THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 34 – Part VII

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

REPORT

JUNE 1988

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

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

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

C W OGILVIE
Chairman

28 June 1988

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2.3 One superficially attractive solution to the latter problem would be for the law to provide, simply, that the entitlements of all of the beneficiaries under the will (or those entitled upon intestacy)[3] should be reduced equally (or "rateably") by so many cents in the

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

4. THE POSITION IN WESTERN AUSTRALIA

(a) The payment of debts

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

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

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

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

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

2.12 As has been seen, the old order, and the cases decided in relation to it, confers a

Chapter 3

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

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

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

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

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

Commentary and criticism

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

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

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

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

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

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

(c) The order confers a preference on real property

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

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

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

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

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

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

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

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

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

(e) The content of Class 4 is uncertain

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

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

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

6 Paras 4.8-4.9, 4.22 and 4.29.

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

8 *Webb v De Beauvoisin* (1862) 31 Beav 573, 54 ER 1261; *Re FTlCbt 0 Tc ER 1261;*

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

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

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

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

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

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

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

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

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

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

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

3.19 In *The University of Western Australia v The West Australian Trustee Executor and Agency Co Ltd*

(j) The existence of Class 8 is uncertain

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29 Para 3.26.

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

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

5. PROTECTED ASSETS

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

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

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

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

6. The TD ( ) Tj 0 abilities.

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

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

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

3.41 Neither the old order nor the statutory orders are however in any sense a complete or comprehensive set of rules covering all cases of marshalling among beneficiaries. This is because account must always be taken of a testator's wishes, express or implied. One example of this stems from the effect of *Locke K.124m*

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

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

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

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

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37 *Robertson v Broadbent* (1883) 8 App Cas 812, 815; *Re Cameron* (1884) 26 Ch D 19, 25-26.

38 See para 3.48 below.

39 *Re Smith*[1940] 0

Chapter 4

THE LAW IN OTHER JURISDICTIONS

1. INTRODUCTION

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

2. UNITED KINGDOM AND NEW SOUTH WALES

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

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[1] The South Australian legislation governing the administration of estates of deceased persons is principally contained in the *Administration and Probate Act 1919*. On the question in what order the assets of a solvent deceased estate must be applied in the payment of debts the Act is entirely silent. S 62 III equates legal and equitable assets for purposes of administration; *Locke King's Act* appears in s 52. The South Australian legislation is therefore of little assistance in relation to the subject of this report.

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

Class 2 - Assets not specifically disposed of by will but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

Class 3 - Assets specifically appropriated or disposed of by will (either by a specific or general description) for the payment of debts.

Class 4 - Assets charged with or disposed of by will (either by a specific or general description) subject to a charge for the payment of debts.

Class 5 - The fund, if any, retained to meet pecuniary legacies.

Class 6 - Assets specifically disposed of by will, rateably according to value.

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

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

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

Commentary and criticism

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

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

4.7 In relation to Classes 1 and 2, in some cases it may not be clear of what the residue of an estate consists. This is especially likely to be the case where a share of residue has lapsed. On one view, a lapsed share of residue is the property primarily liable to be applied in payment of debts because it falls within Class 1. The argument in favour of primary recourse to the intestate property is based upon the ground that a testator does not normally intend to make any testamentary provision at all for persons not named as beneficiaries in his will. On the other hand, it may appear that the very concept of "residue" is that property which remains **after** the payment of debts. If the latter appears from the terms of a will, then a lapsed share of residue will not be primarily liable because it is not a share of residue at all

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

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

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

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

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14 See paras 4.8-4.9 above.

15 *Roman Catholic Archbishop of Melbourne v Lawlor* 51 CLR 1 TD 70w (-) Tj 4.519 TD -0..34 8 Tc 1.5439 pts Dixer J(4

14 See paras 4.8-Rrd be acitwas achievfootsetes. Wretoegislat35..

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

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

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

4. QUEENSLAND

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

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

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

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

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

"29. Construction of residuary dispositions

Unless a contrary intention appears by the will -

(a) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the residuary estate of the testator both real and personal; and

(b) subject to this Act, where a residuary disposition in fractional parts fails as to any of such parts

59. Payment of debts in the case of solvent estates

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

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

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

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

Class 4 - Donationes mortis causa.

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

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

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

60. Payment of pecuniary legacies

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

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

and

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

61. Payment of debts on property mortgaged or charged

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

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

Commentary

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

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

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

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

(i) Donationes mortis causa are included

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

(j) Section 59(2) requires clarification

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

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

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

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

(l) Section 60 should refer to general legacies

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

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

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

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

26 Paras 4.7-4.9.

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

28 Para 4.14.

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

(n) Section 61 requires amendment

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

(o) Conclusion

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

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

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

5. SUMMARY

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

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

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

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

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30 See para 4.17 above.

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

Chapter 5

THE REFORM OF THE LAW IN WESTERN AUSTRALIA

1. OPTIONS FOR REFORM

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

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

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

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

These matters are now considered in turn.

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

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

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

(b) Is a statutory order of assets necessary?

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

(c) The place of intestate property

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

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

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

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

(e) Conclusion

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

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

2. SUGGESTED AMENDMENTS TO THE QUEENSLAND REFORM

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

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

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

(a) Preferential treatment of specific dispositions

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

(b) The rule in *Lutkins v Leigh*

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

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

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

11 See para 4.42 above.

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

Chapter 6

THE COMMISSION'S RECOMMENDATIONS

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

6.2 The Commission therefore recommends that -

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

Paragraphs 4.25-4.43, 5.1-5.12

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

Paragraphs 3.41-3.43, 5.16

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

Paragraphs 3.21, 4.37, 5.17

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

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

Paragraphs 4.38, 5.19

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

Paragraphs 4.40, 5.20

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

Paragraphs 3.24-3.32, 4.41-4.42, 5.21

C W OGILVIE,
Chairman

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M E RAYNER

G SYROTA

J A THOMSON

28 June 1988