CHANCERY BAR

CHANCERY BAR ASSOCIATION RESPONSE TO THE MINISTRY OF JUSTICE CONSULTATION ON THE DRAFT INHERITANCE AND TRUSTEES' POWERS BILL

Introduction

1. This is the response of the Chancery Bar Association ("the ChBA") to the Ministry of Justice's consultation on the draft Inheritance and Trustees' Powers Bill.

2. The ChBA is one of the longest established Specialist Bar Associations and represents the interests of some 1200 members handling the full breadth of Chancery work, both in London and throughout the country. Membership of the Association is restricted to those barristers whose practice consists primarily of Chancery work. It is recognised by the Bar Council as a Specialist Bar Association.

3. The ChBA operates through a committee of some 17 members, covering all levels of seniority. It is also represented on the Bar Council and on various other bodies including the Chancery Division Court Users' Committee and various Bar Council committees.

4. This reply to the consultation by the Ministry of Justice on the draft Inheritance and Trustees' Powers Bill has been produced by a sub-committee consisting of Penelope Reed QC, Andrew Francis, Thomas Dumont, Anna

Clarke and Richard Wilson all of whom were involved in the ChBA response to the Law Commission Consultation on Intestacy and Inheritance Act claims on death.

5. The ChBA welcomes the Bill and in general terms thoroughly endorses the proposed changes. The points made below are therefore confined to outstanding issues and specific points of drafting.

Clause 3: Definition of "personal chattels"

6. The new definition is a considerable improvement. We remain concerned that there may be difficulties in practice with the concept of something being purchased solely as an investment. For example it is not clear whether this would apply to valuable artwork enjoyed by the deceased in his home but nevertheless bought with a view to appreciation. Similarly valuable jewellery might be difficult to categorise.

Adoption and Contingent Interests: clause 4

7. The section as drafted is rather wider than the Law Commission report envisaged, covering not only contingent interests on intestacy (which we supported) but also under Wills. It is not clear why the position under wills ought to be different from the interests under lifetime trusts and testators will need to be advised of the effect of this new section. However the ChBA does not have strong views against this.

Presumption of prior death: Clause 5

8. While the ChBA did not support the amendment of section 18(2) of the Family Law Reform Act 1987, the proposed clause is tightly drawn and we have no difficulty with it.

Power of Advancement: Clause 9

9. We warmly support the amendments to sections 31 and 32 of the Trustee Act 1925 to reflect what in fact occurs in practice. Our only point is that in the new sub-section (1A) it ought to be made clear that it is the date of the advancement at which the value is taken and not some other date.

Amendments to the Inheritance (provision for Family and Dependants) Act 1975: Schedule 2

10. **Domicile requirement:** the real issue is that in practical terms if there are no assets within the jurisdiction, the Court cannot make an order. Therefore the "applicable law" test set out in the proposed sub-section 1(4) does not really deal with the problem. We consider that a test which revolves around the location of assets regardless of the domicile of the deceased would produce fairer results rather than the applicable law test which is complex and unnecessary. We were unable to think of a hard case where the deceased was domiciled outside England and Wales but had property here. Clearly if there are applicable law issues the Court may have to deal with them in the course of proceedings but it already does that in cases where the deceased had real property overseas. Of course if the deceased was not domiciled and

had no property here, the Court would end up making an order which would be worthless.

11. **Child of the Deceased:** while the sentiment in the proposed section 1(1)(c) amendments are welcomed, the drafting does not quite work. We favour a very simple definition which does not include the word "family". It is of course intrinsic in the idea that someone is treated as another's child, that the other treats himself as a parent, and that there is a notional family. The addition of the use of the term "family", however, potentially obscures the clear, intended position where there are only two members. If, however, Parliament feels unable to omit the word family, then our less-preferred version (a) below still appears to us to be significantly simpler and less likely to generate confusion. We suggest the following:-

"1(1)(d) any person (not being a child of the deceased) <u>who was treated by the deceased as his or her child</u>;"

An alternative, including reference to "family", could be as follows:

(a) "any person (not being a child of the deceased) <u>who in relation to any family (whether or not including more members than the applicant and the deceased) in which the deceased at any time stood in the role of parent, was treated by the deceased as a child of the family."</u>

Generally

12. We are disappointed that the Bill does not incorporate the proposals that pension funds could be brought back into the estate. Often the value of the pension funds available outweighs the value of the net estate by a considerable amount.

13. As indicted at the outset we have not commented on the whole Bill as many clauses provide a well-drafted solution in accordance with the Law Commission recommendations. Attempts to improve some of the clauses have not been successful. In general the Bill is warmly welcomed as resolving many of the issues with which the Law Commission report was concerned and which cause considerable problems in practice.

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