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

BRIEFING PAPER

ADEMPTION

THE ESSENTIAL MEMBERSHIP FOR
THE LEGAL PROFESSION

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ADEMPTION

Issue

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.

The Law Society of Western Australia is aware that there is uncertainty within the legal profession as to whether an administrator is entitled to a copy of the represented person's will. Noting that a will is a private document and that family members might have motives for finding out what is in a will the Public Trustee considers that an administrator is entitled to have access to a copy of a represented person's will if they can show that it is needed to perform their functions as administrator but this should be limited to an administrator sighting the original and not keeping the original.

Background

Section 14 of the Acts Amendment (Consent to Medical Treatment) Act 2008 (WA) (Amendment Act) required a statutory review of the Guardianship and Administration Act 1990 (WA) (Act) and the relevant sections of The Criminal Code as soon as practicable after the expiration of three years from the commencement of the Amendment Act.

In July 2013, the Department of the Attorney General invited the Law Society of Western Australia to make a submission to the statutory review. The Law Society made a submission on 30 August 2013. The report on the statutory review was tabled in Parliament on 2 December 2015 and it included 86 recommendations directed at improving the operation and effectiveness of the Act.

The Law Society provided a detailed comment in March 2018 in relation to each of the recommendations including the Department of the Attorney General's recommendation 38 that the Guardianship and Administration Act 1990 be amended to permit an administrator to sight the will of a represented person or to receive a copy of the will if it is necessary for them to perform their function as an administrator. Both the Public Trustee and the Law Society supported this recommendation.

Position in other States

The position in other jurisdictions is outlined below. Where legislation exists in Australia, it deals with actions of attorneys in different ways.

In New South Wales, Queensland and the United Kingdom, the courts have held that the ademption rule still applies to sale by an attorney where there is no legislative provision stating otherwise.[1] In the United Kingdom, it has been recognised that this approach can lead to harsh results. However, it has been said that it is up to Parliament to provide an exception to the rule.[2]

South Australia

In South Australia, a beneficiary under a will can apply to the Supreme Court where it appears that their share under the will has been affected by action under an enduring power of attorney, but only where the donor of the power lacked capacity at the time of the exercise of the power. The Supreme Court may make such orders as it thinks just 'to ensure that no beneficiary gains a disproportionate advantage or suffers a disproportionate disadvantage, of a kind not contemplated in the will'.[3]

Victoria

In Victoria, where a VCAT-appointed administrator sells a represented person's asset, any beneficiary under the represented person's will has the same interest in any money or other property gained as a result of sale as if the property had not been sold. However, there is no similar legislative provision where the person is acting under an enduring power of attorney rather than as an administrator.[4]

In Simpson v Cunning the Victorian Court recognised an exception to the ademption rule where a person is acting under an enduring power of attorney. Justice Hargrave called for legislative reform:

> The issue requires urgent legislative intervention to resolve any doubt. In the meantime, I would follow Re Viertel [a Queensland decision] and recognise a further exception to the ademption principle whenever there is an authorised sale by an attorney in circumstances where: (1) the deceased lacked testamentary capacity; (2) the Court is satisfied that the deceased, if possessed of testamentary capacity, would have intended the donee of the asset in the will to have the remaining proceeds of sale; and (3) the remaining proceeds of sale can be identified with sufficient certainty.

Further, The Hon. Justice Hargrave stated:

> People are living longer than in the past and their physical health is outlasting their mental capacity. It is commonplace for properties owned by incapacitated persons to be sold under the authority of enduring powers of attorney, to fund accommodation bonds and other necessities and comforts for an ageing population.[5]

New South Wales

In New South Wales, a beneficiary under the will of a person who executed an enduring power of attorney has the same interest in surplus money or other property arising from the sale or other dealing with the property by the attorney as if the sale or other dealing had not taken place.[6]

Sections 22 and 23 of the Powers of Attorney Act 2003 (NSW) state as follows:

Section 22 Effect of ademptions of testamentary gifts by attorney under enduring power of attorney

(1) Any person who is named as a beneficiary (a "named beneficiary") under the will of a deceased principal who executed an enduring power of attorney has the same interest in any surplus money or other property arising from any sale, mortgage, charge or disposition of any property or other dealing with property by the attorney under the power of attorney as the named beneficiary would have had in the property the subject of the sale, mortgage, charge, disposition or dealing, if no sale, mortgage, charge, disposition or dealing had been made.

(2) The surplus money or other property arising as referred to in subsection (1) is taken to be of the same nature as the property sold, mortgaged, charged, disposed of or dealt with.

(3) Except as provided by subsection (4), money received for equality of partition and exchange, and all fines, premiums and sums of money received on the grant or renewal of a lease where the property the subject of the partition, exchange, or lease was real estate of a deceased principal are to be considered as real estate.

(4) Fines, premiums and sums of money received on the grant or renewal of leases of property of which the deceased principal was tenant for life are to be considered as the personal estate of the deceased principal.

(5) This section has effect subject to any order of the Supreme Court made under section 23.

(6) A person is named as a beneficiary under a will for the purposes of this section if:

(a) the person is referred to by name in the will as being a beneficiary, or
(b) the person answers a description of a beneficiary, or belongs to a class of persons specified as beneficiaries, under the will.

(7) This section does not apply to any person to whom section 83 of the NSW Trustee and Guardian Act 2009 applies.

Section 23 Supreme Court may make orders confirming or varying operation of section 22

(1) On the application of a named beneficiary referred to in section 22 (1) or such other person as the Supreme Court considers has a proper interest in the matter, the Supreme Court may:
(a) make such orders and direct such conveyances, deeds and things to be executed and done as it thinks fit in order to give effect to section 22, or
(b) if it considers that the operation of section 22 (1) and (2) would result in one or more named beneficiaries gaining an unjust and disproportionate advantage, or suffering an unjust and disproportionate disadvantage, of the kind not contemplated by the will of the deceased principal-make such other orders as the Court thinks fit to ensure that no named beneficiary gains such an advantage or suffers such a disadvantage.

(2) An order made by the Supreme Court under subsection (1) (b):
(a) may provide that it has effect as if it had been made by a codicil to the will of the deceased principal executed immediately before his or her death, and
(b) has effect despite anything to the contrary in section 22.

(3) An application under subsection (1) must be made within 6 months from the date of the grant or resealing in this State of probate of the will or letters of administration unless the Supreme Court, after hearing such of the persons affected as the Supreme Court thinks necessary, extends the time for making the application.

(4) An extension of time granted under subsection (3) may be granted:
(a) on such conditions as the Supreme Court thinks fit, and
(b) whether or not the time for making an application under this section has expired.

These provisions are similar to the Victorian provision in relation to administrators. There is no requirement that the will-maker lacked capacity at the time of the dealing. There is no obligation on the attorney to keep a separate account of proceeds. In addition, the Supreme Court has the power to vary the operation of this provision if it considers it would result in a beneficiary gaining an unjust and disproportionate advantage or suffering an unjust and disproportionate disadvantage of a kind not contemplated by the will.[7]

Queensland

In Queensland, a beneficiary may apply to the Supreme Court for compensation out of the estate where their benefit under a will or on intestacy has been lost due to an act of an attorney.[8] There is no requirement that the principal lacked capacity at the time of the sale or other dealing by the attorney.[9]

Western Australia

In 1997 the Supreme Court of Western Australia, in Re Hartigan recognised an exception to the ademption rule where property is disposed of by an enduring attorney.[10]

In Re Hartigan the Public Trustee sought directions and an opinion of the court on questions relating to the administration of the estate of Miss Hartigan undertaken by the Public Trustee under the provisions of s 64 of the Act. Miss Hartigan did not have testamentary capacity and was in residential care. The document that was treated in the proceedings as Miss Hartigan's last will and testament provided for the sale of a real property,

which was in a state of disrepair, and the net proceeds of which were to be divided in equal shares among three beneficiaries.

As the Public Trustee considered it appropriate to sell the property to provide for the maintenance and welfare of Ms Hartigan, the Public Trustee sought to avoid a situation where an executor or administrator after Miss Hartigan's death had need to trace moneys that may form part of the devise

of the property or in which it could be argued that by not separating the net proceeds of the sale of the property from the other funds, the devise of the property is adeemed.

The Hon Justice Parker found helpful and persuasive the decision of Thomas J. in Re Viertel (the facts in which were not identical in that the sale of the property in that case was effected without knowledge of the donee's will) because:

> "the heart of that reasoning turns on the sale of property by a person other than a testator at a time when the testator is incapable of selling the property or altering an existing will to give effect to the testator's intentions in the changed circumstances. If that is correct it ought not to be a material distinction whether or not the person effecting the sale knew of the terms of the will. I am somewhat reassured in this view by another opinion.... Re Bearsby, SCt of WA (Wheeler J); Civ 1919 of 1997; 29 August 1997 where Her Honour gave the opinion that the proposed sale of a property would not adeem its devise in a will in circumstances where the testatrix lacked the capacity both to sell the property herself to change her will. It will be apparent that there is a measure of uncertainty as to the relevant state of the law so that I approach the task of decision with some hesitancy... this very uncertainty is the reason for the Public Trustee to seek the opinion of the Court."

It was the opinion of Parker J. that should Ms Hartigan's property be sold when she lacks capacity to sell herself or change her will and the net proceeds of sale and any income accruing on those proceeds are held in a separate fund drawn from for her maintenance, benefit and welfare, the sale of the property would not adeem its devise under the will except to the extent that the moneys from that separate fund are spent on Miss Hartigan's maintenance, benefit and welfare.

NOTES

1 RL v NSW Trustee and Guardian [2012] NSWCA 39 (19 March 2012); NSW Trustee and Guardian v Bensley [2012] NSWSC 655 (4 June 2012); Orr v Slender [2005] NSWSC 1175 (21 November 2005); The Trust Company Ltd v Gibson [2012] QSC 183 (29 June 2012).
2 Banks v National Westminster Bank [2005] EWHC 3479 (Ch) [30].
3 Powers of Attorney and Agency Act 1984 (SA) s 11A.
4 Law Reform Commission Victoria Consultation Paper – Wills – 30 January 2013.
5 Simpson v Cunning [2011] VSC 466 (22 September 2011) [45
6 Powers of Attorney Act 2003 (NSW) s 22 and s 23
7 Ibid s 23.
8 Powers of Attorney Act 1998 (Qld) s 107. See also Ensor v Frisby [2009] QSC 268 (7 September 2009
9 Anthony W Collins – The Journal of the Bar Association of Queensland Issue 63 July 2013 -http://www.hearsay.org.au/index.php?option=com_content&task=view&id=1430&Itemid=48.
10 Re Hartigan (Unreported, Supreme Court of Western Australia, Parker J, 9 December 1997).

Policy Position

The Law Society of Western Australia supports:

- The right of an administrator to obtain a copy of or sight the represented person's will; if it is necessary for them to carry out their functions as an administrator
- The similar extension of this right to attorneys under an EPA; and
- Addressing the question of ademption directly by the insertion of new sections in the Guardian and Administration Act 1990 (WA) modelled on sections 22 and 23 of the Powers of Attorney Act 2003 (NSW giving certainty and legislatve effect to the decision in re Hartigan

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