The Law Society of Western Australia
The voice of the legal profession in Western Australia

29 August 2024

The Hon John Quigley MLA
Attorney General
Level 5, Dumas House
2 Havelock Street
WEST PERTH WA 6005

By email: Minister.Quigley@dpc.wa.gov.au

Dear Attorney General

PRESSING MATTERS FOR REFORM IN WESTERN AUSTRALIAN SUCCESSION AND ELDER LAW

The Law Society of Western Australia and STEP WA have collaborated to prepare a joint submission regarding the pressing matters for reform in Western Australian Succession and Elder Law.

The attached submission was endorsed by Law Society Council on 28 August 2024.

The Law Society understands that STEP WA will be writing to you in support of this submission.

We understand that the *Guardianship and Administration Act 1990 (WA)* is currently being reviewed by the Law Reform Commission of Western Australia. We anticipate that this will be an opportunity to address some of the matters raised in this submission, however, a comprehensive and holistic review of the relevant legislation is required to address all issues raised in this submission.

We would be pleased to meet with you to discuss the progression of the above reforms as a matter of priority.

If you have any queries please contact Susie Moir, General Manager Advocacy and Professional Development on smoir@lawsocietywa.asn.au or telephone 9324 8646.

Yours sincerely

Paula Wilkinson
President

Encl.

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PRESSING MATTERS FOR REFORM IN WESTERN AUSTRALIAN SUCCESSION AND ELDER LAW

To

ATTORNEY GENERAL

Law Society Contact

SUSIE MOIR

Date

THURSDAY, 29 AUGUST 2024

The Law Society of Western Australia
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Introduction

There are a number of matters for reform in Western Australian succession and elder law, however, among the most pressing, are the following five:

1. Anti-ademption provisions

2. Enduring powers of attorney:

   (a) enhanced witnessing requirements;

   (b) standard form to be set out in the Regulations so that changes can be made more readily

3. Wills for minors

4. Revision of the requirement to establish parentage during the parent's lifetime

5. Clarity on the circumstances in which wills may be released

We appreciate that one or more of the above matters may have been raised with you previously, either by STEP WA or the Law Society of Western Australia, or both.

We are hopeful that, with the worst of COVID-19 behind us, the Government will now have sufficient resources to progress legislative reform in Western Australian succession and elder law, starting with the most pressing of matters first.

Anti-ademption provisions

We **enclose** copies (in Annexure A) of the following correspondence exchanged in 2021 regarding anti-ademption provisions:

- the Law Society's letter to you of 12 July 2021, proposing the introduction of legislative provisions in Western Australia to carve out an exception to the principle of ademption in cases where substitute decision-makers dispose of property of their principal, that property is the subject of a specific gift under the principal's will and the principal is unable to make a new will to cater for ademption of the gift, due to loss of testamentary capacity;

- your response by letter dated 23 August 2021.

Enduring Powers of Attorney

Apart from anti-ademption provisions, we are strongly of the view that the *Guardianship and Administration Act* 1990 (WA) should be amended as a matter of priority to ensure as far as possible that:

- the donor of an enduring power of attorney fully understands the nature and effect of the power before granting it;
- the donee of enduring power of attorney is fully aware of his or her obligations and responsibilities as attorney before accepting the power.

In particular, we propose that:

- as with the signature of the donor, the signature of the donee (evidencing acceptance of the power) be witnessed by two persons, at least one of whom is authorised to take declarations;
- in addition to (or as part of) formally accepting the appointment, the donee sign a statutory declaration (to be part of form) to confirm that they know and understand their role, responsibilities and obligations as attorney and that they have been provided with and read the separate information sheet (referred to in the following dot point.
- obligations in the Guardianship and Administration Act 1990 (WA), setting out the role, responsibilities and obligations of an attorney, be set out on the form, above the statutory declaration, in a form to be prescribed by regulation, prior to the acceptance of the appointment;

The proposals above are similar to Landgate's survivorship application form which requires such a statutory declaration.

These proposals are consistent with (though not as far reaching as) the model provisions for a nationally consistent enduring power of attorney proposed in the Law Council of Australia's Communique dated 6 August 2021.

At the moment, the signature of the donee of an enduring power of attorney does not need to be witnessed at all, nor is there any requirement for the donee even to date the instrument. The form of acceptance requires only that the donee acknowledge that he or she will be "subject to the provisions of Part 9 of the *Guardianship and Administration Act* 1990". But there is nothing on the form itself that says what the provisions of Part 9 are, nor anything which draws the donee's attention to their obligations as a fiduciary.

The reforms as proposed above are aimed at minimising the risk of inadvertent misuse[1] by the donee of an enduring power of attorney. They are consistent with (though not as far reaching as) the Australian Law Reform Commission report *Elder Abuse – A National Legal Response* (ALRC Report 131), May 2017. Refer in particular to Chapter 5 of that report entitled *Enduring Appointments* and to paras 5.24ff under the heading *Enhanced witnessing*.

As you know, the signatures of persons appointed under an enduring power of guardianship are required to be witnessed by two persons, at least one of whom is authorised to take declarations

[1] According to research [cite authority] much of the abuse suffered by donors of enduring powers of attorney arises not by virtue of fraud on the donee's part, but rather as a result of inadvertent misuse.

and it would seem sensible that the same requirement should apply to persons appointed under an enduring power of attorney.

To facilitate ease of amendment to the enduring power of attorney form, we also propose that, as with the enduring power of guardianship form, it be as prescribed by the Regulations.

Wills for minors

The third are which we believe needs to be addressed as a matter of priority is wills for minors.

Under s.7 of the *Wills Act* 1970 (WA), a will made by a person under the age of 18 years invalid.

Provisions to enable will to be made for persons without testamentary capacity were introduced in the *Wills Amendment Act* 2007 WA that came into force on the 8th of February 2008 (**Statutory Wills**). However, consistent with the general prohibition under section 7, section 40(2)(b) of the *Wills Act* specifically prohibits the court from making a Statutory Will for a minor.

We note there is legislation in other States under which it is possible:

- for a minor to make a Will in contemplation of marriage;[2]
- for a married minor to make a Will;[3]
- for a minor, with capacity, to make a Will after an application to the court with authorisation from the Court on the Court being satisfied that the minor understands the nature and effect of the proposed Will and that the proposed Will reflects the intentions of the minor and that it is reasonable in all the circumstances that the orders should be made;[4] and
- where the minor lacks testamentary capacity, for the court to authorise the making of a Will on behalf of the incapable person including a minor.[5]

The comparable provisions in Victoria, New South Wales, Queensland and South Australia are set out in the attached annexure (Annexure A).

In our view, similar provisions should be introduced into the WA *Wills Act* 1970 so that:

- a minor who has married and has responsibilities towards a spouse or, potentially a child, can thus reflect their intentions as to the disposal of any property that they may have;
- a minor child, with capacity, who has a considerable estate, and has valid reasons for not wishing to consider one or other of their parents or siblings as beneficiaries of their estate if they should die before 18, has the ability to make such a Will, on application to the Court and authorisation from the Court;

[2] Wills Act 1997 (Vic), section 5; Succession Act 1981 (Qld), section 9(2); Wills Act 1936 (SA), section 5

[3] Wills Act 1997 (Vic), section 5; Succession Act 1981 (Qld), section 9(2); Wills Act 1936 (SA), section 5

[4] Wills Act 1997 (Vic), section 20; Succession Act 2006 (NSW), section 16; Succession Act 1981 (Qld), section 19; Wills Act 1936 (SA), section 6

[5] Wills Act 1997 (Vic), section 21(3); Succession Act 2006 (NSW), Division 2; Succession Act 1981 (Qld), section 21; Wills Act 1936 (SA), section 7

- in the case of a minor who is incapacitated either since birth or through subsequent injury and has a considerable estate, an application can be made to the Court to authorise the making if a will on behalf of that incapable minor. Due regard can be had to the moral claim (or lack of moral claim) of family members that stand to benefit on an intestacy and/or to the inclusion of other persons with an important role in the life of the incapacitated minor who would not otherwise stand to benefit on an intestacy.

We note that, under the *Marriage Act* 1961 (Cth) a person who has attained the age of 16 years but has not attained the age of 18 years may apply to a Judge or magistrate for an order authorising him or her to marry. If such an order is granted, then it would not seem logical for that same person to be prevented from making a Will to deal with his or her assets for the benefit of his or her family.

In relation to the position where a minor is unmarried, but has testamentary capacity, the following two cases provide an illustration of the kind of circumstances that may warrant a Statutory Will for the minor.

In the South Australian case of *Re: J* (LC) [2014] SASC20, the minor possessed the sum of approximately $630,000.00 at the time of making the application. She had received these funds as an award of damages from a personal injury suit. The minor lived with her maternal grandparents, her mother having passed away when she was 2 years old. Her relationship with her father was tainted and she only wished to leave a sum of $20,000.00 to her father upon her death, and the rest and residue of her estate (after the payment of funeral and testamentary expenses) to her maternal grandparents. Had she passed away without a Will prior to attaining the age of 18 years, her father would have had a majority interest in her estate under the laws of intestacy. The Court considered her situation and her reasons for wishing to leave her estate and was satisfied of her understanding of the effect of the application and of the terms of the proposed Will. The Court then authorised the making of the Will by the minor.

In the Queensland case of *Re K* [2014[QAC 94, Atkinson J, authorised the making of a Will by a minor who had very severe personal injuries which were the subject of a lawsuit at the time of making the application. It was expected that the claim would settle prior to the minor obtaining the age of 18 years for a significant award of damages (given the nature of his injuries). The minor lived with his mother who had been his sole carer since she was released from hospital, and he "had virtually nothing to do with his father". The minor therefore wished to leave his entire estate to his mother should he predecease her. Were he to die intestate prior to attaining the age of 18 years, the disposition of his estate on an intestacy would not have reflected his testamentary wishes as his father would have shared in the distribution. Upon consideration of the evidence, the Court was satisfied as to the matters required by Section 19 of the Queensland Act and authorised the making of the Will by the minor.

In relation to the position where a minor is unmarried, and lacks testamentary capacity, the following case provides an illustration of the kind of circumstances that may warrant a Statutory Will for the minor.

The case of *Re "Charles"* [2009] NSWSC 530 involved an 11-year old child who had suffered severe and permanent brain injury as a result of physical abuse from his parents. The child received victim's compensation of $50,000.00 as a result of those injuries. The New South Wales Supreme Court approved an application made by the Minister for Community Services for a new Will on behalf of "Charles" to avoid this money being inherited by his parents following his death.

New provisions, enabling wills for minors, could easily be modelled on those already adopted in Victoria, Queensland, New South Wales and South Australia.

Requirement that paternity be acknowledged during the parent's lifetime

This requirement is contained in the *Administration Act* 1903 (WA), the *Wills Act* 1970 (WA) and the *Family Provision Act* 1972 (WA).

Section 12A of the *Administration Act* deals with intestacy. Subsection 12A(1) provides that where a person dies intestate then, for the purpose of determining who is entitled to participate in the distribution of the intestate estate, the relationship between a child and his parents shall be determined irrespective of whether the parents are or have been married to each other.

The difficulty arises from subparagraph 12A(2)(b)(i) which provides that, where the parents are not, or have not been, married to each other, the relationship between a child and his parent is recognised *only if parentage is admitted by or established against the parent in his lifetime*.

However, in inserting the requirement that parentage is admitted by or established against the parent in his lifetime, the following recommendation of the Law Reform Committee (predecessor of the Law Reform Commission) was not adopted:

> "The Committee considers that an illegitimate's right to claim from or through his father should not be conditional on paternity having been established against or acknowledged by the father during his lifetime…… The Committee considers that any apprehension about the possibility of false claims of paternity succeeding will be overcome by the general requirement of clause 4 (2) of the Bill, that matters or fact must be established to the "reasonable satisfaction" of the Court…. This standard was laid down by Dixon J. in *Briginshaw –v- Briginshaw* (1938) 60 CLR 336…"[6]

Provisions similar to s.12A of the *Administration Act* are found in s. 31 of the *Wills Act*, and s.4 of the *Family Provision Act* 1972 (WA).

The requirement that parentage be admitted by or established against the parent during the lifetime of the parent is unduly restrictive and requires modernisation, particularly in light of the availability of reliable and accurate DNA testing. This could be as simple as altering the relevant wording of the legislation as follows "*only if parentage is admitted by the parent during the parent's lifetime, or established against the parent, whether before or after the death of the parent*."

We note that submissions were made to the Attorney-General about this in recent years by a grandparent of a deceased child who left an illegitimate child whose paternity was not admitted during the deceased child's lifetime and so was unable to participate in the distribution of the estate on intestacy.

Release of Wills

The final priority area we wish to flag is the lack of any statutory entitlement to inspect a person's will:

- before death; or
- after death and before probate.

This causes problems for the custodians of originals wills, including law firms, the Public Trustee and other trustee companies.

Disclosure prior to death

[6] Para 34 report no. 2

Firms or bodies or other persons (**custodians**) that hold wills in safe custody for testators are often approached by the administrator or enduring attorney for a testator who has subsequently lost legal capacity, seeking access to the testator's will. The purpose for seeking access may be quite legitimate. For example, the administrator or attorney may wish to ensure that a proposed sale of their principal's property is not going to disturb any specific gifts contained in the principal's will (particularly in light of uncertainty surrounding ademption in such circumstances, as to which see above).

However, great care must be taken before granting access to a person who is not the testator. A will is considered to be a private document and the confidentiality of the testator must be protected. At the same time, it may be in the testator's interests to disclose the will, or certain parts of it, to an enduring attorney or administrator with a genuine interest. So custodians are placed in a difficult predicament.

We note that in South Australia s. 40 of the *Guardianship and Administration Act* 1993 enables a duly appointed administrator to view the will of a represented person if that represented person has lost capacity but the administrator must not disclose the contents of the will. Something similar could be introduced in the *Guardianship and Administration Act* 1990 (WA), expanded to cover enduring attorneys, in circumstances where access to the will is required to facilitate the due and proper discharge of the administrator's/enduring attorney's obligations towards the principal. We set out s.40 of the *Guardianship and Administration Act* 1993 (SA) in full as follows:

> **40 Administrator's access to wills and other records**
>
> (1) Subject to the terms of his or her appointment, an administrator is entitled to view, and take an extract from or copy of, any will or other testamentary disposition of the protected person and any records relating to the protected person's property.
>
> (2) A person who has the custody or control of a document referred to in subsection (1) must allow the administrator access to it.
>
> Maximum penalty: $2 500.
>
> (3) An administrator must not, except with the authority of the Tribunal, disclose the contents of a will or other testamentary disposition to which he or she has had access pursuant to this section to any person other than the protected person.
>
> Maximum penalty: $5 000.

Disclosure after death

The only person to whom a will can be released after the death of the testator is the executor named in the will. But there will be cases where the named executor has predeceased the deceased or does not have the capacity to act, in which case (in the absence of a substitute executor) the custodian is faced with difficulty and uncertainty as to whom should be provided with a copy of the will.

Uncertainty in this area could easily be removed with the introduction of legislative provisions along the lines of s. 54 of the *Succession Act* 2006 (NSW) which lists out the persons to whom custodians must grant access. We set out s. 54 of the *Succession Act* 2006 (NSW) in full as follows:

> **54 Persons entitled to inspect will of deceased person**
>
> (1) In this section—
>
> ***will*** includes a revoked will, a document purporting to be a will, a part of a will and a copy of a will.
>
> (2) A person who has possession or control of a will of a deceased person must allow any one or more of the following persons to inspect or be given copies of the will (at their own expense)—
>
> (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 as a beneficiary of the deceased person,

(c) the surviving spouse, de facto partner or issue of the deceased person,

(d) a parent or guardian of the deceased person,

(e) any person who would be entitled to a share of the estate of the deceased person if the deceased 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 of the testator if the testator had died intestate,

(g) any person (including a creditor) who has or may have a claim at law or in equity against the estate of the deceased person,

(h) any person committed with the management of the deceased person's estate under the *NSW Trustee and Guardian Act 2009* immediately before the death of the deceased person,

(i) any attorney under an enduring power of attorney made by the deceased person,

(j) any person belonging to a class of persons prescribed by the regulations.

Note—

"De facto partner" is defined in section 21C of the *Interpretation Act 1987*.

(3) A person who has possession or control of a will of a deceased person must produce it in a court if the court requires the person to do so.

We note the list of persons in the NSW legislation is quite broad and we would suggest that consideration be given to narrowing the scope to ensure that only persons with a legitimate interest are included.

May we also draw your attention to the fact that a Registrar of the Supreme Court has informed us that members of the public are approaching the Supreme Court seeking access to wills or an order that wills be released (which of course the Court has no power to accommodate). The Registrar has suggested that it would be helpful if there were legislation in place, along the lines of s.54 of the *Succession Act* 2006 (NSW), to which the Court may refer the public, setting out in clear terms who is entitled to access a will and in what circumstances.

Annexure A

Comparable provisions from Victoria, New South Wales, Queensland, and South Australia are set out below.

Victorian provisions

In Victoria the *Wills Act* 1997 under section 5 provides that a Will made by a minor is not valid. However, section 6 provides for Wills by minors who are married in the following terms:-

"Despite section 5 –

(a) a minor may make a Will in contemplation of marriage, and may alter or revoke such a Will, but the Will is of no effect if the marriage contemplated does not take place;

(b) a minor who is married may make, alter, or revoke a Will;

(c) a minor who has been married may revoke the whole or any part of a Will make while the person was married or in contemplation of that marriage."

Under part 3 of the Victorian Act dealing with Wills made or rectified under court authorisation, division 1 of that Act deals with court authorised wills by minors.

Section 20 of the Act provides as follows:-

"20. Wills by minors authorised by the Court

(1) Despite section 5, the Court may make an order under this section authorising a minor to make a Will in specific terms or revoke a Will;

(2) An order under this section may be made on the application of the minor or a person on behalf of the minor.

(3) The court may make the order only if the court -

(a) is satisfied that the minor understands the nature and effect of the proposed Will, alteration or revocation and the extent of any property disposed of under the proposed Will or alteration; and

(b) Is satisfied that the proposed Will, alteration or revocation accurately reflects the intentions of the minor;

(c) Is satisfied that it is reasonable in all the circumstances that the order be made; and

(d) Has approved the proposed Will, alteration or revocation.

(4) The court may make the order on the conditions it considers appropriate.

(5) To remove any doubt it is declared that an order under this section does not make, alter or revoke a Will of dispose of any property.

(6) In addition to the requirements of the execution of a Will specified in the Part 2 of the Act, one of the witnesses to the making of a Will under this section must be the Registrar.

(7) A Will under this section must be deposited with the Registrar….

Part 3 division 2 of that Act – Court authorised Wills for persons who do not have testamentary capacity –
Under Section 21 (3) the court may make an order under this section on behalf of a person who is a minor and who does not have testamentary capacity, but must not make an order under this section on behalf of the person who is deceased at the time the order is made.

The same information requirements that apply to an application for an order for persons who have attained their majority who do not have testamentary capacity as set out in section 28 of that Act apply also to applications made on behalf of a minor.

New South Wales

In New South Wales the position is governed by the *Succession Act* 2006 No 80.

Under Part 2.2 – Wills made or rectified under Court authorisation, division 1 dealing with Wills by minors provides as follows:-

16. Court may authorise minor to make, alter or revoke a Will

(1) The court may make an order authorising a minor;

(a) to make or alter a Will in the specific terms approved by the court, or;

(b) to revoke a Will or part of a Will

(2) An order under this section may be made on the application of a minor or by a person on behalf of the minor.

(3) The court may impose such conditions on the authorisation as the court thinks fit.

(4) Before making an order under this section, the court must be satisfied that:

(a) the minor understands the nature and effect of the proposed Will or alteration or revocation of the Will and the extent of the property disposed by it, and

(b) the proposed Will or alteration or revocation of the Will accurately reflects the intentions of the minor; and

(c) it is reasonable in all the circumstances that the order should be made.

(5) A Will made under this section is not valid unless:

(a) for a Will – the Will is executed in accordance with the requirements Part 2.1 (providing for the usual requirements of the Will to be signed by the Testator and two witnesses to attest to the same);

(b) In addition to the requirements of Part 2.1, one of the witnesses to the making of the Will under this section is the Registrar, and

(c) The conditions of the authorisation (if any) are complied with.

(6) A Will that is authorised to be made, altered or revoked in part by an order under this section must be deposited with the Registrar under Part 2.5.

(7) Failure to comply with sub-section 6 does not affect the validity of the Will"

In addition, under section 17 of the New South Wales Act the Will of a deceased person that is a court authorised Will for a minor is a valid Will. A court authorised Will for a minor will be one where a court in a place outside of New South Wales has made an order authorising a minor to make the Will or the Will was executed according to the law of the place relating to the Wills of minors and the minor was a resident in that place at the time the Will was executed.

Under division 2 of the *Succession Act* the court may make authorised Wills for persons who do not have testamentary capacity. Again, under section 18 (4) the court may make an order in this section on behalf of a person who is a minor and who lacks testamentary capacity. However, the court may not make an order under sub-section (3) unless the person in respect of whom the application is made is alive at the time that the order is made.

Again, the information required in support of application for leave is set out in section 19 of the *Succession Act* and mirrors to a large extent those provisions set out in section 41 of the *Wills Act* 1970 WA setting out the contents of applications under Section 40 of that Act.

Queensland

In Queensland the position is similar.
Under section 9 of the *Succession Act* 1981 under sub-section (1) a Will made by a minor is not valid. However, under sub-section (2) –
"(a)" a minor may make a Will in contemplation of marriage, and may alter or revoke the Will, but the Will is of no effect if the marriage contemplated does not take place;
(b) a minor who is married may make, alter or revoke a Will; and
(c) a minor whose marriage has ended, whether by divorce, annulment or death of the minor's spouse, may revoke part or all of a Will made -

(i) in contemplation of a marriage; or
(ii) while the person was married.

Sub-Section 1 does not apply to a Will –

(a) Made under an order made under section 19;

(b) Mentioned in section 33X

Section 33X relates to Wills made by a minor under an order of a foreign court and mirrors the respective section in the New South Wales and Victorian legislation.

Under Section 19 of the *Queensland Succession Act* the court may authorise a minor to make, alter or revoke a Will in the following terms:

19(1) The court may make an order authorising a minor to –
(a) make or alter a Will in the terms state by the court; or

(b) revoke a Will or part of a Will

(2) A minor, or a person on behalf of a minor, may apply for an order under subsection (1).
(3) The court may make the order only if the court -
(a) is satisfied that the minor understands the nature and effect of the proposed Will, alteration or revocation and the extent of any property disposed of under the proposed will or alteration; and
(b) is satisfied that the proposed Will, alteration or revocation accurately reflects the intentions of the minor; and
(c) is satisfied that it is reasonable in all the circumstances that the order be made; and
(d) has approved the proposed Will, alteration or revocation.
(4) The court may make the order on the conditions it considers appropriate.
(5) To remove any doubt, it is declared that an order under this section does not make, alter or revoke or dispose of any property."

Again, like the other States' legislation, the Will must be executed in the manner required under the Act but one of the witnesses attesting the Will or other instrument must be the Registrar (section 20 (c)).

Further, as is the position with the other two States, under section 21 the court may authorise a Will to be made, altered or revoked for a person without testamentary capacity, including under subsection (7) "in this section – a person without testamentary capacity includes a minor".

The information required by the court in support of an application for leave to make a court authorised Will under section 21 is set out in section 23 of the *Queensland Succession Act* and again mirrors the evidence required under both the *Victorian and New South Wales Acts and the Western Australian Wills Act* section 41

South Australia

South Australia also has legislation dealing with Wills of minors under its *Wills Act* 1936.

Under division 2 – Testamentary Capacity the Act provides as follows:-

"5 – Will of Minor

(1) Subject to this Act, a minor cannot make, alter or revoke a Will;

(2) A minor who is or has been married may make, later or revoke a will as if he or she were an adult;

(3) A minor may make a Will in contemplation of marriage (and may alter or revoke such a Will) but the Will is of no effect unless the contemplated marriage is solemnised.

6 – Will of minor pursuant to leave of the Court

(1) The Court may, on application by a minor, make an order authorising the minor to make or alter a Will in specific terms approved by the Court, or to revoke a Will.

(2) An authorisation under this section may be granted on such conditions as the Court thinks fit.

(3) Before making an order under this section, the Court must be satisfied that –

(a) The minor understand the nature and effect of the proposed Will, alteration or revocation; and

(b) The proposed will, alteration or revocation accurately reflects the intentions of the minor; and

(c) It is reasonable in all the circumstances that the order should be made.

(4) A Will or instrument altering or revoking a will made pursuant to an order under this section –

(a) Must be executed as required by law and one of the attesting witnesses must be the Registrar or the Public Trustee; and

(b) Must be deposited for safe custody with the Registrar under section 13 of the *Administration and Probate Act 1919*.

(5) The Will may not be withdrawn from deposit with the Registrar by the minor unless the Court has made an order authorising the minor to revoke the Will or the minor has attained the age of 18 years or is married".

In Section 7 of the Act, dealing with Wills of persons lacking testamentary capacity, pursuant to permission of the Court, under subsection 7 (5) an order may be made under this Section in relation to a minor. The information required to support the application is set out in subsection 7 (4) and again mirrors the information requirements in each of the other States' legislation.

The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

12 July 2021

The Hon John Quigley MLA
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WEST PERTH WA 6005

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Dear Attorney General

ANTI ADEMPTION PROVISIONS IN WESTERN AUSTRALIA

The Law Society of Western Australia would like to raise with you the possibility of harmonised anti-ademption provisions in Australia, based on the provisions in New South Wales.

The issue of ademption and the question of access by an administrator or attorney under an Enduring Power of Attorney (EPA) to the Will of the deceased rises when an administrator or attorney disposes of assets specifically bequeathed under the represented person's Will, in which case the gift may then fail. It is unclear at law whether, for example, when an asset which has been sold by an attorney to fund the accommodation needs of an incapacitated principal, the balance of the sale funds pass to the intended beneficiary of the asset in the Will of the principal after the principal dies.

In Western Australia there is no legislation giving a partial exemption to administrators / attorneys in regard to ademption, although such laws are in place in Victoria[1] and NSW.[2] The common Law position in Western Australia is found in the case of *Re Hartigan*[3] which in turn follows the leading Queensland case of *Re Viertel*,[4] however a 2012 decision of the New South Wales Court of Appeal has cast doubt on the validity of these authorities.[5][6]

The Law Society has previously provided you with a Briefing Paper (copy enclosed) advocating for the need to amend the *Guardianship and Administration Act 1990* (WA) or another Act,[7] to introduce statutory provisions similar to sections 22 and 23 of the *Powers of Attorney Act 2003* (NSW) in order to clarify this issue in Western Australia. I am hopeful that

[1] *Powers of Attorney Act 2014* (Vic) – s.83A
[2] *Powers of Attorney Act 2003* (NSW) – s.22
[3] *Re Hartigan* (Unreported, Supreme Court of Western Australia, Parker J, 9 December 1997
[4] [1996] QSC 66
[5] "one reaches the reluctant view that the Queensland judges were misled in those cases by misapplication of the 19th century law in some of the authorities on which their decisions were based". *RL v NSW Trustee and Guardian* [2012] NSWCA 39 per Young AJA at 191
[6] "In my view this decision [*Re Hartigan*] is mistaken, for the same reasons that *Re Viertel* is mistaken, it is because the sale of the house by a person with authority to do so would have the effect of adeeming the specific devise that legislation … was enacted. " Ibid per Campbell JA at 174
[7] Such as the *Powers of Attorney Act 1896* (WA)

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clarification on this matter could form part of your Government's legislative program in this session of Parliament.

The Law Society notes that legislative amendments will be required to the *Guardian and Administration Act* in the near future to give effect to the new Advance Health Directive regime in Western Australia, and this may provide the opportunity to address this issue.

If you have any queries, please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely

Jocelyne Boujos
President

Encl

Attorney General; Minister for Electoral Affairs

Our Ref: 67-25491

Ms Jocelyne Boujos
President
Law Society of Western Australia

By email: president@lawsocietywa.asn.au

Dear ~~Ms Boujos~~ Jocelyne,

ANTI ADEMPTION PROVISIONS IN WESTERN AUSTRALIA

Thank you for your letter to the Hon. John Quigley MLA, Attorney General; Minister for Electoral Affairs, dated 12 July 2021, regarding the introduction of provisions to address the principle of ademption in cases where a testator has lost capacity, and a substitute decision maker disposes of property intended to be gifted under a testator's will; for example, to pay for the care of the testator. I am responding on behalf of the Attorney General.

Related to this issue, and as mentioned in your letter, the Attorney General supports recommendation 38 of the Statutory Review in full, that administrators should have access to a represented person's will where it is necessary to perform the function of administrator. The extension of this right of access to an attorney appointed under an Enduring Power of Attorney is supported in principle, subject to further consultation and the introduction of appropriate safeguards to protect against financial exploitation.

The Attorney General is also supportive, in principle, of introducing provisions based on sections 22 and 23 of the *Powers of Attorney Act 2003* (NSW) which would address ademption directly and give statutory effect to *Re Hartigan*.

I note your comments that the introduction of a new Advance Health Directive (AHD) form will require legislative amendment to the *Guardianship and Administration Act 1990* (WA) (GAA). I am pleased to advise that introducing a new AHD form only requires amendments to the *Guardianship and Administration Regulations 2005* (WA), and not to the GAA itself. Work to progress this is currently underway.

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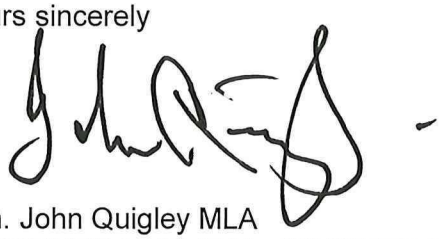
You will appreciate that the McGowan Labor Government has, over the past year, been required to redirect significant resources to respond to COVID-19; however, both I and the Government remain committed to progressing amendments to the GAA.

Thank you for raising this matter.

Yours sincerely



Hon. John Quigley MLA
ATTORNEY GENERAL; MINISTER FOR ELECTORAL AFFAIRS

23 AUG 2021