RELEASE OF WILLS AND OTHER DOCUMENTS GUIDELINES

INTRODUCTION

There is no entitlement in Western Australia to inspect a will before a testator's death. In addition, there is no statutory entitlement in Western Australia to inspect a will after a testator's death and before it is admitted to probate. Once a will has been proved a search can be made and upon payment of the relevant fee a copy of the probate which includes a copy of the will can be obtained.

The purpose of these Guidelines is to provide assistance to lawyers who hold documents on behalf of their clients and are faced with a request to access these documents. Particular attention will be given to access to wills as this is the area where most problems seem to arise.

REQUESTS GENERALLY

All lawyers who hold documents on behalf of their clients hold those documents as a bailee and are obliged to ensure that the documents are stored safely. All requests for those documents must be treated with care bearing in mind the need to protect the confidentiality of the client. For this reason, the release of documents should be authorised by a lawyer and not treated as an administrative task. Before a document is released from safe custody the lawyer must check that the request came from the client. Particular care should be taken with email requests. Where the request for an original will is in writing the signature on the written request should be compared with the signature on the will. If the client is not known personally to the lawyer authorising the release of the document, a procedure for checking the identity of the client should be in place and be carried out. The lawyer cannot charge for the time spent in making the necessary enquiries before approving the release of documents unless this is authorised in the safe custody agreement with the client.

The date of the release and the details of the documents released should be recorded in the safe custody register together with the receipt signed by the client or the person authorised to collect the document on behalf of the client. Where another person collects the documents on behalf of the client or where one person is authorised to collect documents which are held on behalf of two or more clients the authority to collect should also be retained.

It is not proposed in these guidelines to discuss the vexed question as to whether such records should be kept in written form or whether digital records are adequate.

RELEASE OF WILLS WHEN THE TESTATOR IS ALIVE

To a Duly Appointed Administrator Under Guardianship and Administration Act 1990 (WA)

At common law there is no right to inspect a testator's will while the testator is alive. A will is considered to be a private document. As Michael Bowyer[1] points out it is dangerous to rely upon what is in a will while the testator is alive as a will has no effect until the testator dies. The testator may revoke or vary the will or the will may be not be valid. In South Australia s 40 Guardianship

and Administration Act 1993 (SA) enables a duly appointed administrator to view the will of a represented person if that represented person has lost capacity but the administrator cannot disclose the contents of the will. There is no equivalent provision in the Western Australian Act. The only provision relating to a will is contained in Part B of Schedule 2 of the Act which in subparagraph (e) empowers the State Administrative Tribunal in exercise of its functions for the administration of estates under s 72 (1) to make orders as it thinks fit for the purpose of preserving any property forming part of the estate of the represented person and for this purpose is empowered by subparagraph (f) to require the production of documents '*by calling for, and inspecting, any testamentary instrument of the represented person'.*

An administrator is required to act in the best interests of the represented person (s 70 (1)). This includes (s70 (2)(e) of doing so in consultation with the represented person, taking into account as far as possible the wishes of that person as expressed, in whatever manner, or as gathered from the person's previous actions. However, the appointment of an administrator may be as a limited administrator or a plenary administrator. Where the appointment of an administrator is limited a request to see the will of the represented person may not be justified. However, if the administrator has plenary powers which include the power to sell property a request to a lawyer to see the will of the represented person may be justified as the will may contain specific gifts of property.

Lawyers in Western Australia are bound by the *Legal Profession Conduct Rules 2010 (WA)* which provide in rule 9 that a practitioner must not disclose client information to a person other than the client. The rule lists a number of exceptions which include the right to disclose information if the client expressly or impliedly authorises the disclosure or the practitioner believes, on reasonable grounds that the client has authorised the disclosure or if the practitioner is permitted or compelled by law to disclose the information to that person. An example of the latter is where the Family Court of Australia has issued a subpoena requiring a copy of a will of a testator who is still alive be produced to the Family Court.[2] Rule 6 (1) (a) also provides that a practitioner must act in the best interests of a client in any matter where the practitioner acts for the client.

If the administrator needs to sell an asset in order to make proper provision for the care of the represented person then it may defeat a provision in the will. In other Australian jurisdictions there are provisions in the legislation which provide that if this occurs the gift is not adeemed but if when the represented person dies the proceeds can be identified the proceeds of the sale or what is left of them can replace the gift of the property. In *Re Hartigan; ex parte Public Trustee*[3] Parker J held that where a property is sold by a person other than the testator, when the testator is incapable of selling the property or of altering an existing will to give effect to the changed circumstances, the gift should not be adeemed whether or not the person effecting the sale knew of the terms of the will. This decision has been criticised by the New South Wales Court of Appeal in *R L v NSW Trustee and Guardian*[4] but has been cited with approval by the Supreme Court of Queensland in *Public Trustee of Queensland v Lee.*[5]

It can be seen that there is no straight forward answer to this problem. It may be that if the administrator is a plenary administrator the powers given to the administrator by s69 (2) and (3) of the Act are sufficient authority for the administrator to access the will of the represented person.[6] Before releasing any documents to an administrator a lawyer should check the identity of the administrator and sight a copy of the order appointing the administrator. If the order appointing the administrator is limited the lawyer will need to consider whether access to the will of the represented person is necessary for the performance of these limited functions. Even if the administrator has plenary powers the lawyer may still have concerns regarding the release of the will. It may be appropriate to suggest to the administrator that the administrator apply for directions pursuant to s 72 of the Act and request orders be made which are within the power of the State Administrative Tribunal pursuant to Part B of Schedule 2 and in particular subclauses (e) and (f).

To an Attorney Appointed under an Enduring Power of Attorney

Similarly, an attorney appointed under an enduring power of attorney may need to sell assets in order to make proper provision for the care of the donor. However, ss 69, 70 and 72 of the Act do not apply to an attorney. Section 104 of the Act provides that an enduring power of attorney may be created by using the form, or substantially the form, being Form 1 contained in Schedule 3 of the Act. This form provides that the attorney is authorised to do on behalf of the donor anything that can lawfully be done by an attorney. There are certain actions which an attorney cannot lawfully do. For example, an attorney cannot vote on behalf of the donor and the attorney cannot make a will on behalf of the donor. On the other hand, s 107 provides that the attorney must *'exercise his powers as attorney with reasonable diligence to protect the interests of the donor'.* As the lawyer should also act in the interests of the client this may mean that in order to preserve, where possible, the gifts contained in the donor's will the lawyer may need to provide some information regarding the will of the donor to the attorney. How much information and how this should be done is discussed later. There are of course situations where the attorney has no need to access the information contained in the will and in those circumstances the request should be politely refused.

Before any information is released the lawyer should ask three questions:[7]

1. Does the enduring power of attorney comply with the form in the Act?
2. Was the enduring power of attorney properly executed?
3. Are there any issues with the donor's capacity to execute the enduring power of attorney?[8]

A further question should also be asked. Is the donor still alive? There have been instances when an attorney has sought to access the will on the death of the donor so that the attorney can distribute the estate. The lawyer should advise the attorney that the enduring power of attorney ceases on the death of the donor.

It should also be noted that the form for creating an enduring power of attorney contains two alternatives. The enduring power of attorney may only be operative during a period when the State Administrative Tribunal declares that the donor does not have legal capacity. If this is the case the lawyer will need to see the order.

If the enduring power of attorney comes into effect immediately the lawyer should ascertain whether it is possible to obtain instructions from the client as to whether the will should be made available to the attorney. In many cases a person who has legal capacity is not in a position to attend to their financial affairs due to frailty or their inability to access their finances by electronic means and rely on their attorney to do this for them even though he or she may have legal capacity.

It has been suggested by some commentators that when drafting an enduring power of attorney for a client the document should contain a paragraph stating whether or not the donor wishes the attorney to see the donor's will before the donor's death if the donor is incapacitated. Although clause 3 of the authorised form permits conditions or restrictions to be inserted it is not usual to insert any conditions or restrictions due to the difficulty in Western Australia in having an enduring power of attorney containing conditions and restrictions lodged at Landgate. It is however, possible for the safe custody agreement with the client regarding the holding of the client's will in safe custody to contain a clause to this effect.

Releasing the Will to the Administrator or Attorney

In South Australia a detailed study regarding the release of wills came to the conclusion that there should be no change in the law to enable the release of a will prior to the testator's death.[9]

Previously, it was mentioned that in South Australia a duly appointed administrator could view the will of the represented person. However, in order to look after a represented person's financial affairs an administrator in Western Australia or an attorney appointed under a valid enduring power of attorney may need to see the will. This does not mean that the original will should be released to the administrator or attorney. At no time should this be done. Section 78 (1)(b) of the Act provides that a person ceases to be an administrator on the death of the represented person. An enduring power of attorney is revoked on death. The will does not become operative until the death of the testator and therefore there can be no reason to give the administrator or attorney the original will.

There are three possible types of access:[10]

1. a photocopy of the entire document;
2. a photocopy with some parts blocked out;
3. information about the document.

The problem with 1 is that too much information may be given and with both 2 and 3 is that it might mislead the administrator or attorney. What is the best course of action is really something, in the absence of an order from a court or tribunal or clear instructions from the client, for the lawyer to decide after taking into account what would be in the best interests of the client. If the question to the lawyer is 'Would you please check the will and see if it is in order for me to sell the house?' It might simply be sufficient for the lawyer to say it is (or is not) in order to sell the house. Unfortunately, even such a simple question and answer may in certain circumstances create the wrong impression. Whatever decision is made the lawyer should fully document the reasons for releasing a copy of the will or the information contained in the will or for refusing to do so.

RELEASE OF WILL UPON DEATH OF TESTATOR

Upon the death of the testator the only person to whom the will can be released is the executor named in the will. In *Hawkins v Clayton* {1988] HCA 15 (1988) 164 CLR 539 the High Court held that that the solicitors who held the deceased testator's will in safe custody and knew of his death had a duty to find the executor and inform him of the existence of the testator's will. Whilst ascertaining whether the testator had died was not part of this duty, as the solicitors concerned knew of the testator's death, it could be seen as an extension of this duty and therefore lawyers who hold wills in safe custody should have a system in place for checking the current death notices.

It is not usual to ask for proof of death in the form of the death certificate before providing the executor with a copy of the will as the death certificate will not be immediately available. The executor may require a copy of the will to ascertain whether the will contains any instruction regarding burial or cremation. Sometimes the will may assist in identifying assets. However, where the death certificate has not issued it is prudent for the lawyer to check if a death notice has been published in the press or if there is notification of a funeral on the Western Australian Cemeteries Board web site. If the lawyer who is holding the will is not instructed to apply for the grant of probate the original will should only be handed over after the executor has provided proof of identity. If there is more than one executor named in the will the original will should only be handed over to one of the executors if authority to do so is provided by the other executor or executors. A receipt should be obtained and the executor should be advised not to mark the original will in any way nor to pin or clip anything to the will.

There will be cases where the executor named in the will has predeceased the testator or does not have capacity to act as executor. In these circumstances, careful consideration must be given by the lawyer as to whom should be provided with a copy of the will. If there is no substitute executor named in the will, if doubts are raised about capacity or if there is a dispute amongst the

beneficiaries as to who should apply for the grant advice from a lawyer experienced in this particular area may need to be obtained before the original will is handed over.
There is also the possibility that a will, particularly one which was made many years before the death of the testator, has been revoked by marriage, divorce or a later will.

Unlike most of the other states and territories, there is no specific legislation in Western Australia for interested persons (other than the executor) to be provided with access to the will of a deceased person prior to probate of the will being granted. South Australia is the only other state that does not have such a provision. Once probate has been granted a copy of the probate which includes a copy of the will is a public document and pursuant to rule 43A of the *Non-contentious Probate Rules 1967* (WA) a copy can be obtained from the Supreme Court upon payment of the required fee.

Master Sanderson considered this issue in *Chapman v Garrigan* [2017] WASC 336. He confirmed that there was no statutory provision in Western Australia and referred to Order 73 Rule 20 of the R*ules of the Supreme Court 1971* (WA) pursuant to which a person can be ordered to bring in a will or testamentary paper. However, as he stated, this provision is only of use once proceedings have been issued. He observed that there had been no reported case in which a party had sought a copy of a will of a deceased testator prior to probate being granted. Master Sanderson's views on how this issue should be dealt with are as follows:

This is one of those areas where practitioners should exercise common sense. It is difficult to envisage any circumstances where it would be inappropriate for a party who may have an interest in an estate to be denied a copy of the will. Even if a potential beneficiary were to object to that course of action the named executor would be justified in providing a copy of the will upon request. Of course discretion would apply. A party who does not have and could not conceivably have any interest in the estate should not have access to the will. But otherwise the administration of the estate would run more smoothly if access were provided as a rule rather than as an exception to some assumed rule.[11]

Despite the comments of Master Sanderson, a lawyer acting for an executor should not provide access to the will without first obtaining instructions from the executor. Where the person seeking access to the will has an interest in the estate the executor should be encouraged to provide information regarding the will for the reasons given by Master Sanderson. The question which then has to be answered is what is a sufficient interest in the estate? The New South Wales legislation[12] which is the most recent and the most extensive legislation in Australia provides that a person having possession or control of a will of a deceased person must allow the following person or persons to inspect or be given copies of the will (at their own expense) namely:

(a) any person named or referred to in the will, whether as a beneficiary or not;
(b) any person named or referred to in an earlier will whether as beneficiary or not;
(c) the surviving spouse, de facto partner or issue of the deceased person;
(d) a parent or guardian of the of the deceased person;
(e) any person who would have been entitled to a share of the estate of the deceased person if that person had died intestate;
(f) any parent or guardian of a minor referred to in the will or who would be entitled to a share of the estate if the deceased person had died intestate;
(g) any person, including a creditor, who has or may have a claim in law or equity against the estate;
(h) any person under the relevant NSW legislation committed with the management of the estate of the deceased person immediately before the death of that person;
(i) any person appointed as an attorney of the deceased in an enduring power of attorney;
(j) any person prescribed by regulation.

The definition of 'will' includes a revoked will, a document purporting to be a will, a part of a will and a copy of a will.

The South Australian Law Reform Institute (SALRI) in its Report '*Who may inspect a will* '[13]considered that although the New South Wales legislation was a good starting point for the form of the legislation the persons entitled to access a will after death should be more limited. In particular, the SALRI after referring to the comments made by Master Sanderson set out above that access to a will should be limited to those who have an interest in the estate, was of the view that as an enduring power of attorney ceased on death the attorney should not have access. In addition, the enlargement of the categories of person by regulation was not supported as it might be extended to persons who did not have an interest in the estate and that persons (including creditors) having a claim either in law or equity against the estate should only have the right to access the will by order of a court. The final recommendation of the SALRI which have been supported by the Law Society of South Australia was that six categories of persons should have access to the will namely:

(1) Any person named or referred to in the will, whether as a beneficiary or not; any person named or referred to in an earlier will as a beneficiary of the deceased person.
(2) The surviving spouse, domestic partner[14] (whether same sex or not), or child or stepchild of the deceased person.
(3) The parent or guardian of the deceased person.
(4) Any person who would be entitled to a share of the intestate estate of the deceased person if the deceased person had died intestate.
(5) Any parent or guardian of a minor referred to in a will or who would be entitled to a share of the estate of the deceased person if the deceased person died intestate;
(6) Any person committed with the management of the deceased person's estate under the *Guardianship and Administration Act 1993* (SA).

This list of categories provides useful guidance for lawyers advising executors as to who should have access to a testator's will after the death of the testator but prior to the grant of probate being made.

CONCLUSION

These guidelines indicate that there is little assistance to be found in Western Australian legislation for the lawyer faced with a request to release a will during the lifetime of a testator to an administrator or an attorney once the testator has lost capacity. Similarly, unlike most other Australian jurisdictions there is no legislation relating to the release of a will once the testator has died. In all these circumstances, the above commentary can only provide guidance. It cannot provide a specific answer as to how each request should be dealt with, except to say that all requests should be treated carefully on their individual merits and whether the decision is to release a copy of the will or not, the decision and the reasons for that decision should be carefully documented.

[1] *Release of Wills When the Testator is Still Alive* Michael Bowyer, Principal Legal Officer, Public Trustee

[2] *Interaction Between Family Law & Succession Law* Andrew Davies Law Society of Western Australia Seminar 2 November 2012
[3] Parker J Unreported Supreme Court of Western Australia, 9 December 1997
[4] [2012] NSWCA 39
[5] [2011] QSC 409
[6] *Release of Wills When the Testator is Still Alive* Michael Bowyer
[7]*Release of Wills when the Testator is Still Alive* Michael Bowyer
[8] Ibid Michael Bowyer raises the situation of where the attorney says that the donor has severe dementia but the enduring power of attorney '*was only executed last week'.*
[9] The South Australian Law Reform Institute Report *'Who may inspect a will?'*
[10] *Release of Wills when the Testator is Still Alive* Michael Bowyer
[11] [2017] WASC 336
[12] Section 54 *Succession Act* 2006 (NSW)
[13] Link to be included as a footnote
[14] 'domestic partner is the South Australian terminology. In Western Australia the reference would be to a 'de facto partner'.