

1 September 2022

Dr Adam Tomison
Director-General
Department of Justice
GPO Box F317
PERTH WA 6841

Email: doj.dg@justice.wa.gov.au

Dear Dr Tomison

DERIVATIVE ACTIONS IN DECEASED ESTATE MATTERS

Thank you for your letter dated 5 July 2022 regarding the above matter. The Law Society is acutely aware of the judicial commentary regarding the erosion of modest estates in legal costs and the Law Society is passionate in maintaining the good reputation of the legal profession in Western Australia. I welcome the opportunity to comment on the questions posed in your correspondence, and I answer them as follows:

1. *Should a leave mechanism similar to section 49(2) of the Succession Act 1981 (Qld) be adopted in Western Australia?*

Yes. The Law Society agrees that requiring the Court's consent to bring a derivative action would have the benefit of 'heading off' futile or uneconomic claims before costs could get out of hand. The Law Society has no issues with a formulation in similar terms to that found in s.49(2) of *Succession Act 1981 (Qld)*.

2. *Are defendants in these kinds of matters adequately protected by the existing security for costs regime in Western Australia?*

The Law Society does not consider that any changes ought to be made to the security of costs regime in Western Australia. The leave mechanism contemplated in question 1 may facilitate the Court making orders regarding security for costs.

3. *Is any reform required to the regulation of the legal profession, particularly regarding charging costs that are disproportionate to the sum in dispute?*

The Law Society does not consider that any further regulation of the Profession is warranted at this stage.

You will be aware of the inclusion of item 12 in the *Legal Profession (Supreme and District Courts) (Contentious Business) Determination 2018*, and retained in the 2020 and 2022 Costs Determinations. This was introduced for claims brought under section 7(1) of the *Family Provision Act 1972* after the decision in *Miller v Taylor* [2018] WASC 75.

Further, there is also CPD 9.2.2 of the Supreme Court Consolidated Practice Directions, which together with O 75 of the Rules, sets out procedures to ensure that

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applications pursuant to the *Family Provision Act 1972 (WA)* proceed expeditiously and cost effectively, and excessive or unnecessary costs are not incurred.

The Law Society also notes that the legal profession in Western Australia has just undergone its most significant regulatory reform in over a decade with the commencement of the *Legal Profession Uniform Law (WA)* (Uniform Law).

It would be appropriate to monitor the conduct and experience of the legal profession under the Uniform Law before any further regulation is imposed. I note that there is also an express requirement under the Uniform Law that costs must be proportionately and reasonably incurred and proportionate and reasonable in amount.¹

The Law Society is actively developing a proposal for compulsory pre-action mediation in estate matters. I look forward to updating you further about this in due course.

If you have any queries please contact Mary Woodford, General Manager Advocacy and Professional Development on 9324 8646 or mwoodford@lawsocietywa.asn.au

Yours sincerely



Rebecca Lee
President

¹ Legal Profession Uniform Law (WA), s.172



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Ms Rebecca Lee
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Dear Ms Lee

Derivative actions in deceased estate matters

The Department of Justice (Department) has received instructions from the Attorney General, Hon John Quigley MLA, to consider whether legislative reform is required following the comments of the Hon Justice Martin in the matter of *Shephard v Galea and Byrne as Executors and Trustees of the Estate of the late Joseph Galea* [2019] WASC 164 (*Shephard*).

This case involved a dispute over a deceased estate where the plaintiff (a beneficiary) brought a derivative action against the defendants (the executors). Martin J was concerned that the costs of pursuing the derivative action in *Shephard* would ultimately exceed the benefit to the beneficiary taking the action, even if that beneficiary had been successful.

Martin J stated that 'serious and urgent legislative reform' was required, and that:

...it should be necessary, at least, for would-be plaintiffs...to first obtain permission of the court as a matter of merit before being able to proceed with a derivative action of the present kind. (At [191])

Requirement to obtain leave

At common law, upon establishing special circumstances, a beneficiary of a deceased estate might sue to recover assets where the executor declined to take action and other beneficiaries are joined: *Ramage v Waclaw* (1988) 12 NSWLR 84 at 89-93.

Martin J has recommended legislative reform of this common law rule so that it is first necessary for a beneficiary bringing such a derivative action to obtain permission of the court, as a matter of merit, before being able to proceed with the derivative action. The motivation is to ensure that the overall economics of the proposed derivative action do not mean that the exercise becomes futile.

The Department is considering legislative reform to address Martin J's concerns and notes that a new requirement for leave could be based upon section 49(2) of the *Succession Act 1981* (Qld). This provides:

Upon the making of a grant [of probate of a will or letters of administration of the estate of any deceased person] and subject thereto, the powers of personal representatives may be exercised from time to time only by those personal representatives to whom the grant is made; and no other person shall have power to bring actions or otherwise act as personal representative without the consent of the court. (underlining added)

The Department seeks your views on whether a requirement for leave to bring a derivative action in a deceased estate matter should be implemented, and if so, whether a provision of similar effect to section 49(2) of the *Succession Act 1981* (Qld) should be inserted into the *Administration Act 1903* (WA).

Security for costs

The Department is also considering whether defendants in these types of matters are adequately protected from the risk that the plaintiff cannot satisfy a costs order made against them. Whilst the Department is not aware of any particular issues, we would be grateful for your views on whether the current security for costs regime is adequate in these circumstances. For example, the legislative reform contemplated above might include a reference highlighting the court's power to order a level of security be provided by the applicant seeking leave to pursue a derivative action.

Legal costs

Lastly, the Department is aware of the comments of the Hon Justice Curthoys in *Miller v Taylor* [2018] WASC 75, an action under the *Family Provision Act 1972* (WA). Curthoys J expressed concerns about the legal costs involved describing them as a 'scandal to the administration of justice' that 'brings the legal profession into disrepute' (at [441]) and noted that the small estate had been ravaged by legal costs (at [418]).

The Department is therefore also considering whether the regulation of the legal profession regarding costs is adequate. The Department would welcome any comment on this issue, noting that WA has recently transitioned to the Legal Profession Uniform Law.

Summary of questions

The Department would be grateful for your comment on the above issues, and in particular, the following questions:

1. Should a leave mechanism similar to section 49(2) of the *Succession Act 1981* (Qld) be adopted in Western Australia?
2. Are defendants in these kinds of matters adequately protected by the existing security for costs regime in Western Australia?
3. Is any reform required to the regulation of the legal profession, particularly regarding charging costs that are disproportionate to the sum in dispute?

It would be appreciated if you could provide a response on the above issues by 31 August 2022.

If you have any queries in relation to the above, or require any further information, please contact Ms Priya Pillay, Policy Officer, on 9264 9946 or at priya.pillay@justice.wa.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A Tomison', with a long horizontal line extending to the right.

Dr Adam Tomison
DIRECTOR GENERAL

5 July 2022