Further Consultation Paper

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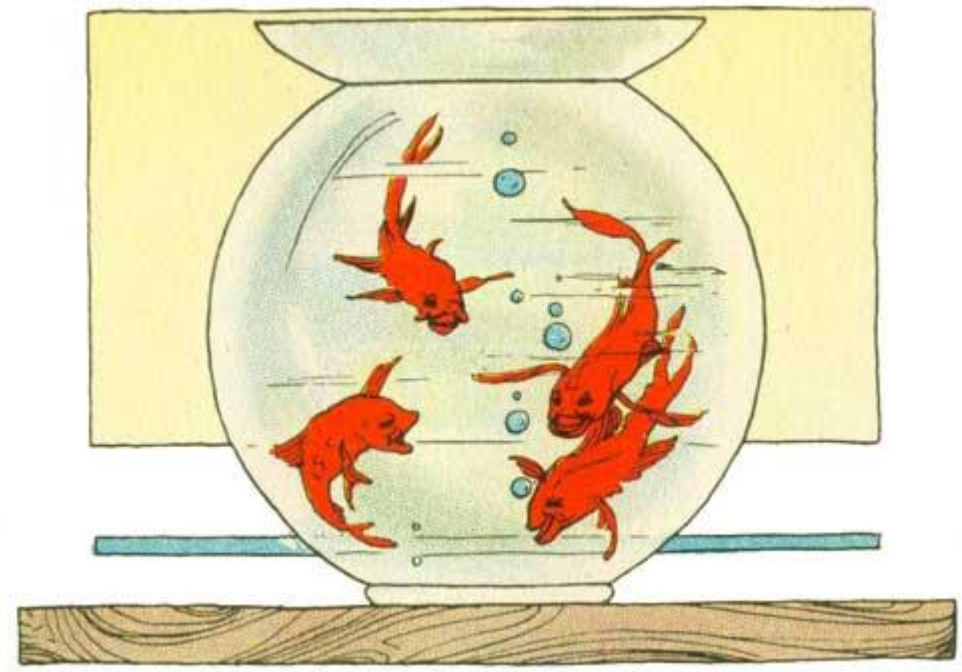

South Australian Law Reform Institute

Administration of small deceased estates and Resolution of minor succession disputes

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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BACKGROUND

1. In March 2014, the South Australian Law Reform Institute ('**SALRI**') released an Issues Paper entitled 'Issues Paper 5 - Small Fry: Administration of small deceased estates and resolution of minor succession disputes'.

2. The focus of the Issues Paper was on presenting reform options for simplifying and reducing the time and cost of (a) the administration of small deceased estates; and (b) resolving minor succession disputes.

3. Although the paper was widely circulated to the legal profession, other relevant interested parties and the general public, the overall response was somewhat disappointing. There was, for example, no engagement from the courts. The Law Society's response was equivocal. The Law Society's most relevant committee, the Succession Law Committee, did not directly engage with the questions set out at the end of the Issues Paper. In addition, no Adelaide-based law firm responded.

4. Before SALRI makes any final recommendations, it considers it both necessary and appropriate to come back to key interested parties to further define the issues and to see to what extent there is consensus.

ADMINISTRATION OF SMALL DECEASED ESTATES

5. The obtaining of a formal grant of representation has the clear advantage of minimising risk to administrators, beneficiaries and those dealing with the estate by protecting the personal representative from personal liability for acts done in good faith under the authority of the grant and any third party who deals with assets of the estate in good faith and in reliance on the grant.[1] However, a formal grant is seen by some as a complex, costly and time intensive process, particularly for a small estate where the total cost may dwarf the available assets of the estate.

Reform Options

6. The Issues Paper presented two primary reform options for administering small deceased estates, namely (1) models for simplifying and reducing the time and cost of the grant process; and (2) models for obtaining authority to administer small estates with something less than a formal grant of representation. These models had been garnered from other

[1] *Administration and Probate Act 1919* (SA) s 43.

Australian jurisdictions and the common law world, and, in one instance, independently formulated by SALRI.

7. The models varied according to the degree of risk involved to the interested parties in the administration process, as summarised below.

(a) Essentially riskless procedures

8. This group comprised the existing grant procedure, assisted grants of the types discussed in the Issues Paper and the expedited grant as suggested as a possibility by SALRI.

(b) Less formal, but therefore potentially more risky procedures

9. These included the 'election to administer' and the 'deemed grant' as discussed in the Issues Paper and possibly the Law Society's suggestion. These procedures are perceived to work satisfactorily elsewhere, especially in Australian jurisdictions and have been discussed at length by the National Committee and the Victorian Law Reform Commission (see Issues Paper). However, the one significant drawback they have in terms of making a simpler, cheaper procedure available to everyone is that they have been largely, if not exclusively, reserved for the Public Trustee (in the Northern Territory trustee companies and legal practitioners may use the procedure of election as well). They are not procedures available to the public.

(c) More speculative models

10. The Issues Paper identified certain procedures that could be instituted either by affidavit or a statutory declaration. Some required court involvement, but others might only involve lodgement and the ability to search the documents involved.

11. If such a procedure were adopted, it could be made available to the Public Trustee and other specified bodies (who might have professional indemnity or other insurance). However, such procedures would be largely designed for lay potential administrators.

Discussion

12. From the above three categories, it can be seen that one significant issue to be decided is the extent to which any simplified procedure is made available to lay administrators who might want to proceed without the assistance of a solicitor or the Public Trustee. It is arguable that such a procedure should be available to such administrators in the case of small estates.

13. In relation to any of these possible procedures, there are obvious threshold questions to be decided about the size and nature of the estate and whether real estate will be included.

14. As noted above, it is both necessary and appropriate to come back to the key interested parties to further define the issues and see to what extent there is consensus. The Public Trustee, for example, in its initial discussions with SALRI, seemed to favour a notion of deemed grant, as applies in Victoria. However, in their written submission, the Public Trustee suggested that the status quo was appropriate because in some cases of small estates, they expedited the process. However, such a position does not offer any simple, cheap alternative for a lay administrator wishing to proceed him or herself. The Public Trustee also only uses their informal procedure in estates under about $30,000.

15. SALRI therefore asks:

    a. *Is there a need and impetus for change, given the muted response to the discussion paper?*

    b. *Is there not a case for developing a procedure that allows lay administrators a relatively simple and cheap alternative to the current situation in South Australia?*

    c. *If so, which way of proceeding is best, and why?*

    d. *Is more than one procedure appropriate? Please explain.*

RESOLUTION OF MINOR SUCCESSION DISPUTES

16. The authority in succession law remains exclusively vested with the Supreme Court of the various Australian jurisdictions, reflecting that these are serious matters for families and individuals, regardless of their monetary value.

17. The Supreme Courts are vested with the exclusive jurisdiction to determine disputes about deceased estates, regardless of the quantum and complexity of the estate. However, not all disputes involve large sums of money or are particularly complex. Alternative methods of resolution which are more simple, quick and cost effective than a Supreme Court hearing may be more appropriate for minor succession disputes.

Reform Options

18. The Issues Paper presented two primary reform options for simplifying and shortening contentious succession claims, namely (1) extending succession law jurisdiction to other

courts or tribunals; and/or (2) modifying procedures in the Supreme Court to improve time and cost efficiency.

(a) Extending succession law jurisdiction to others courts or tribunals

19. The option of investing a court or tribunal other than the Supreme Court with the power to hear and determine succession law disputes was canvassed as a possible option for reform. However, it should be noted that this option is without precedent in any other Australian jurisdiction. Also whatever agency is responsible for hearing and determining succession law disputes will need the resources to ensure that it can effectively carry out this role.

20. In July 2013, the jurisdiction of the South Australian Magistrates Court's for 'general civil claims' was raised to $100,000 (increasing from $40,000). This presented the opportunity for the resolution of succession law disputes below that monetary value by the Magistrates Court.

21. In March 2015, the South Australian Civil and Administrative Tribunal (SACAT) commenced operations. The jurisdiction of SACAT extends to matters within administrative and civil law, and is specifically conferred by legislation.[2] Although SACAT does not presently have jurisdiction in succession law, SACAT will continue to take on additional areas of responsibility over coming years. As such, it is possible for such a jurisdiction to be conferred on SACAT in the future. The main objectives of SACAT include the promotion of accessible, swift, cost effective, straightforward and flexible resolution of disputes with a focus on mediation and informality.[3] Given that access and expense are common factors which frustrate the resolution of succession disputes, SACAT's objectives could be seen to be well-suited to the resolution of minor succession disputes.

22. The Issues Paper also considered the potential criteria for a succession law dispute to be resolved other than by a hearing in the Supreme Court. The proposed criteria included:

- *value*: either of the estate or of the claim (whether of itself or as the proportion it represents of the value of the estate); or
- *complexity, regardless of value*: only complex questions to go directly to the Supreme Court, regardless of the amount of the claim or how much of the total value of the estate it represents; or

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[2] *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 31. For a summary of the relevant legislation see: http://www.sacat.sa.gov.au/about-sacat/legislation/sacat-jurisdictions. SACAT's role to date includes the work of the former Guardianship Board.

[3] *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8.

- a combination of both.

23. The practical implementation of these criteria was then considered. It was proposed that there could be a process of vetting all claims, with the default presumptions being:

    - that the value of most claims would not represent a sufficient percentage of the value of the estate to warrant it being heard at first instance by the Supreme Court; and
    - that the claim was not complex enough to warrant first instance resolution by the Supreme Court.

24. It was further suggested that these presumptions could be rebutted by affidavit evidence from counsel as to complexity and from a solicitor as to value. If neither of these presumptions was rebutted the matter would automatically be heard at first instance in some other way than in the Supreme Court. If only one of these presumptions was rebutted, it was raised whether there should be a discretion as to where the dispute should be heard at first instance.

25. The Registrar of Probates was put forward as the most suitable person to identify which claims ought to be heard at first instance by the Supreme Court. In regional disputes, it was suggested that such power could be exercised by District Registrars.[4]

(b) Modifying procedures in the Supreme Court

26. The view might be taken that particularly contentious issues, such as, for example, lost or informal wills and questions of testamentary capacity, might continue to require determination by the Supreme Court. However, even if minor succession disputes were to remain within the Supreme Court jurisdiction, there may be scope for procedural change to accommodate such claims.

27. There is already precedent within the Supreme Court's civil jurisdiction for the simplification of dispute resolution processes for estates under a certain value, or the mandating of alternative paths of dispute resolution for these kinds of disputes. For example, for disputes under the *Inheritance (Family Provision) Act 1976* (SA) where the net value of the estate that is available for distribution is estimated to be under $500,000, the dispute may be determined by a Master of the Supreme Court summarily on the available evidence, whether or not that evidence is in a form that complies with the usual rules of evidence.[5]

28. There may be scope within the Supreme Court's existing jurisdiction for minor succession disputes (not just those about family provision) to be arbitrated by Supreme Court Masters. A vetting process could be implemented to ensure that only more serious disputes or major issues (such as testamentary capacity) were heard by the Supreme Court

[4] Although currently unused, and in need of jurisdictional updating, there is a power in Part 3 of the *Administration and Probate Act 1919 (SA)* to appoint District Registrars of the Supreme Court to deal with small estates.

[5] *Supreme Court Civil Rules 2006* (SA) *rr 312(12), 312(12A).*

at first instance. As noted above, it is suggested that the Registrar of Probates would be the most suitable person to carry out this vetting process.

29. Other procedural changes that might facilitate the cost effective and timely resolution of minor succession law disputes could include:

- Introducing the streaming of civil disputes between courts, by which a judge hearing a case could, at any stage of the litigation, transfer it for hearing to a forum that was more appropriate in terms of the complexity and expense of the proceedings.
- Increased use of alternative dispute resolution procedures already available in the Supreme Court, such as:[6]
    - Referral by the court of the action or any issue arising from it to mediation, conciliation and arbitration;[7]
    - Referral by the court of any question to an expert referee for investigation and report;[8]
    - Appointment by the court of expert specially qualified assessors to assist the court in determining all or part of a dispute;[9]
- Transposing informal procedures from other courts to the Supreme Court, such as the following family dispute resolution procedures used in the Family Court:
    - Encouraging parties to resolve disputed issues before the commencement of litigation and ordering parties to attend family dispute resolution before the commencement of litigation;
    - Requiring a certificate from an accredited family dispute resolution practitioner showing that the parties have made genuine efforts to resolve their dispute before the commencement of litigation;

Such procedures could be adopted for all succession disputes or only for those where the claim, of itself or relative to the size of the estate, was of a certain size or type.

30. The need to develop more efficient and effective ways to progress and resolve civil disputes in South Australia has been widely raised by, amongst others,[10] the South Australian subcommittee of the Australasian Institute of Judicial Administration.[11]

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[6] Similarly, the Federal Court routinely considers whether the parties may be assisted in resolving some or all of the issues in their commercial dispute by a referral to assisted dispute resolution (ADR) including mediation (whether the parties want this or not), arbitration or a conference of experts.

[7] *Supreme Court Act 1935* (SA) ss 65, 66; *Supreme Court Civil Rules 2006* (SA) ch 10 (Alternative Dispute Resolution); *District Court Act 1991* (SA) ss 32-4; *District Court Rules 2006* (SA) ch 10 (Alternative Dispute Resolution).

[8] *Supreme Court Act 1935* (SA) s 67; *District Court Act 1991* (SA) s 34.

[9] *Supreme Court Act 1935* (SA) s 71.

[10] See, eg, Chris Merritt, 'Middle Australia excluded as court costs put "justice out of reach", *The Australian* 18 May 2012; Candice Keller, 'Justice beyond the Mean of Most as Legal Costs Double', *The Advertiser,* 15 July 2012; Community Law Australia, *Unaffordable and Out of Reach; the Problem of Access to Justice* (Community Law Australia, 2012); Miles Kemp, 'DIY Justice as South Australian Legal Costs too much of many', *The Advertiser*, 21 October 2013.

Discussion

31. Before proceeding with final recommendations, it is apparent that a number of threshold issues still need to be determined. In particular, the overriding considerations are whether a new simplified dispute resolution process would be quicker and cheaper for the parties than the current one, the extent to which it would usefully remove work from the Supreme Court and the extent to which an alternative forum would be capable of resolving the dispute authoritatively.

32. Further, if there is a consensus that reform to the current system is both necessary and desirable, the potential criteria for a succession law dispute to be resolved other than by a hearing in the Supreme Court, and the practical implementation of these criteria, will need to be determined. It is critical that these criteria are capable of determination accurately and easily for any new simplified dispute resolution process to work.

33. SALRI therefore asks:

a) Is there a need and impetus for change, given the muted response to the Issues Paper?

b) If so, which of the following ways of proceeding is best, and why:

(i) extending succession law jurisdiction to others courts or tribunals?; or

(ii) modifying procedures in the Supreme Court to improve time and cost efficiency?

c) If you think some kinds of succession law disputes should always be determined by the Supreme Court, please provide examples.

d) If you think some kinds of succession law disputes could be adjudicated other than by a hearing in the Supreme Court, please provide examples.

e) If you think some kinds of succession law disputes could be adjudicated other than by a hearing in the Supreme Court, what criteria should be adopted for identifying such disputes?

i. Value: either of the estate or of the claim (whether of itself or as the proportion it represents of the value of the estate); or

[11] South Australian Law Reform Institute, *Small Fry: Administration of small deceased estates and resolution of minor succession disputes,* Issues Paper 5 (January 2014) [184], [196].

ii. *Complexity, regardless of value: only complex questions to go directly to the Supreme Court, regardless of the amount of the claim or how much of the total value of the estate it represents; or*

iii. *A combination of both.*

f) *If you think some kinds of succession law disputes could be adjudicated other than by a hearing in the Supreme Court, who do you think is the most appropriate person to identify such claims?*

i. *Registar of Probates (District Registrars for Regional Disputes);*

ii. *Supreme Court Master;*

iii. *Supreme Court Judge;*

iv. *Other. Please explain.*

g) *If you think succession law jurisdiction should be extended beyond the Supreme Court, what other courts or tribunals should be invested with that jurisdiction?*

i. *Magistrates Court;*

ii. *SACAT;*

iii. *Other. Please explain.*

h) *If you think that there should be procedural changes within the Supreme Court to accommodate minor succession disputes, what procedural changes should be adopted?*

i. *Minor succession disputes (not just those about family provision) to be determined by Supreme Court Masters;*

ii. *Streaming of civil disputes between courts;*

iii. *Increased use of alternative dispute resolution procedures already available in the Supreme Court;*

iv. *Transposing informal procedures from other courts to the Supreme Court;*

v. *Other. Please explain.*