Queensland Law Society

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Your Ref:

Our Ref: 326 – 3

24 September 2012

The Hon. Jarrod Bleijie MP
Attorney-General and Minister for Justice
Department of Justice and Attorney General
GPO Box 149
BRISBANE QLD 4001

By Post and Email to: [redacted]

Dear Attorney

Thank you for meeting with representatives of the Queensland Law Society on 20 September 2012 to discuss matters pertaining to civil and criminal law policy. I am informed the meeting was productive and I would like to thank you for being generous with your time.

The Society would be keen to continue these discussions on a regular basis and would invite you to nominate a future meeting date at your convenience.

I note you invited us to consider further issues arising from the discussions, namely:

- What programs exist or could be created or expanded to assist impecunious parties to QCAT proceedings to access legal representation;
- What issues are associated with the current legal position with respect to ademption;
- Whether the size of the Queensland statute book is an accurate measure of red tape in Queensland administration;
- What measures could be put in place to ensure that contribution schedule lot entitlements are fair and equitable for all owners of lots in bodies corporate; and
- Whether the definition of 'worker' in the *Workers' Compensation and Rehabilitation Act 2003* should be revisited with respect to independent contractors.

We will refer all of these matters to our appropriate policy committees and return to you or your relevant ministerial colleague with our views. We have included our response on the issue of ademption below.

1. Ademption

The QLS Succession Law Committee has expressed some concern in relation to recent decisions regarding the judicial operation and interpretation of the exceptions to ademption. These concerns have also been echoed by Allan Swan and Chris Groszek in their article: "The widening scope and uncertainty of the doctrine of ademption," ***enclosed*** for your kind consideration.

In 1996, in *Re Viertel*, His Honour Justice Thomas found that it was an exception to the doctrine of ademption where the attorney,[1] unaware of the contents of a testator's will, sells an estate property pursuant to a power of attorney. In essence His Honour found that notwithstanding the sale, any gift of the estate property was not adeemed and the beneficiaries did not lose that entitlement under the will. A copy of the judgment is ***enclosed*** for your kind attention.

This position has been followed throughout Queensland, Victoria and New South Wales[2] and generally represents the position in international jurisdictions.[3] The Society considers this position to be good law as it is fair, ensures the testator's autonomy is respected and upheld and has the propensity to reduce Family Provision Applications, which will be discussed in more detail below.

Recently, however, there has been a splintering of the operation of this exception. In New South Wales, both *RL v NSW Trustee and Guardian* [2012] NSWCA 39 and *NSW Trustee and Guardian v Bensely & Ors* [2012] NSWSC 655 departed from the position in *Re Viertel.* In the recent Queensland judgment of *The Trust Company Limited v Gibson & Anor* [2012] QSC 183, ***enclosed,*** Her Honour Justice Mullins at paragraph 27 called for further clarification as to whether the exception should be enshrined:

> I therefore consider that I should apply the dicta in RL and not follow Viertel and the cases that have followed Viertel. It will be a matter for the Parliament in Queensland to address whether there should be any statutory response to the circumstances that resulted in the decision in Viertel.[4]

The Society considers that this issue should be examined, with the view to amending the *Powers of Attorney Act* 1998 to enshrine this exception. As eluded above, the Society considers that a statutory exception will likely reduce the number of Family Provision Applications filed in the Courts as significant estate assets are likely to be bequeathed to beneficiaries who are closely linked to or dependent on the testator (usually being a spouse or child). If the testator's will sets out that a beneficiary is to receive one significant estate asset (eg real property), and that estate asset is adeemed, a Family Provision Application is an undoubted certainty.

As often as not, the gift which is negated in this process is one of real property. The general pattern is that by a specific gift, that real property goes to one person (the 'devisee'), whilst the residue of the estate goes to another or others (the 'residuary beneficiaries'). For the majority of testators, such real property is a significant part of the estate. The fact that the testator has singled out this significant asset is a clear indication that the testator intended that the selected devisee, and no one else, was to receive this significant asset. In so doing, the testator may have been faithfully fulfilling a long held expectation, a need, a moral or social obligation.

The usual *Re Viertel* scenario is that the same testator loses mental capacity, and attorneys, acting under enduring power of attorney, sell the real property, sometimes to fund the testator into assisted accommodation. Without the exception provided by *Re Viertel*, as developed recently by Queensland courts, the sale annihilates the capacity of the clause in the will to give the real property to the devisee. What remains of the proceeds of sale is then caught by the residue clause, and defaults to the residuary beneficiaries – a completely unintended outcome.

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[1] Who had a power for financial matters under the Enduring Power of Attorney for a principal/testator who had lost capacity.

[2] *Ensor & Ors v Frisby & Anor* [2010] QSC 268; *Moylan v Rickard & Anor* [2010] QSC 327; *Power v Power & Anor* [2011] NSWSC 288; *Simpson v Cunning* [2011] VSC 466

[3] *Jenkins v Jones* (1866) LR 2 Eq 323; *Re Dorman deceased* (1994) 1 WLR 282; *Re Estate of Pearl Swoyer, Deceased* 439 NW 2d 823 (SD 1989).

[4] *The Trust Company Limited v Gibson & Anor* [2012] QSC 183 at [27].

New South Wales has recognised that this is an undesirable outcome. That state has had legislation (presently *Trustee & Guardian Act 2009* (NSW)) traceable back to 1983, which in effect enshrines the *Re Viertel* exception. That is why the observations in *RL v NSW Trustee and Guardian* [2012] NSWCA 39 where obiter – the matter was governed by legislation in that state. The judicial observations that have undermined *Re Viertel* were legally unnecessary for the decision – they were "by the way". Nevertheless, *RL v NSW Trustee and Guardian* [2012] NSWCA 39 is a decision by a Court of Appeal. Observations by such a court, even if obiter, are not to be lightly disregarded by single judges of other states. It is not inconceivable that other single judges in Queensland will consider that the NSW obiter should be followed. Others judges may not place as much emphasis on the NSW observations and may go the other way.

There is potential for either:-

(a) single judge decisions in Queensland to be in conflict; or

(b) all single judge decisions in Queensland to follow the decision of *The Trust Company Limited v Gibson & Anor*, and that will leave us with the undesirable outcome previously identified, where unexpected sales destroy the intended structure of the will.

The Society therefore welcomes further dialogue with you and your staff to consider this issue.

Thank you again for meeting with us. We look forward to a continuing collaborative relationship with you and the Government.

Yours faithfully

Dr John de Groot
President