THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: ELCS:EEsh1775725

1 October 2019

The Hon. Mark Speakman SC MP
Attorney General of NSW
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney,

Miscellaneous amendments to succession laws

Our members have identified a need for reform in three specific areas of succession law:

- resealing grants of representation;
- the chain of representation in the administration of estates; and
- the effect of the end of a de facto relationship on a will.

We recommend including amendments as recommended in a future Justice Legislation Miscellaneous Amendments Bill.

1. Resealing grants of representation

Issues have been raised with the Law Society about the scope of the power of the Supreme Court to reseal a grant of representation. 'Resealing' refers to the process whereby a court applies its own seal to a grant of probate or letters of administration which was made in another jurisdiction, effectively giving the grant the same force, effect and operation as if it were made in that court.

Section 107 of the *Probate and Administration Act 1898* (NSW) authorises the Court to reseal a grant made outside of NSW which is "already granted or hereafter to be granted by any court of competent jurisdiction in any portion of Her Majesty's dominions". The intent of s 107 is to enable the Court to be confident, without the need for extensive inquiries or investigations, that the foreign grant is the product of a robust legal process and a legal system comparable to that in New South Wales. At a practical level, it enables the Court to reseal grants made in qualifying jurisdictions quickly, simply and with minimal expenditure of resources.

Section 107 has also resulted in reciprocal arrangements between NSW and many of Her Majesty's dominions, which enable NSW grants to be resealed in the courts of those jurisdictions.

Currently "Her Majesty's dominions" include:

- Antigua and Barbuda;
- Australia — all Australian states, Australian Capital Territory, Northern Territory and including Australian external territories (Ashmore and Cartier Islands; Australian Antarctic Territory; Christmas Island; Cocos (Keeling) Islands; Coral Sea Islands Territory; Heard Islands; McDonald Island; Norfolk Island);

THE LAW SOCIETY OF NEW SOUTH WALES
170 Phillip Street, Sydney NSW 2000, DX 362 Sydney T +61 2 9926 0333 F +61 2 9231 5809
ACN 000 000 699 ABN 98 696 304 966 www.lawsociety.com.au

- Belize;
- Bahamas;
- Barbados;
- Canada;
- Grenada;
- Jamaica;
- New Zealand — including external territories and associated states (Cook Islands; Niue; Ross Dependency; Tokelau).
- Papua New Guinea;
- Solomon Islands;
- St Christopher and Nevis;
- St Lucia;
- St Vincent and the Grenadines;
- Tuvalu;
- United Kingdom — including dependencies (Anguilla; Bermuda; British Antarctic Territory; British Indian Ocean Territories; Cayman Islands; Falkland Islands and dependencies; Gibraltar; Montsérrat; Pitcairn, Henderson, Ducie and Oeno Islands; St Helena and dependencies; South Georgia and South Sandwich Islands; Sovereign Base Areas of Akrotiri and Dhekelia; Turks and Caicos Islands; Virgin Islands).[1]

Difficulties arise from the fact that membership of 'Her Majesty's dominions' is not an accurate indicator of the nature of a foreign jurisdiction's legal processes or system at any given time. Current examples of jurisdictions legally similar to NSW which lie outside of 'Her Majesty's dominions' – and therefore beyond the scope of s 107 – include Hong Kong, the Fijian Islands, Singapore, Malaysia and Mauritius. The legislatures of some of these nations have responded in kind: for example, the High Court of Hong Kong is authorised to reseal a grant of representation made in Tasmania, Victoria and South Australia and the Northern Territory but not in any other Australian jurisdiction.[2]

Further, restricting the provision to 'Dominions' means reseals may become unavailable from, or in, a jurisdiction whose dominion status changes, without any problematic change to their legal processes, for example, Hong Kong.

We recommend s 107 be amended to authorise the NSW Executive, by statutory instrument, to add or remove the jurisdictions to which the section applies. This would provide Government with the flexibility to ensure the scope of the power to reseal reflects contemporary international circumstances.

2. Chain of representation

We understand the Supreme Court regularly experiences amongst probate applicants a lack of awareness or a misunderstanding of the principle of a 'chain of representation'. The principle applies to probate applications pursuant to s 13 of the *Imperial Acts Application Act 1969* (NSW):

> **13 Executor of executor represents original testator**
>
> (1) An executor of a sole or last surviving executor of a testator is the executor of that testator.
>
> This provision shall not apply to an executor who does not prove the will of his testator and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

[1] L Handler and R Neal, *Mason & Handler Succession Law and Practice NSW*, LexisNexis, [5257.2].
[2] *Probate and Administration Ordinance* (Cap 10)(HK) ss 48, 49, 49A, Sch 2.

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.
(3) The chain of such representation is broken by:
    (a) an intestacy,
    (b) the failure of a testator to appoint an executor, or
    (c) the failure to obtain probate of a will,
    but is not broken by a temporary grant of administration if probate is subsequently granted.
(4) Every person in the chain of representation to a testator:
    (a) has the same rights in respect of the estate of that testator as the original executor would have had if living, and
    (b) is, to the extent to which the estate of that testator has come to his hands answerable as if he were an original executor.

We acknowledge it is incumbent on the legal profession to be aware of the laws of succession and to advise their clients accordingly. However, in our view government also has a role in ensuring the law is clear and accessible. Awareness of the principle of the chain of representation as an element of the law of succession would be assisted by consolidating the relevant provisions. By way of comparison, in other jurisdictions where the principle applies, the relevant provision sits within one of the principal instruments of succession law.[3]

Accordingly we recommend s 13 of the *Imperial Acts Application Act 1969* (NSW) be repealed and the principle of the chain of representation be incorporated in the *Probate and Administration Act 1898* (NSW).

3. De facto relationships

We note that reforms to the Queensland law of succession, which took effect in June 2018, seek to clarify the effect of a de facto relationship on a will, in the absence of stated testamentary intention. A new s 15B of the *Succession Act 1981* (Qld) provides that, if a testator who is in a de facto relationship makes a will, if the de facto relationship subsequently ends:

- any disposition in the will to the former de facto spouse is revoked;
- any appointment of the de facto spouse as executor, trustee, advisory trustee or guardian is revoked; and
- any grant in the will of a power of appointment exercisable by, or in favour of, the former de facto spouse is revoked.

Section 15B echoes s 15 which deals with the effect of a divorce or ending of a civil partnership on a testamentary disposition to the former spouse or partner. In acknowledging and providing for spousal relationships as other than through marriage, s 15B seeks to provide greater clarity for testators who are in such relationships.[4]

The provision includes exceptions aimed at protecting the interests of children of the de facto partner and of the couple. Section 15B(2) provides that the end of the de facto relationship will not revoke an appointment in the will of the former de facto partner as trustee of property in a trust whose beneficiaries include the former de facto partner's children. Similarly, a grant of a power of appointment exercisable by the former de facto spouse only in favour of the former couple's children will not be revoked.

The Law Society recommends consideration be given to similar reforms in NSW which would modernise succession law by aligning the status of the end of a de facto relationship

[3] See, for example, *Succession Act 1981* (Qld) s 47; *Administration and Probate Act 1958* (Vic) s 17.
[4] Queensland, *Parliamentary Debates*, 23 March 2017, 871 (Yvette d'Ath).

with that of the end of a marriage or civil partnership. We note that a similar parity between spouses and de facto partners is already found in the NSW law relating to family provision.[5]

We note the possibility of such an amendment leading to disputes as to when a de facto relationship ended. While proving the end of a marriage requires only producing a Certificate of Divorce, proving the end of a de facto relationship requires bringing persuasive substantial evidence. For the purpose of the *Succession Act 2006* (NSW), in determining the existence of a de facto relationship, the Court may have reference to the factors set out in s 21C(3) of the *Interpretation Act 1987* (NSW):

> (3) Determination of "relationship as a couple" In determining whether 2 persons have a relationship as a couple for the purposes of subsection (2), all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:
>
> (a) the duration of the relationship,
> (b) the nature and extent of their common residence,
> (c) whether a sexual relationship exists,
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them,
> (e) the ownership, use and acquisition of property,
> (f) the degree of mutual commitment to a shared life,
> (g) the care and support of children,
> (h) the performance of household duties,
> (i) the reputation and public aspects of the relationship.

We understand that in Queensland, although the point has not yet been litigated, members of the Queensland legal profession are aware that in time it may. On balance, we recommend the amendment be progressed in New South Wales in consultation with the courts and the legal profession as to its likely effect.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

Elizabeth Espinosa
President

[5] *Succession Act 2006* (NSW) s 57(1).