Common Mistakes Made by Executors

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COMMON MISTAKES MADE BY EXECUTORS

1 OVERVIEW OF EXECUTOR'S DUTIES

Although the title to this paper refers to executors, it may be taken that it will also cover administrators. In other words, the legal personal representative of an estate ("LPR").

The general duties of a LPR may be summarised as follows:

- To arrange for the proper disposal of the body;
- To obtain a grant;
- To ascertain the assets of the estate, reduce the estate to possession and recover any amounts to the estate;
- To ascertain liabilities of the estate and pay funeral, testamentary and administration expenses and debts of the estate;
- To distribute the estate in accordance with the testamentary dispositions or to those entitled to take on intestacy;
- Where assets are held on trust, to invest those assets and administer the trust;
- To keep proper accounts;
- To wind up the estate.

1.1 Disposal of the Body

The duty to arrange the funeral and burial of the body rests on the executor. So, where you may commonly find family members in dispute about funeral arrangements and the like, the final decisions rests with the executor. Of course, the executor may consider the wishes of family members however s/he is not bound by them.

1.2 To Obtain a Grant

An executor appointed under a will cannot be forced to accept the office. He may renounce – ideally, as soon as possible. If a named executor however intermeddles, he may be ordered to take out a grant.

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An executor appointed under a will applies for a grant of probate of the Will. Where there is no will so that the deceased died intestate, letters of administration are granted ordinarily to the husband or wife of the deceased and/or one or more of the next of kin so some other person who, in the opinion of the Court, is fit to be appointed.

1.3 Calling in the Assets

Section 44 of the PAA provides that upon a grant of probate of a will or grant of administration in an intestacy, all the real and personal estate of which the person dies seised or possessed of or entitled to in NSW, shall as from the death of such person pass to and vest in the executor or administrator. Before that time, the property of the deceased vests in the Public Trustee.

The vesting of the property is an actual vesting which entitles the legal personal representative to administer the estate – not in their personal right but rather in their representative capacity. Accordingly, the property of the deceased – although vested in his LPR, cannot be claimed by the LPR trustee in bankruptcy.

Given that the grant means that the vesting is taken to relate back to the date of death, any acts done by a LPR before the making of the grant are validated by the grant if done for the benefit of the estate.

1.4 Payment of Debts

Section 46(1) of the PAA provides that the real and personal estate of the deceased shall be assets in the hands of the LPR for the payment of all duties and fees and the payment of the deceased's debts.

Subsection (2) of s46 provides that a LPR may sell or mortgage any real estate that comes into his hands with and without a power of sale and convey the reap property to a purchaser or mortgagee in as full and effectual a manner in law as the deceased could have done. This subsection must be considered in conjunction with ss 153 and 154 of the Conveyancing Act 1919 (NSW) and in particular, the rule that one of several executors or administrators acting alone does not have authority to sell the real estate without the leave of the Court.

1.5 Obligation to keep accounts

This is a statutory duty imposed by s85 of the PAA.

> With respect to estates of persons who die after 3 January 1981 (s85(1AA)) provides that where the LPR is:

- A creditor of the estate;
- The guardian of a minor who is a beneficiary of an estate where the whole or a substantial part of the estate passes to charity;
- A person (not being a beneficiary of the estate) selected at random by the Court;

- A person otherwise required to do so by the Court-

the LPR is required to verify and file or verify, file and pass accounts relating to the estate within such time, and from time to time, and in such manner as may be fixed by the rules, or as the Court may order.

Pt 78 r 71 of the Supreme Court Rules provides that under s85(1AA), accounts must be filed within 12 months after grant.

The Affidavit of Executor or Administrator contains undertakings that the LPR will verify and file or verify, file and pass accounts if obliged by the Act or by Court. If there has been a random selection by the Court, notice is usually given to the LPR after the grant has been made.

In the following circumstances, a LPR may not be required by s85(1AA) to verify, file and pass accounts:

- The LPR may be required by the Court on the application of an interested person to produce and verify accounts – s85(2);
- The LPR who wishes to claim commission must first file verified accounts (s86(20));
- If the LPR wishes to avail himself of the prima facie evidence of the correctness of his administration offered by s85(3), he may voluntarily file verified accounts.

In some cases, where all the major beneficiaries agree, the Court may waive the passing of accounts if they have been filed and verified. The Order of the Court allowing the account is prima facie evidence of its correctness and operates after 3 years from the Order (except where there is error, omission or fraud) as a release without any formal order – s85(3).

Where the Court disallows a disbursements when passing accounts, the Court may order the LPR to refund the amount disallowed – s85(4).

If a LPR may not be required to pass accounts under s 85, this does not mean that the general obligation to keep and maintain proper accounts imposed by the general law can be avoided: see *Jones v The Estate of Brian Farley* (Santow J. 10 October 1997, unreported).

What is “proper” will depend on the circumstances of the case. However the accounts should be unambiguous, clear and distinct so as to give accurate information to beneficiaries. A trust account must be kept separate from other matters, particulars of receipts and payments are supported by invoices or vouchers/receipts and such documents are available for inspection, the account must contain information as to the amount and state of the assets and property and set out details of liabilities.

1.6 Commission

Section 86 of the PAA authorises the Supreme Court to allow commission to be paid from the assets of the estate to the LPR for their “pains and trouble as is just and reasonable”.

If the Will contains a commission clause, then, in the absence of any unusual circumstances, the Court will not allow further commission to that LPR.

Occasionally, an issue as to construction may arise to ascertain whether a legacy given to an executor excludes a right to commission. It has been held that a gift of residue to an executor does not raise a presumption that the gift is given in consideration of that beneficiary acting as executor.

A LPR who neglects or omits without good cause to pass accounts may be disallowed commission: s86(2).

In considering what, if any, commission should be allowed, the Court considers the conduct of the LPR and the performance of his duties. I will touch upon commission disputes later on in this paper.

1.7 Distribution

Once the assets of the estate have been called in and the debts paid, distribution may occur. The LPR will hold the net distributable estate subject, perhaps, to outstanding administration expenses and commission, for the beneficiaries in the will or those entitled to take on intestacy.

There is a difference between administration and trusteeship. Once administration is complete, the LPR holds whatever assets might remain as trustee for the beneficiaries of the estate. When this occurs is not always clear.

The administration of an estate may be incomplete where, for example, there is an impediment to transferring an asset to the LPR or those entitled. So far as that asset is concerned, the duties of administration would not be complete.

The interest of a beneficiary in an unadministered estate confers no beneficial interest in any particular piece of property. The only "interest" the beneficiary has at that stage is a right by way of a chose in action. That is, to see the proper administration of the estate: *Commissioner of Stamp Duties (QLD) v Livingstone* [1965] AC 694.

1.8 The Executor's Year

The principle of an executor's year refers to an obligation upon the executor to realise estate assets, pay debts and expenses and distribute the estate within a year of the deceased's date of death. Whilst this principle applies, in practice, it depends upon what is reasonable in the circumstances. Although it has been said in *Grayburn v Clarkson* (1868) LR 3 Ch App 605 at 606) that if the year has passed, the onus shifts on the executor to justify the delay.

In *Williams v Stephens* (unreported, NSWSC Eq. D. 24 March 1986) Young J said: *"The Court will not necessarily…take a merciful approach to executors who do not answer beneficiaries' requests properly and wind up an estate which is committed to there are as soon as possible".*

2 EXECUTORS AS BENEFICIARIES AND CLAIMANTS

It is not the purpose of this paper to cover the provisions of the Succession Act 2006 (NSW) ("SA") or the repealed Family Provision Act 1982 (NSW) in respect of claims for family provision orders. However, there are many instances where a named executor in a will is also an "eligible person" under the legislation (s57 of the SA or s8 of the FPA) to bring a claim for provision against the estate of deceased. The Supreme Court Rules require that the administrator of the estate to be joined as a defendant unless there is sufficient reason for not doing so. In such situations, where the executor is to be named as a defendant but is also a plaintiff, is it appropriate to name the executor as the defendant? Can the executor act in two capacities?

The LPR is generally required to uphold the will and to ensure that all relevant material, especially evidence as to the needs and circumstances of the beneficiaries, is placed before the Court. The LPR is required to file the Schedule J affidavit.

The LPR is required to serve a Notice of Claim upon any eligible person where a family provision claim is made. The Notice informs the recipient that an application for family provision orders has been made and inviting the recipient, if s/he is entitled to do so, to make a claim and stating that if s/he does not, then the Court may deal with the plaintiff's application without regard to that recipient.

An executor should also, in such cases, put forward any evidence relating to a particular gift in the will. Specifically, it is the duty of the executor to put material before the Court which a beneficiary wishes to have placed before it, and, except where they believe that such material is false, it is not their responsibility to prevent such a case being put: *Re S J Hall, deceased* (1959) SR (NSW) 219.

The question of whether an executor plaintiff should also be named as a defendant to family provision proceedings was considered by Campbell J in *O'Brien v McCormick* [2005] NSWSC 619. In *O'Brien*, there were 2 executrixes appointed by the will. Probate was grant to both. In addition to being appointed co-executor, Mrs O'Brien obtained a specific bequest of real property, together with its contents. The residue of the estate was to be divided equally amongst Mrs O'Brien and her 3 sisters – one of whom was the other co-executor, Mrs McCormick.

Mrs McCormick and her 2 sisters brought family provision claims. Mrs O'Brien brought proceedings seeking the removal of Mrs McCormick as an executrix. The Summons named both executrixes as defendants. Mrs McCormick was also named as a Plaintiff so she appeared on both sides of the record. Mrs McCormick formed the view that it was not appropriate that she continue to act as executor in the circumstances and she sought a revocation of the grant.

Commencement of proceedings against the estate by an executor was no ground for revocation of the grant: *Collison v Collison* (28 March 1995, unreported, Master McLaughlin). *Collison* concluded that in such instances, the proper procedure was that the executor not be named as a defendant in the family provision proceedings.

His Honours said at [19]:

> *"That rule [re joining the administrator as the defendant], and other rules of court regulating procedure under the Family Provision Act 1982, should be read in light of the definition of "administrator" in s6 FPA, which extends to (inter alia) a person to whom probate has been granted. The decision in Collison gives content to Pt 77 r60(2)(b)* [now repealed]*, by holding that one type of case where there is sufficient reason not to join every administrator is when there is an executor who is a plaintiff, in which case the plaintiff should not join himself as defendant."*

At [28] Campbell J discussed the payment of the plaintiff's fees for defending a family provision application. His Honour said:

> *"The defence of Family Provision Act 1982 proceedings is one of the tasks an executor performs in administering the estate: Re Woodman, deceased; ex parte The Trustee (1940) 11 ABC 159 at 175; Re Linning [1995] 1 QdR 274 at 276; Re Lowe [2000] NSWSC 1180 at [5]. Even if usually when executors are party to litigation they ought in strictness all be party to that litigation (Union Bank of Australia v Harrison, Jones & Devlin Ltd (1910) 11 CLR 492 at 499), that situation does not apply when a rule of court like Part 77 rule 60 Supreme Court Rules 1970 and the practice described in Collison v Collison (Master McLaughlin, 28 March 1995, unreported) permit the estate to be represented in litigation by fewer than all the executors. In defending the Family Provision Act 1982 proceedings the Plaintiff is engaging in one of the types of action where a single executor's action can bind the estate, without any need for assent or approval by any co-executor: cf Union Bank of Australia v Harrison, Jones & Devlin Ltd (1910) 11 CLR 492. As part of what is involved in defending the proceedings she has the power to pay the estate's money in payment of the fees of the solicitor acting in the defence of the proceedings, in a way which is valid as between the solicitor and those interested in the estate."*

3 CONFLICTS OF INTEREST

A conflict of interest or duty arises where LPR prefers interest to duty or intends to neglect duty.[1] This is different to a situation of conflict in the terms of disagreement or unpleasantness between the LPR and beneficiaries. The fact that there is conflict between a nominated executor and beneficiaries under a will is not a sufficient justification to pass that person over or remove them from office.[2]

Equity will not permit a party as trustee to place himself or herself in circumstances or in a situation in which his or her interest conflicts with duty.[3] Where a trustee or other holder of a fiduciary office infringes this rule, one form of relief is removal from office.[4] I will deal with removal of LPR later.

Examples of conflicts of interest, whether actual or potential, between an executor or administrator and beneficiaries may arise in the following circumstances:

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1 *Morgan v MacRae* [2001] NSWSC 1017 at [25] per Young CJ in Eq.

2 *Re Jensen* [1998] Qd R 374 where the hostility arose from religious differences between them.

3 *Hobkirk v Ritchie* (1934) 29 Tas LR 14 at 47 per Nicholls CJ and Crisp J.

4 Ibid.

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(a) where the executor alleges that s/he is a debtor of the estate and is yet to seek reimbursement;

(b) where a beneficiary alleges that certain assets are rightfully the property of the estate and no step are taken to support this claim; and

(c) where the executor claims that the estate owes him or her money and there is no document recording the loan.[5]

A potential for conflict between the duty of an executor and interest as a beneficiary or debtor of an estate if not sufficient, by itself, to justify a revocation of a grant of that executor, particularly if the testator appointed the executor knowing of the potential for that conflict.[6] A testator is assumed to have known the facts existing at the date of the appointment and a court infers that the testator is nevertheless willing to trust in the loyalty and integrity of the appointee in administering the estate. This is the reason why the appointment of a particular person as executor by a testator is not lightly to be set aside and a grant in his or her favour revoked.[7]

The appointment by a testator of a debtor of the estate as executor does not, of itself, involve the creation of conflict of interest and duty.[8] "The law assumes that it is in the interests of debtors to pay their just debts".[9] One of the duties of an executor is to collect the just debts owed to the estate. The interests of a debtor to the estate accord with the duty to the estate of that debtor as executor.[10] But, problems often arise where the debtor/executor disputes the debt to the estate after the death of the testator. The executor may refuse to acknowledge the indebtedness as an asset of the estate because the executor is the alleged debtor and accepts as truth facts which do not give rise to the alleged debt. There may also be instances "in which the executor is writing to admit as a debt of the estate a disputed claim made by himself or herself which is based on assertion of fact made substantially solely or principally by the executor."[11] The executor is in a position of conflict of interest and duty in each of these cases.[12] This conflict is not potential – it is actual and present.[13]

What do courts do in determining of whether the conflict of duty or interest is sufficient to have an office holder removed?

Courts are concerned with more than the question of whether there is a situation of conflict of duty or interest.[14] On the one hand, courts are unlikely to be concerned if no serious risk of mischief is likely to emanate from the circumstances of the situation.[15]

The test seems to be that before a court acts where there is a state of conflict and duty so as to remove an executor, either the situation "must have already given rise to mischief of a level of seriousness that is reasonably high or there must be a reasonably high level of risk arising in the future.[16] The standard must be high and flexible.[17] This standard is not set too low in respect of

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5 *Upton v Downie* [2007] NSWSC 1095.

6 *Rutter v McCusker* [2008] NSWSC 1289 at [24] per Palmer J; *Tuohey v Tuohey* [2002] VSC 180 at [59]ff per McDonald J; *Re Estate of Ritchie* [2002] NSWSC 10870 at [8] per Windeyer J.

7 Ibid, there citing *Monty Financial Services v Delmo* (1996) 1 VR 65 and *Upton v Downie* [2007] NSWSC 1095 at [50] per Gzell J.

8 *Rutter v McCusker*, as above at [25].

9 Ibid.

10 Ibid.

11 Ibid at 26.

12 Ibid.

13 Ibid.

14 *Gowans v Watkins*, (unreported, SC(Vic) Teague J, No 6131/1995, 21 February 1996) at 28.

15 Ibid.

16 Ibid at 30.

executors because a court should respect the intention of the testator, "a matter which is not a consideration in other situations of conflict."[18]

Certain executors might make errors of judgment and do things that a detached executor ought not to have done but such matters may be deemed inconsequential if there is no established mischief or risk of such mischief in the future.[19]

Informal documents and conflict of interest

What does one do in the situation where an executor is named as a beneficiary in a valid Will but a later informal document exists in which the person is again named as executor but perhaps is not a beneficiary or receives a lesser share? What does the person do?

The executor should disclose the existence of the informal document to the Court but set out his/her reasons for not being of the view that the informal document is testamentary.

4 CHALLENGING THE APPOINTMENT OF AN EXECUTOR

4.1 Overview

Generally, any person can be appointed executor of an estate and prima facie, that person is entitled to a grant of probate: *Marsh v Patten* (1868) 7 SC (NSW) Eq 18. Difficulties often arise between persons who benefit from the estate, whether named in a will or who take on an intestacy, and the executor or administrator of an estate. For example:

- Hostility may be exhibited towards each, where such hostility was present before the date of death of the deceased and the activation of the office of personal representative triggers the hostility;
- A beneficiary may resent the appointment for any number of reasons, personal or otherwise.
- A beneficiary may consider that the personal representative is not administering the estate properly or expeditiously.
- A beneficiary may consider that the personal representative is acting in his or her own interests and placing those interests before those of that beneficiary.
- Beneficiaries for any of the above reasons or, indeed, for others, may oppose the appointment of the executor as nominated in a will and, if that person does not

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[17] Ibid.

[18] Ibid at 30-31.

[19] Ibid at 41.

renounce the office, a right he or she has before seeking a grant of probate, those beneficiaries may attempt to bar that executor from seeking a grant of probate in respect of the will. In order to achieve that result, the beneficiaries must seek an order that the person nominated as executor be passed over from holding the office. I emphasise that the procedure of passing over is only available against an executor before the grant of probate. If there has been a grant, persons disaffected by the executor must take steps to remove that person from office as executor.

4.2 Passing Over An Executor

An application to pass over or remove an executor who has been granted probate has its difficulties:

- what is the jurisdiction of the court to make an order, whether passing over or removing an executor from office. Is it statutory or part of an inherent jurisdiction of a court;
- the hurdle facing the beneficiary that a court will be conscious of the fact that the deceased person selected the executor to act in the administration of his or her estate and that a presumption arises in favour of the executor; and
- whether the circumstances themselves warrant the making of an order, the effect of which is to remove the person selected by the deceased person from office.

4.3 Important Distinctions

(a) *passing over of executor*- proceedings for removal must be taken before a grant of probate;

(b) removal of executor- proceedings for removal must be taken after a grant of probate and before there is assent and completion of administration of an estate; and

(c) removal of trustee - proceedings for removal must be taken after administration of an estate has been completed and a trustee is administering a trust created by a will.

Where a person named as executor fails to seek a grant of probate and another who has an interest under the will cites the executor to take probate but he or she fails to appear to the citation, the right of that executor in respect of the executorship ceases wholly: s69 PAA.

Where, however, the person named as executor is cited to seek a grant, appears to the citation but still does not seek a grant, the process of administration is not stultified by such circumstances. A citation either compels a grant to be taken by those primarily entitled to it or, when not taken, “the process provides a substitute for a voluntary renunciation on their part”.[20] In those circumstances, it may be appropriate to order that the citor be at liberty to have the grant in the form of letters of administration.[21]

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[20] *Re Estate of Shephard, deceased* (1982) 29 SASR 247 at 254 per Legoe J there citing with approval Mortimer *Law and Practice of the Probate Division* (1911) at 522 and affirmed by the Full Court (1982) 30 SASR 1.

[21] *Re Estate of Shephard, deceased*, as above.

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4.4 Relevance of appointment by deceased

The appointment of a particular person as executor of a will is an important consideration for the court in considering an application for either the passing over or removal of an executor.[22]

It is the intention of the testator that the person appointed to the office of executor shall have control over his or her property after death.[23] A court will not lightly interfere with the discretion of a testator to appoint a particular person as his executor.[24]

One judge has stated that the act of appointment by a testator amounts to a presumption that the testator made a decision to appoint a certain person to that office having regard to the fact that this person had knowledge of the character and abilities of the testator and to the nature of the duties which the office holder would be called upon to discharge.[25]

Prima facie, a court may assume that a testator made a considered judgment about the wisdom of appointing such a person to the office and that the testator was confident in his or her ability to complete the task fairly and competently.[26]

The presumption extends to a judgment by the testator that it would be discharged notwithstanding potential conflict of interest which the appointment would create.[27] There may be a conflict of interest between the office holder and beneficiaries. That presumption arises from the very fact that a testator has considered the matter and it is manifest on the very document that he or she has nominated a particular person to have that role. That decision is entitled to be given due weight by a court but that fact, in itself, cannot be treated as limiting or thwarting the jurisdiction of a court to ensure that the paramount consideration of welfare of beneficiaries and the due administration of the trust be executed.[28]

If there is evidence that an executor or trustee is not complying with that part of his/her duty, a court should not “shrink” from that obligation in terminating the office.[29] If a court considers that the conduct of the person nominated as an officeholder is serious enough for a removal from office, the predilection of the testator becomes secondary to the obligation for the proper execution of the trust in the interests of the beneficiaries. That tension is lessened where the conduct of the officeholder is such that a court is more concerned about the due administration of the trust and the interests of the beneficiaries than the very appointment of the officeholder by the testator.

4.5 Revocation of Grant

Courts have an inherent power to revoke a grant of probate and a statutory power to revoke a grant of administration[30]

The object of the inherent power to revoke a grant is to ensure the due and proper administration of an estate and protect the interests of those beneficially interested.[31] There is nothing in the nature of the inherent power which limits the form of order which such an order may take.[32]

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[22] *Titterton v Oates* [1998] ACTSC 23 at [56] per Crispin J and see *Monty Financial Services v Delmo* [1996] 1 VR 65 at 75 per Ashley J.

[23] *Re Goods of Samson* (1873) LR 3 P D 48 at 50 per Sir James Hannen.

[24] *Re Pacey* (1915) 11 Tas LR 172 at 173 per Ewing J.

[25] *Titterton v Oates*, as above.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid at [57]

[30] Section 66 PAA in relation to grants of administration.

An inherent power to revoke a grant of probate relates to:

(a) Circumstances in which the grant was made in error, namely

(i) where the testator is found to have been alive at the date on which the grant was made, legislation prescribing that a court only has jurisdiction to grant probate of the estate of a deceased person;[33]

(ii) where a will later in date from that the subject of the grant is found subsequently;

(iii) where there was a mistake of fact which gave rise to the grant;

(iv) where the grant was obtained by fraud[34], duress or undue influence; and

(v) where the will is subsequently found to be invalid or void because of lack of testamentary capacity or lack of knowledge and approval or the application of undue influence.

(b) Where the due and proper administration of the estate has been prevented or put in jeopardy because of incapacity or misconduct by an executor such as:

(i) The development of physical or mental incapacity of administering the estate;[35]

(ii) The executor neglects or refuses to effect the administration of the estate;[36] and

(iii) The executor is guilty of misconduct or unjustified delay in administration.[37]

There is only one way in which an executor may be removed and that is by revocation of the grant and by the making of a fresh grant.[38]

4.6 Conduct entitling removal

Conduct which has been held to amount to a justification for the removal of a personal representative whether by passing over of the person nominated in a will or by removal of such a person from office as an executor or as a trustee is similar.[39]

Conduct which is deemed to amount to a dereliction of appropriate behaviour or bad health thus justifying removal is conduct which prevents the due and proper administration of an estate thus placing it in jeopardy or which prevents that administration by acts of the person or by reason of his or her health.[40]

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31 *Profilio v Profilio* [1999] NSWSC 57 at [28] per Bryson J.

32 Ibid.

33 NSW: *Probate and Administration Act 1898* (NSW), ss 40 and 40C.

34 *Re Gillard (deceased)* [1949] VLR 378.

35 *Re Estate of Mack* [1962] NSWR 1029 per Myers J.

36 *Re Estate of Mack* [1962] NSWR 1029 per Myers J.

37 *Bates v Messner* [1967] 1 NSWR 638 at 642 per Asprey JA.

38 *Morgan v MacRae* [2001] NSWSC 1017 at [21] per Young CJ in Eq questioning a different decision of Bryson J in *Profilio v Profilio* [1999] NSWSC 657 at [28]. See, too, *Gorman v McGuire* [2002] NSWSC 1089 at [6]-[7] where Palmer J agreed with Young CJ.

39 *Re Crane* (2005) 93 SASR 198, [2005] SASC 379 at [25] per Besanko J.

40 *Re Goods of Loveday* [1900] P 154 at 156 per Sir Francis Jeune P.

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In a useful decision of the Supreme Court of South Australia, Justice Besanko in *Re Estate of Crane*[41] referred to various grounds upon which a court had removed or passed over a person nominated as executor from office:

(a) an executor is of bad character having been convicted of the manslaughter of the deceased and who was serving a life sentence;[42]

(b) where the sole executor is in prison;[43]

(c) an executor had neglected his or her duties;[44]

(d) an executor had intermeddled in an estate and then refused to take a grant;[45]

(e) an executor is absent abroad;[46]

(f) an executor is suffering from ill-health;[47]

(g) an executor is of unsound mind;[48]

(h) an executor is not competent to take probate;[49]

(i) an executor has disappeared;[50] and

(j) the estate is insolvent.[51]

The following should be added to that list:

(k) where a named executor had taken no steps to obtain probate;[52]

(l) where a person was the subject of a warrant for his arrest and disappeared without trace prior to the death of the testator;[53]

(m) where prior to his death, a testator allegedly sold property to one executor for undervalue;[54]

(n) drunkenness;[55]

(o) lack of management ability;[56]

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41 (2005) 93 SASR 198, [2005] SASC 379 at [25].

42 *Re Estate of S* [1968] P 302 at 305 per Baker J; *Bar-Mordecai v Rotman, Re Estate of Hillston* , unreported, SC (NSW), Einstein J, No 120009/1994, 4 September 1998.

43 *Re Estate of Drawmer (dec)* (1913) 108 LT 732.

44 *Re Estate of Potticary* [1927] P 202 at 204 per Hill J.

45 *Re Estate of Biggs* [1966] P 118, [1966] 1 All ER 538 per Rees J.

46 *Re Goods of Taylor* [1892] P 90; *Bar-Mordecai v Rotman*; *Re Estate of Hillston*, unreported SC(NSW), Einstein J, No 120009/1994, 4 September 1998 at [21].

47 *Re Galbraith (deceased)*; [1951] P 422, [1951] 2 All ER 470 per Karminski J.

48 *Re Goods of Atherton* [1892] P 104.

49 *Re Goods of Stewart* (1875) LR 3 PD 244.

50 *Re Sawtell* (1862) 2 Sw & Tr 448, 164 ER 1070 at 1071 per Sir Cresswell.

51 *Ex parte Leguia; re Estate of Ashworth* [1934] P 80.

52 *Re Estate of Ray (deceased)* (1926) 136 LT 640 per Lord Merrivale P.

53 *Re Goods of Wright, deceased* (1899) 79 LT 473 per Sir Francis Jeune where his Lordship held that there were special circumstances which enabled him to pass over the nominated executor pursuant to s 73 of the *Court of Probate Act 1857* (UK).

54 *Re Estate of Crane* (2005) 93 SASR 198, [2005] SASC 379.

55 *Re Will of Orloff (deceased); Terracall v Churkovic* [2010] VSC 83 at [39] there citing with approval *Bar-Mordecai v Rotman*, unreported, SC(NSW), Einstein J, 4 September 1998; *Re Ardern* [1898] P147.

(p) where a trustee becomes bankrupt (unless the testator was aware of this fact);[57]

(q) where a spouse of an intestate person was divorced from him or her and could not be located;[58]

(r) where a person nominated as an executor makes it clear that he or she intends to leave the jurisdiction without taking probate;[59]

(s) where an executor fails to rent property of a trust and it becomes vacant.[60]

4.7 Reasons for not removing personal representative

In some circumstances the Court may refuse to remove a personal representative given the importance attached to the testator's choice of executor. Some examples of cases where the personal representative has not been removed include:

(1) a mere conflict in terms of hostility or nastiness between the personal representative and beneficiaries;[61]

(2) if the personal representative was removed, there would be further delay to the finalisation of the estate;[62]

(3) where there are allegations of delay but a court considers that the executor has a complex and difficult estate to administer and that such a task will take time;[63]

(4) lack of proof that the due and proper administration has either been put in jeopardy or that the executors are not fit and proper persons to carry out the duties required of them;[64] and

(5) the imminent winding up of the estate and the prospects of a final distribution in the immediate future.[65]

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56 Ibid.

57 *Miller v Cameron* (1936) 54 CLR 572 at 575 per Latham CJ there citing *Bainbrigge v Blair* (1939) 1 Beav 495; 48 ER 1032. His Honour said that such removal happens as a matter of course there citing *Re Barker's Trusts* (1875) 1 Ch D 43. The basis of the rule seems to be that the bankrupt might be tempted to misapply the trust funds. If, however, the bankruptcy occurred without moral fault and the trustee has recovered from financial problems, he or she may be allowed to keep office.

58 *Re Estate of Frost* [1905] P 140 at 141 per Bargrave Deane J.

59 *Re Estate of Leguia* [1934] P 80 at 83 per Sir Boyd Merriman having heard argument concerning s 73 of the *Court of Probate Act 1857* (UK).

60 *Pajic v Lepan* [2006] NSWSC 1123 at [5] per Young CJ in Eq.

61 See Conflict.

62 Ibid.

63 *Gibson v Buchanan* [2004] NSWSC 957 at [41] per Palmer J.

64 *Otto v Redhead* [2009] QCA 147 at [5] per the Court of Appeal.

65 Ibid at [6].

5 DISPUTES BETWEEN CO-EXECUTORS

5.1 Overview

Often a testator will appoint two or more executors to administer his or her estate. In fact, I have seen one will in which the testator appointed 12 executors, including a former Court of Appeal Judge, and Chief Justice of the Supreme Court. Let's just say they happily renounced probate and it turned out the deceased lacked testamentary capacity. I'll save that story for some other time.

Appointing 2 or more executors is useful in the event that one is unable or unwilling to act (for example, predeceased the deceased). Additionally in such a situation one executor can apply for probate reserving to the other/s leave to come in and prove the will. Such a practice is permitted under s41 of the PAA.

What does a Court do if problems arise between the person granted leave to come in and prove the will and the executor to whom probate was granted? An important consideration for the Court is the fact that the testator wished the persons appointed by him/her in the will to administer the will.

***Rutter* v *McCusker* [2008] NSWSC 1289 - Palmer J**

P/XD were beneficiaries of their father's will. First defendant was de facto widow of father and she was granted probate of his will.

Ps sought revocation of the grant and sought an order that the grant be made to an independent person primarily because they alleged the de facto widow was in a position of substantial and irreconcilable conflict between her duty as executrix and her personal interest as a sole director and shareholder of the D company, which was said to be a substantial debtor of the estate. A second reason was that the executrix had not acted even-handedly in the interests of all beneficiaries.

The Ps were the children of the deceased's first marriage. The deceased had a one child with the executrix.

The will gave shares in the company to one plaintiff, together with a debt owed by the deceased to that company. It gave to the other plaintiff the deceased's interests in a yacht and a legacy of $150,000. The residue was left to the executrix widow. The estate comprised shares and debts owed by several companies. The Ps contended that the estate was owed about $425,000 by the executrix's company. There was insufficient cash in the estate to pay the legacy and the alleged debt was required to be repaid to the estate so that the legacy could be paid. The executrix denied the existence of the debt. Her daughter commenced family provision proceedings against the estate. So too did the Plaintiffs. All claims were dismissed. In that case, McLaughlin AsJ (as his honour then was) found that the debt was owed to the estate and he found that no attempt had been made by the executrix to get in the indebtedness to the estate and said [at 107] *"the obvious reason for that failure on her part to carry out one of the fundamental duties of an executor – to get in the assets of the estate – is doubtless that she is the sole shareholder and sole director of [that company], and that she personally stands to benefit if that company is not required to pay its indebtedness to the Deceased".*

The executrix maintained in the revocation proceedings that despite his Honour's finding, the company was still entitled to dispute its indebtedness.

The Ps had asked the executrix to serve a demand on the company, which she failed to do so. The Company was joined as a party and it cross claimed seeking a declaration that it was not indebted to the estate. The cross claim was verified on oath by the executrix. The company was placed into administration shortly after. In the Report as to Affairs of the company, the executrix had identified the alleged debt as a contingent liability. She had also reported a contingent asset being the company's claim against the estate for $700,000. The Report was apparently the first time a claim against the estate was made by the Company. The claim to support the alleged indebtedness of $700,000 would have depended upon the evidence of the executrix.

Palmer J summarised the principles applicable to revoking of a grant of probate in circumstance involving a conflict of interest and duty on the part of the executor. At [24 - 25] his Honour said:

> *"a potential for conflict between duty as an executor and interest as a beneficiary or debtor of the estate is not sufficient on its own to justify revocation of a grant to that executor, particularly if the testator has appointed the executor knowing the potential for that conflict. An executor is assumed to know the facts existing at the time of appointment and the Court infers that he or she is nevertheless willing to trust in the loyalty and integrity of the appointee in administering the estate. For this reason, the appointment of a particular executor by a testator is not lightly to be set aside by the Court…*
>
> *the appointment by a testator of a debtor of the state as executor does not, of itself, involve the creation of conflict of interest and duty. The law assumes that it is in the interests of debtors to pay their just debts. Likewise, it holds that it is the duty of executors to get in the just debts owed to the estate. So far the interests of a debtor to the estate accord with the duty to the estate of that debtor as executor.*
>
> *Problems may arise, however, when the debtor/executor disputes the debt to the estate after the testator's death. There may be cases in which the executor refuses to acknowledge a debt as an asset because the executor is him/herself the alleged debtor, and accepts as truth a version of events which does not give rise to the alleged debt. There may be other cases in which the executor is willing to admit as a debt of the estate a disputed claim made by him/herself which is based on assertion of fact substantiated solely or principally by the executor. In both such cases the executor is in a position of conflict of interest and duty. The conflict is not potential. It is actual and present.*

His Honour found that the admission of an uncorroborated claim against the estate and refusal to collect an asserted asset of the estate depended upon the executrix's acceptance of her own veracity. In such case, the administration of the estate was placed in jeopardy and the grant was revoked.

The finding that the due administration of an estate is in jeopardy is one that is not made lightly: see *Labraga* v *Pomfret* [2005] NSWSC 973 at [114] and cited by Tamberlin J in *Esplin v Timms* [2010] NSWSC 339 at [8].

In *Esplin* v *Timms*, the plaintiffs also were two children of the deceased. A third child was the defendant executor appointed under the deceased's will. The terms of the will did not authorise the defendant to borrow or sell, save for the purpose of realising assets of the estate.

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The defendant had sold two lots after transmitting title to the lots in his name, contrary to the terms of the will. He had also undertaken an extensive redevelopment of the property, for which there was no power contained in the will.

The defendant had received legal advice that the transfer of the assets of the estate could not take place without exposing him to liability for breach of trust. Regardless, he did not follow the advice. In the course of his administration, part of the estate's assets were transferred to the plaintiffs where there was no power to do this under the will.

He mortgaged the estate assets to secure a guarantee given in favour of an advance to his bankrupt brothers and other advances made to him by a bank. These actions were also unauthorised. He did not appear at the hearing. The Court was satisfied that the defendant had placed the due and proper administration of the estate in jeopardy and that he was not a fit and proper person to carry out the duties of executor. The grant was revoked and he was ordered to verify and file accounts as to his administration of the estate. As Young J pointed out in Morgan v *Macrae* [2001] NSWSC 1017 at [21] – [24] if an executor is removed there must be a consequential order that requires the filing of accounts. An independent administrator was appointed as the Ps were also not suitable because they would have a clear conflict of interest if appointed in circumstances where they had received benefits from the estate which must be accounted for.

5.2 Pajic v Lepan [2006] NSWSC 1123

This was a simple estate. Assets of the estate were a home and $5k in the bank. The property was left to the deceased's children equally. The executor was a friend of the deceased. However by a later codicil, the deceased gave what appeared to be a life interest in the property to his sister. The executor made arrangements for the aunt to vacate the premises for $5k and the plaintiff and second defendant (sister) put the executor in funds for this to happen.

The deceased had, at the time of the hearing, been dead for 3 years. The property was vacant. The executor demanded monies for commission to which he was not entitled unless the Court makes an order for commission if he has duly passed accounts to show he had properly administered the estate. He had not been cooperative with the major beneficiaries.

The grant of probate was revoked and he was ordered to file accounts.

6 UNLAWFUL DISTRIBUTIONS

The situation often arises when a LPR makes an unlawful distribution. For example, an overpayment to a beneficiary, paying someone mistakenly or paying an alleged debt of the estate which turns out not to have been a valid debt or even worse, was statute barred.

An executor/administrator will commit a *devastavit* if they apply the assets of the estate in payment of claims which they have no right to satisfy: *Re Rosenthal* [1972] 3 All ER 552. A trustee will commit a breach of trust.

The publication of relevant notices affords LPR with some protection from claims that might be made after an estate has been administered.

For the purposes of seeking protection from distributions made without notice of a family provision claim, s93(1) of the SA is relevant.

That subsection provides that the LPR of an estate may distribute the property in the estate if:

- The property is distributed at least 6 months after the deceased's death, and
- The LPR has given notice in the approved form[66] that the LPR intends to distribute the property in the estate after the expiration of a specified time,
- The time specified in the notice is not less than 30 days after the notice is given, and
- The time specified in the notice has expired, and
- At the time of distribution, the LPR does not have notice of any application or intended application for a family provision order affecting the estate.

S93 is analogous to s92 PAA, in its amended form as from 1 March 2009.

Subsection (2) renders a LPR who distributes the property of the estate as not liable in respect of that distribution to any person who was an applicant for a family provision order if the LPR did not have notice of the application at the time of distribution and if:

- The distribution was made in accordance with s93, and
- The distribution was properly made by the LPR.

Note that for the purposes of s93, "notice to the LPR of an application or intention to make any application under chapter 3 of the SA must be in writing and signed (either by the person if not legally represented by the lawyer acting for the person): r4.4 UCPR.

The notice prescribed by the court rules (Pt 78 r91) was Form 121 under which the time to lapse before a distribution was made was not less than one calendar month. Form 114 (approved for s93 on 1 March 2010) specifies that the claim must be sent not more than 30 days after publication of the form.

When is a distribution ""Properly Made"? To date, I am not aware of any case that has considered this point and it remains to be seen.

The LPR cannot defeat a timely claim by premature distribution of the estate. If s/he has notice from any source of a likely or intended claim and if the period within which applications may be made under the SA as of right has not expired, the representative who distributes does so at his/her own peril: *Guardian Trust & Executors Co of New Zealand Ltd v Public trustee of New Zealand* [1942] AC 175.

[66] From 1 March 2010 the approved for is Form 114.

An administrator who acts in breach of the obligation may be personally liable to a successful applicant who suffers loss as a result: see *Ernest v Mowbray* [2004] NSWSC 1140. It may, in some cases, be worth writing to a possible family provision applicant if the LPR suspects that a claim might be made and seek confirmation as to their intentions: see *Carstrom v Boesen* [2004] NSWSC 1109.

The SA does not contain any provision equivalent to s17 of the FPA for the shortening of time for an application under the FPA to be made. S94 of the SA however allows for consent to be obtained from an intended applicant with respect to the proposed distribution or whose intended application will not affect the proposed distribution.

Also note that the time in which an eligible person may bring a claim for family provision orders under the SA is within 12 months from the date of death. If the estate is distributed during this time, and although notice has been given by the LPR, the distributed property may be designated as notional estate: s79 of the SA.

6.1 Section 94 SA

Section 94 of the SA is a new provision. It provides that a LPR who distributes property for the purposes of providing those things immediately necessary for the maintenance or education of an eligible person who was wholly or substantially dependent on the deceased immediately before his/her death is not liable for any such distribution that is properly made (s94(1)), irrespective whether or not the LPR had notice at the time of the distribution of any application or intended application for a family provision order.

No person who may have made or may be entitled to make an application under this Chapter is entitled to bring an action against the legal representative of the estate of a deceased person because the legal representative has distributed any part of the estate if the distribution was properly made by the legal representative after the person (being of full legal capacity) has notified the legal representative in writing that the person either:

- consents to the distribution, or
- does not intend to make any application under this Chapter that would affect the proposed distribution: ss94(3)

A legal representative of the estate of a deceased person who receives notice of an intended application under this Chapter is not liable in respect of a distribution of any part of the estate if the distribution was made in compliance with section 93 (1) by the legal representative not earlier than 12 months after the deceased person's death: ss94(4).

Subsection (4) does not apply if the legal representative receives written notice that the application has been commenced in the Court or is served with a copy of the application before making the distribution: ss94(5).

S94 applies to estates of persons dying on or after 1 March 2009.

Where an executor has not published the requisite notices and waited the appropriate period of time before making a distribution of the estate, s/he is personally liable to any person suffering loss as a result.

Section 95 of the PAA stipulates that nothing in sections 92, 93 or 94 of the PAA prejudices the right of any beneficiary, creditor or other person who has a claim in respect of the assets of the estate of a testator or an intestate…to follow those assets into the hands of the persons or any of the persons among whom those assets or that part may have been distributed or received those assets.

In seeking to follow assets in the hands of another, the plaintiff must:

(a) establish that the personal representative wrongly distributed assets of the deceased's estate, either to a stranger to the estate with no title at all or by paying a beneficiary or next of kin in excess of his/her entitlement; and
(b) first exhaust his/her primary remedy (if any) against the LPR: *Re Diplock* [1948] Ch 465 at 303-5.
(c) The plaintiff need not sue the LPR if the LPR has no assets: *Re Diplock* or the LPR distributed after complying with s92 PAA or under a court order.

6.2 Section 92 PAA

Section 92 PAA affords protection a LPR who distributes the assets of an estate in the same circumstances as provided for in s 93 SA.

Section 92A PAA is one of the new sections. It allows a LPR to make maintenance distributions to certain persons who survive the deceased by 30 days or if another period for survival appears in the will, then within that period. A LPR may make a distribution even though s/he is aware of a pending or intended family provision application.

Section 93 PAA deals with the procedure a LPR may follow to bar claims in certain circumstances.

As to the nature of the form of notice to be given I refer you to Mason & Handler Succession Law and Practice (NSW) looseleaf and the form of notice suggested by the learned authors at pp2552-2553 (service 98).

Sections 92 and 93 of the PAA were recently considered by the Supreme Court in:

6.3 McGrath v Troy as Administratix of estate of the Late Warren Terrence Wade [2010] NSWSC 1470 (24 November 2010) - White J

This was a claim to compel an administrator of an estate to restore monies wrongly distributed and to restore moneys paid as a debt/s owed by the deceased. P also sought her removal, an order that the second defendant restore payments made to him (to whom part of the estate was distributed), and claims under the family Provision Act.

The P was 3 years old at the time of the hearing and the proceedings were commenced by his mother acting as his tutor (Ms McGrath). Ms McGrath had a sexual relationship with the deceased in 2006. The P was born in December 2006.

The deceased died intestate. He left behind his mother (the administrator), his father (2D) and sister (3D). There was an issue as to whether he was the father of P.

The only substantial asset in the estate was the deceased's superannuation, which included life insurance (just under $130,000). The administrator proposed dividing the estate three ways between herself, her former husband and daughter. The daughter, through her solicitor, claimed from the administrator cash loans she had made to the deceased totalling $42,330 and said at least $40,000 was owing to her.

An amount of $20,000 was paid to the administrator in December 2007, said to be on account off debts owed by the deceased to her. Two payments of $5,000 each were paid from the solicitor's trust account to the administrator and the father for what was described as funeral expenses. However, the administrator's affidavit evidence was the funeral expenses totalled $8,217. Amounts were also paid on account of legal costs.

In January 2008 $40,000 was paid to the sister as repayment of the alleged debt. After payment of legal costs the balance of the estate was $48,245.55. That amount was distributed on 28 July 2008 by 3 equal cheques to the administrator, father and sister.

Before the deceased's death on 25 January 2007, the administrator (his mother) was aware of a claim made by Ms McGrath that the P, her son, was the deceased's child. The administrator did not accept that contention. Through her solicitor, she placed an advertisement in accordance with s92 PAA stating that any person having a claim on the estate must provide particulars of that claim within a month, after which time she might distribute the assets, having regard only to the claims of which, at the time of distribution, she had notice. The administrator contended that although she was aware of the assertion of Ms McGrath that the P was the son of the deceased, nevertheless, she had not received notice of a claim on the estate.

The P commenced family provision proceedings in July 2008 (after the publication of the s92 notice and the distribution of the estate). The claim was initially misconceived because the child was the only person entitled on an intestacy as the issue of the deceased. If he were not the deceased's son, then he would not be an eligible person under the Family Provision Act.

DNA tests ordered during the course of the proceedings established that the P was the child of the deceased.

The Summons was amended to join the father and sister as defendants and sought orders that all defendants restore monies received by them to the estate. The P also sought a declaration that the administrator had committed a breach of trust and damages were claimed.

During the course of the hearing it turned out that the administrator had paid to herself (via her solicitor) $20,000 which she claimed was in respect of a debt owed to her by the estate and which alleged debt she had not disclosed in her affidavit in support of her application for a grant of letters of administration.

His Honour did not accept that the estate owed the moneys as alleged. He accepted that she was entitled to be reimbursed for testamentary expenses and ordered that she restore the balance ($19,419.91 plus interest from the date of payment) to the estate.

The administrator and her former husband were also ordered to repay to the estate the difference received by them as reimbursement for funeral costs. The expenses were $8,217, not $10,000. Interest was also ordered.

In relation to the payment of $40,000 to the daughter, the question was whether the administrator breached her duty in paying the amount.

His Honour referred to s63 of the *Limitation Act 1969* (NSW) which extinguishes a debt on expiry of the limitation period. He agreed that earlier cases permitting a personal representative to pay a statute barred debt are no longer authoritative in NSW in light of the section. His honour found the debt was statute barred and she had breached her duty in paying the amount which was so barred and ordered the administrator to restore $33,000 to the estate.

In relation to the administrator relying upon s92 of the PAA, His honour noted that no proceedings were brought by the administrator under s 93 to bar a claim.

The question was whether the administrator had notice at the time of distribution of a claim made on behalf of the plaintiff that the plaintiff was the deceased's child.

His honour found that the administrator was so aware.

His Honour inferred that the administrator was on notice of the plaintiff's birth prior to his birth, by reason of a telephone conversation she had with the child's mother in which she said 'you shouldn't have another child…you should really think about this."

After the birth the mother invited the administrator to see the child. The administrator declined. Again, his Honour accepted that was notice to her that Ms McGrath contended the child was the deceased's son.

Following the deceased's death Ms McGrath rang the administrator enquiring about the funeral and told her that she would like to attend as "after all, I have his son here." The reply was "well, you're going to have a hard time proving that.."

The administrator denied the conversation although Ms McGrath was not cross examined on it. His Honour did not accept the administrator's evidence. Further a file note produced by her solicitor showed that discussions were had with the administrator that she could, as a potential grandparent, undergo DNA testing to verify the paternity of the child however she declined to do so.

The file note established that both she and her solicitor were aware of a claim that the plaintiff was the deceased's child.

On 20 June 2007 a barrister rang the administrator on behalf of Ms McGrath and said he was asked to advise Ms McGrath about the possibility of making a claim on the estate because she was the mother of the deceased's son. The administrator said "look my son is dead. The woman claims he was the father of a baby. No-one will ever be able to prove it." Mr Boyd discussed the possibility of DNA testing however she refused to give any information about including the full name of the deceased.

Eight days later a notice of intention to apply for letters of administration was published. The grant was filed on 23 July 2007. In her affidavit in support of 19 July 2007 she deposed that she and her

former husband were the only persons entitled to a distribution of the estate. She also deposed in a later affidavit that there was no de facto relationship and no child have been born to the deceased.

His Honour found that the affidavit was not the whole truth as she was well aware of the possibility that the plaintiff was the deceased's child and found that she had deliberately shut her eyes to finding out the truth. In such case, the law treated such persons as having actual knowledge of the fact: at [83].

On 25 January 2008 Mr Boyd wrote again to the administrator, noting that it was contended by Ms McGrath that the child was the son of the deceased and that no provision was made for the child in the estate, and said he anticipated Ms McGrath will instruct lawyers shortly to make a claim on behalf of the child against the estate.

There was no reply to this letter nor any further communication was received.

On 18 June 2008 a s92 notice of intended distribution was published by the solicitor.

On 2 July 2008 the solicitor wrote to the administrator and said the 14 day period was to expire that day; no notification had been received and he believed it would be reasonable to consider winding up the estate without the fear of further litigation. He mentioned that if a family provision claim was made it could be out of time however "the circumstances disclosed to us show how unlikely it would be for a party to be able to establish paternity on the part of your son."

The P's Summons was filed on 10 July 2008. Service could not be affected until November 2008. On 28 July 2008 the balance of the estate after payment of legal costs was distributed.

The administrator maintained she had no notice of the claim. The solicitor maintained the same view. In fact, his letter received extensive criticism by the trial judge so much so that consideration was given to referring the solicitor's conduct to the Legal Services Commissioner.

His honour did not accept that the first time the administrator received notice of the claim was when she was served with the Summons. It was submitted that prior notifications were not notices of a claim within the meaning of s92 but mere assertions or conjectures. His Honour applied the dictionary meaning of "claim" which includes an assertion of a right or alleged right and includes the assertion of something as a fact. Hence, "to make an assertion is to make a claim": at [92].

He said at [99] "The Act does not protect against claims or demands of which the administrator has notice or knowledge. If the administrator knows or has notice of facts which entitle a person to distribution of the estate, or knows or has notice of a demand, then he or she distributes at his or her peril. If an administrator wishes to bar a claim of which he or she has notice, then he or she must proceed under s93.

It is not part of the function of a fiduciary with notice of a claim to disregard it because he or she honestly believes that the claim is without substance: *Guardian Trust & Executors Company of New Zealand Limited v Public trustee of New Zealand* [1942] AC 115 at 128.

He held the administrator had notice of the claim that the plaintiff was the deceased's son and she distributed the estate having notice of the claim at her peril of having to restore it and said "a claim does not have to take any particular form": at [101]. The position is now somewhat different under the *Succession Act* 2006.

She also was not afforded relief under s85 of the *Trustee Act* (excusable breaches of trust) – see at [106 – 116].

The Court ordered the removal of the administrator and revoked the grant. The NSW Trustee was appointed instead, as he found the due and proper administration of the estate had been put in jeopardy and she was not a fit and proper person to carry out the duties to which she swore she would perform. The administrator had not offered to restore the estate but rather had offered security by way of a charge over her house. The Court did not accept such security.

The claim against the former husband was not pressed as such a claim would only be available if the plaintiff first exhausted his remedy against the administrator and that remedy had not yet been exhausted: at [120].

A decision that is well worth a read.

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