
    - (c) the registrar so directs.
  - (4) After a will has been deposited in a registry by a personal applicant, it may not be delivered to the applicant or to any other person unless in special circumstances the registrar so directs.
  - (5) A personal applicant shall produce a certificate of the death of the deceased or such other evidence of the death as the registrar may approve.
  - (6) A personal applicant shall supply all information necessary to enable the papers leading to the grant to be prepared in the registry.
  - (7) Unless the registrar otherwise directs, every oath or affidavit required on a personal application shall be sworn or executed by all the deponents before an authorised officer.
  - (8) No legal advice shall be given to a personal applicant by any officer of a registry and every such officer shall be responsible only for embodying in proper form the applicant's instructions for the grant.

**(a) Temporally proximate deaths**

4.24 The phenomenon of modern transport has given rise to the problem not merely of related persons who die simultaneously, but of related persons who die as a result of the same accident but not simultaneously. The former problem is dealt with in Western Australia by section 120 of the *Property Law Act 1969*.<sup>22</sup> The latter is not dealt with by legislation in this State at all. A relevant consideration in the latter case is that, unless a will provides to the contrary, assets are likely to flow needlessly from one person to another, and therefore to be administered twice. In a typical case, where, say, a husband dies in an accident and is survived for a relatively short time (say, one to fourteen days) by his wife who then dies as a result of the accident then, if the wife inherits property under the will or on the intestacy of the husband, the assets will need to be administered twice, and for no good or useful reason. To avoid this possibility most careful drafters draw wills giving property to closely-related persons on the condition of survival of the testator for a period of, say, 14, 28 or 30 days, the assumption being that if the beneficiary survives so long then he or she may well survive indefinitely. Many wills, however, and especially home-made wills, are not drafted in this way. Equally, there is nothing in the Western Australian law of intestate succession that recognises this type of situation. The Commission therefore recommends that it be dealt with in legislation reforming the *Administration Act*.

4.25 There is another reason why the Commission takes this view. This is because deaths of husband and wife in close temporal proximity may well result in substantial assets passing otherwise than in accordance with the wishes of the persons so dying. Where, for example, a husband and wife each have children by a previous marriage then, unless their wills, or the law, provide to the contrary, there is every likelihood of the property of the first of them to die in close temporal proximity passing to the children or other issue of the second so to die, under the residuary clause of the will, or on the intestacy, of the latter. In such a case, many persons would prefer that if their spouse did not survive indefinitely then it should be their own issue or other relations who inherit, not the issue or other relations of the spouse.

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<sup>22</sup> This provides that, for most legal purposes, where two or more persons die in circumstances in which it is not reasonably possible to determine the order of their deaths, then they shall each be presumed to have survived the other or others and to have died immediately afterwards.

4.26 This is a subject on which a variety of views have been expressed to the Commission. On balance, the Commission considers that the ultimate responsibility for the inheritance to property upon death rests with the individual citizen, and that the legislature should make only facilitative provisions with regard to the phenomenon of temporally proximate deaths. Accordingly, the Commission recommends that in cases both of dispositions of property by will, and of intestate succession, a beneficiary or distributee should be required to survive the testator or intestate for the period of thirty days, unless the will provides to the contrary, and that in the case of a beneficiary or distributee failing so to survive then he or she should be deemed to have predeceased the testator and his or her interest in the property should therefore be treated as having lapsed.<sup>23</sup>

#### **(b) Testamentary gifts to unincorporated associations**

4.27 Judicial decisions, both of Australian and of English courts, have over many years invalidated certain gifts by will to unincorporated associations on the ground that, being purportedly made to non-existent legal entities, such gifts offend the rules of law against non-charitable purpose trusts on the one hand, or of perpetuities on the other.<sup>24</sup> Equally, some such gifts have been upheld, or 'salvaged', as being for the benefit of the individual members of the association,<sup>25</sup> or as being 'in augmentation of its general funds'.<sup>26</sup> The result of these cases is that the law in the area is, to a significant degree, technical, inconsistent, and uncertain.<sup>27</sup> Even if such a gift is upheld under existing law, the precise legal duty of the personal representative with regard to the distributable assets in his or her hands may be uncertain, raising questions as to whom payment should be made, and on what terms, and from whom a receipt and discharge should be obtained.

4.28 In 1978 the Queensland Law Reform Commission in its report *Law Relating to Succession* considered these matters comprehensively.<sup>28</sup> It principally recommended that

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<sup>23</sup> Precedents are found in ss 32 and 35(2) of the *Succession Act 1981* (QLD).

<sup>24</sup> *Bacon v Pianta* (1966) 114 CLR 634.

<sup>25</sup> *Leahy v Attorney-General for New South Wales* [1959] AC 457; *Re Cain* [1950] VLR 382; see also *Re Denley's Trust Deed* [1969] 1 Ch 373.

<sup>26</sup> *Re Goodson* [1971] VR 801.

<sup>27</sup> For example, a legacy to 'the Communist Party of Australia for its sole use and benefit' will fail: *Bacon v Pianta* ((1966) 114 CLR 634); as will a legacy to 'the New Life Centre': *Re Haks* [1972] QWN 27; or to 'the Brisbane Revival Centre': *Re Hargreaves* [1973] QR 448. But a legacy for the general purposes of 'the Loyal Orange Institution of Victoria' (*Re Goodson* [1971] VR 801), or a Masonic Lodge (*Re Turkington* [1937] 4 All IR 501), or the Old Bradfordsians Club (*Re Drummond* [1914] 2 Ch 90) will succeed. Most lawyers find these distinctions absurd.

<sup>28</sup> Report 46-47.

gifts to unincorporated associations (as distinct from gifts to individuals), whatever their form, should be treated as gifts in augmentation of the general funds of the association, and therefore as legally valid; that assets representing these gifts be applied by the association in accordance with its constitutional rules from time to time governing the application of its general funds; and that simple rules be enacted governing the transfer of such assets, the issue of receipts, and the protection of the personal representative. These recommendations are now enacted as section 63 of the *Succession Act 1981* (Qld).

4.29 The Commission believes that these provisions embody a good solution to a frequently recurring and difficult legal problem. It is not aware that they have operated during the past nine years other than satisfactorily, and it recommends the adoption of similar rules for Western Australia.<sup>29</sup>

**(c) Testamentary 'mere' powers of appointment**

4.30 In the well known case of *Tatham v Huxtable*<sup>30</sup> members of the High Court of Australia cast doubt on the validity of a purported grant of certain kinds of 'mere' power of appointment by will of the kind often found in certain discretionary trusts on the ground that, if not amounting to a 'disposition' of a testator's property within section 6 of the *Wills Act 1970*, it could constitute an invalid delegation of the testator's will-making power to the donee of the power of appointment or discretionary trustee. Subsequent cases<sup>31</sup> have confirmed the reality of this problem, which has also been the subject of considerable academic comment.<sup>32</sup> The gist of criticism of the supposed invalidity of certain types of mere powers of appointment and discretionary trust provisions by will is that if they would be perfectly valid if contained in a deed inter vivos then there is no good reason why they should not be regarded as valid if contained in a will.

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<sup>29</sup> Section 63(3)(c) (as amended by the *Real Property Acts and Other Acts Amendment Act 1986*) which deals with the transfer of devised land would not appear to cater adequately for old system land. In this respect the Queensland provision should be adopted in an appropriately amended form in this State or expressly confined to land which is not old system land.

<sup>30</sup> (1950) 81 CLR 638.

<sup>31</sup> In particular, *Lutheran Church of Australia v Farmers Co-operative Executors & Trustees Ltd* (1970) 121 CLR 628; and *In the Will and Estate of Nevil Shute Norway* (Supreme Court of Victoria, 1963, unreported).

<sup>32</sup> See, for example, *Gordon* (1953) 69 LQR 334; *Keeler* (1971) 4 Adelaide L Rev 210; *Sundberg* (1974) 48 ALJ 527; *Baker*, (1975) 5 Adelaide L Rev 103; Hardingham, Neave & Ford, *Wills and Intestacy in Australia and New Zealand* 2nd ed, ch 5

4.31 In its report of 1978, the Queensland Law Reform Commission concluded that this criticism was well-founded, and it recommended the enactment of legislation to validate such mere powers and discretionary trust provisions. This legislation is contained in section 64 of the *Succession Act 1981* (Qld). It provides that if a power to appoint or a trust to distribute property would be valid if contained in a deed inter vivos then it shall be deemed to be valid if contained in a will.

4.32 The Commission, while tending to doubt the existence of a common law rule that would invalidate the relevant types of testamentary mere powers and discretionary trust provisions in any event, is of the view that, as a matter of caution, a similar provision to that of the Queensland legislation should be enacted in Western Australia in order that this matter be placed beyond doubt. It recommends accordingly.

## **Chapter 5**

### **SUMMARY OF RECOMMENDATIONS**

5.1 The Commission recommends that the *Administration Act 1903* be repealed and that a new statute, to be entitled *Probate and Administration Act*, should be enacted to replace it.

*Paragraphs 2.4-2.19*

5.2 The *Probate and Administration Act* should contain, inter alia, provisions having effect as follows:

- (1) Jurisdiction should be conferred on the Court in more general terms, and without the requirement that property of the estate be situated in Western Australia.

*Paragraphs 3.33-3.36*

- (2) The classes of persons entitled to grants of administration, both upon intestacy and with the will annexed, should be clearly set out in order of priority. However, the Court (or Registrar) should have a discretion to make a grant otherwise than in accordance with the statutory order in cases in which it is impracticable or undesirable for a person first entitled to a grant to receive it. In the latter case, the test to be applied should be whether a grant so made would be more beneficial to the estate or desirable to protect the interests of persons beneficially interested therein, and particularly of infants.

*Paragraphs 3.1-3.9*

- (3) Section 11 of the *Public Trustee Act 1941* (which except in certain circumstances gives the Public Trustee priority over creditors in entitlement to a grant of administration) should be repealed but a provision in similar terms should be enacted in the *Administration Act*.

*Paragraph 3.9*

- (4) The system of administration sureties should be abolished.

*Paragraphs 3.10-3.13*

- (5) The terms of new legislation corresponding to section 56 of the present Act (which requires the Principal Registrar or a district agent to furnish an applicant for a grant in a 'small estate' with the information needed to complete the necessary documents) should reflect existing practice in the Probate Registry.

*Paragraph 3.17*

- (6) The class of estates to which the provisions of sections 55-60 of the present Act apply ('small estates') should be those not exceeding the sum of \$30,000 in apparent gross value, provided the Probate Registry is given adequate staff to cope with the additional work that implementation of this recommendation will entail.

*Paragraphs 3.14-3.18*

- (7) The amount at present proclaimed under section 139 (which allows the release of funds standing to the credit of the deceased in a bank or building society without production of a grant where the funds do not exceed the proclaimed amount) should be increased to \$15,000. The section should apply not only to banks and building societies as at present but to credit unions and similar institutions.

*Paragraphs 3.19-3.23*

- (8) (a) Where the deceased dies intestate, the basic sum allowed to the deceased's parents in situations where they are entitled to a share in the estate under the Table in section 14 of the Act should be increased from \$6,000 to \$18,000.

(b) The sum mentioned in section 17 of the present Act relating to the maintenance of infants should be increased to \$50,000.

(c) The rate of interest on legacies fixed by section 143A of the present Act should be increased to 8 per cent per annum.

*Paragraphs 3.24 and 3.26-3.28*

- (9) The mechanism for the further review of -
- (a) the amount specified in section 17 relating to the maintenance of infants;
  - (b) the amount specified in section 55 being the value which the estate may not exceed if the Principal Registrar or district agent is to provide direct assistance; and
  - (c) the rate of interest fixed by section 143A on legacies,
- should be by way of regulation.

*Paragraphs 3.24-3.25 and 3.29*

- (10) A personal representative should be under a duty to file an inventory of the estate, and to pass accounts in relation thereto, only if required so to do by order of the Court or pursuant to a Registrar's requisition.

*Paragraphs 3.30-3.32*

- (11) (a) Persons acting informally in the administration of an estate (that is without a grant of representation) who receive or hold any part of the estate should be charged as executors in their own wrong but should be protected in respect of payments made by them which might properly be made by personal representatives to whom a grant was made.
- (b) An executor who proceeds to administer the estate prior to obtaining a grant of probate should be given power to renounce office before obtaining a grant.

(c) An executor or administrator after obtaining a grant should have power to ratify and adopt any act done on behalf of the estate by some other person if the act was one which the personal representative might properly have done.

*Paragraphs 4.7-4.10*

(12) Provision should be made for executorship by representation, subject to the right of renunciation in appropriate cases.

*Paragraphs 4.11-4.12*

(13) There should be a limit of four persons who may act as executors or administrators at any one time.

*Paragraphs 4.13-4.15*

(14) The legal consequences of the revocation of a grant of representation should be defined, but so as to be consistent with the provisions of the *Trustees Act 1962*.

*Paragraphs 4.16-4.18*

(15) The phenomenon of temporally proximate deaths should be regulated by the requirement that, unless a will provides to the contrary, a beneficiary either under the will or on the intestacy of another should survive the testator or intestate for a period of thirty days in order to inherit property under the will or upon the intestacy.

*Paragraphs 4.24-4.26*

(16) There should be a statutory regime governing testamentary gifts to unincorporated associations of individuals that resolves doubts as to the validity of such gifts under existing case law, and which protects a personal representative paying money or transferring assets under a will to such an association.

*Paragraphs 4.27-4.29*

- (17) Testamentary powers of appointment or trusts to distribute property should be deemed to be valid if they would be valid if contained in a deed inter vivos.

*Paragraphs 4.30-4.32*

- (18) The Act should expressly bind the Crown.

*Paragraph 4.6*

5.3 An early review of the *Non-Contentious Probate Rules* should be undertaken by a suitably qualified person, partly to determine whether an efficient system of personal applications for grants of representation could be instituted, on a court fees or economic fee-for-service basis, in cases where there are no complicating factors, but regardless of the value of the estate.

*Paragraphs 4.19-4.22*

5.4 Recommendations contained in the Commission's earlier reports *Recognition of interstate and foreign grants of probate and administration* (1984) and *The administration of assets of the solvent estates of deceased persons in the payment of debts and legacies* (1988) should be implemented in the new Probate and Administration Act.

*Paragraphs 1.2-1.4*

**J THOMSON, Chairman**

**R LE MIERE**

**CHARLES OGILVIE**

**GEORGE SYROTA**

14 August 1990.

## **Appendix**

### **COMMENTATORS ON THE DRAFT REPORT**

ANZ Executors & Trustee Company Limited

Challenge Trustees Limited

K F Chapman (Principal Registrar)

D G Doig (Under Secretary for Law)

A Fowke

M Hopper

Law Society of Western Australia

W A Lee

The Hon D K Malcolm (Chief Justice)

Perpetual Trustees WA Ltd

Public Trustee

R & I Trustees Limited

G T Staples

C G Watt (Registrar)