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Précis Paper

Practice and Procedure in Grants of Probate

Paul Studdert, a former Deputy Registrar of the Supreme Court of NSW, gives a thorough overview of important issues that arise in preparing probate applications and provides insight into what a Registrar looks for in considering probate applications.

Discussion Includes

- **Issues in preparing a probate application**
- **Proving the contents of a lost will**
- **Informal wills**
- **Applications for administration on intestacy**
- **Who is entitled to apply for administration?**
- **Applications for administration with the Will Annexed**
- **Applications for reseal**

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Practice and Procedure in Grants of Probate

1. **In this edition of BenchTV, Paul Studdert (Mediator, Studdert Mediations, Sydney) and Ian Benson (Solicitor, AR Conolly & Company) discuss issues that arise in preparing probate applications and important considerations for solicitors and executors.**

Issues for a Practitioner to Consider in Probate Applications

2. **Mr Studdert reminded pracittioners that it is the executor's duty to prove all unrevoked testamentary instruments of the deceased. Testators make wills, and it is not open to executors to choose between those documents they would like to prove and those they would rather not prove.**

3. **Common form probate applications are appropriate where there are no issues arising as to the essential validity of the will, such as the testator's capacity to make a will. If issues do arise as to the essential validity of the will, proceedings in solemn form are appropriate: *Pratt v Estate of O'Sullivan* [2005] NSWSC 1046.**

4. **When preparing a probate application, carefully read the will, with particular attention to the executors, the terms of the appointment of the executor, and the distribution of the estate. There are three categories of appointment of executor:**

    - **Survivorship: The appointment of the first-named executor is contingent upon that executor surviving the testator, or surviving by a particular period of time. In this category, it is important to note that the second-named executors will not be appointed merely because the first-named executor renounces probate. The appointment of the executor is contingent upon survivorship, not upon the willingness to apply for the grant.**
    - **Unable or unwilling clause: The will provides that if the executor is unable or unwilling to apply for probate, a substitute executor is appointed. This is particularly useful in the case of couples where, with life expectancy continually growing, it is often the case that by the time the first dies, the survivor is too old and infirm to properly perform the office of executor.**
    - **Substitute appointment if the first-named executor is unable or unwilling to act, or *continue to act*: This is similar to the previous category, but adds the words "continue to act", thereby allowing the testator to continue to dictate who will represent the estate if, for example, an executor who has obtained probate subsequently dies before completing executorial duties.**

The Will

5. **The will is the actual piece of paper signed by the testator. The Court will not grant probate of a copy of the will where the holder of the original will refuses to release it. In that case, the proper course is to seek an order for the will to be returned under s 150 of the *Probate & Administration Act 1898* (NSW), which may be done by notice of motion in the probate application.**

6. **If the will is in someplace beyond the jurisdiction of the court, the foreign court will usually retain a copy of the will, and it is necessary to apply to the foreign court for an official copy of the will.**

7. **In the case where it is necessary to get probate of a copy of a will (for example where the original will has been lost), the following evidentiary issues must be addressed by the executor in his or her affidavit:**

    - **It must be established that there was a will (i.e. its terms).**
    - **It must be established that the will was actually executed (e.g. by affidavit from an attesting witness).**
    - **It must be proven who last had the will. In the absence of proof to the contrary, the will is presumed to have been in the possession of the testator: *Mortimer v David, Estate of Day* [2005] NSWSC 1166.**
    - **If the will is not forthcoming after death, it is presumed to have been destroyed with the presumption of it being revoked. Evidence is therefore needed to rebut the presumption of revocation, such as the relationship between the deceased and those who benefit under the will, whether there were any changes in the relationship, and the extent to which the deceased's conduct towards them remained consistent with them being beneficiaries. In *Cahill v Rhodes* [2002] NSWSC 561, the presumption was not rebutted due to the breakdown in the relationship between the testator and the primary beneficiary.**

8. **Several considerations arise in the case of informal testamentary documents. *Roggenkamp v Bowd*, *Estate of Bowd* (NSW Supreme Court, 11 August 1995, Hodgson J, unreported) is authority for the proposition that an executor seeking to prove a regularly executed will is under no duty to prove an informal document or lead evidence about it – the executor is under no duty to lead evidence contrary to his or her case. His or her only duty is to disclose it and comply with the rules as to consents or service of notice. The onuses of proof and leading of evidence rest upon whoever seeks to prove the informal document. The judgment is clearly consistent with the**

terms of s 8, *Succession Act 2006* (NSW) which provides that the court may admit an informal testamentary document if it is satisfied that the deceased intended it to form his or her will. It follows that if no evidence as to intention is led in respect of the document, there is nothing from which the Court may be satisfied and accordingly the Court may pass over the document.

9. In the case of informal testamentary documents, an executor must serve notice of the application on anyone who may be affected by the decision of the court or obtain consent. The consent, or the terms of the notice, bind those people to the court's determination.

10. In order to prove an informal document, the evidence must address the following (*Hatsatouris v Hatsatouris* [2001] NSWCA 408):

    - Is there a document?
    - Is the document testamentary in nature?
    - Does the evidence show that the deceased intended that the document, without more, constitute his or her will?

11. What is a "document" for the purpose of this test? Mr Studdert explained that a document can take many forms under the *Interpretation Act 1987* (NSW), and can include a Word document found on a laptop; a tape recording; or a video recording. However wills in these form would be considered informal documents. Wills cannot be executed in accordance with the *Electronic Transactions Act 1999* (Cth). For a will to be valid, the requirements are that it is signed and acknowledged by the testator in the presence of two witnesses, who are present at the same time: s 6, *Succession Act 2006* (NSW).

12. There must be evidence to show that the deceased intended the document to be an operative will. In *Estate of Masters, Hill v Plummer* (1994) 33 NSWLR 446, the critical evidence of this nature was that the testator had handed over the will to the excecutor. In *Hatsatouris v Hatsatouris* [2001] NSWCA 408, the testator had signed the will but passed away before it could be witnessed.

<u>The Affidavit of the Executor in Support of the Probate Application</u>

13. Turning to a consideration of the normal affidavit of the executor in probate applications, the following matters must be addressed (see Form 118):

- **Para 1: The Will: The executor should address the matters referred to above in the case of lost wills or informal wills.**
- **Para 2: Identification of the Will: This requires the executor to state his or her means of identifying the will, such as identifying the testator's signature or filing an affidavit of an attesting witness.**
- **Para 3: Witnesses to the Will: It is important to note that any gift to a witness to a will fails: s 10, *Succession Act.* Unlike the previous s 13 of the *Probate & Administration Act*, s 10 does not apply to spouses of witnesses, nor does it apply to charging clauses in wills. Section 10(3)(b) allows the effect of the section to be overcome if the persons who would benefit from the avoidance of the gift consent to distribution according to the will. It is important to construe the will to determine who would benefit from the avoidance of the gift. . The leading case on application under s 10 is *Miller v Miller, Estate of Miller* (2000) 50 NSWLR 81 (decided at the time of the then s 13 of the *Probate & Administration Act*), which shows that the bar for a successful s 10 application is not set very high.**
- **Para 5: Marriage: Under s 12, *Succession Act*, which applies to marriages solemnised on or after 1 March 2008, a subsequent marriage does not revoke a gift to the spouse or appointment of the spouse as executor although it may otherwise revoke the will. This is in contrast to the previous s 15, *Probate & Administration Act*, pursuant to which a will is revoked by a subsequent marriage unless it was made in contemplation of marriage.**
  A divorce does not revoke a will, but can affect appointments or gifts to the former spouse. Under s 13, *Succession Act*, the effect of divorce is that the former spouse is taken to have predeceased the testator for the purpose of any appointments or gifts contained in the will. In contrast, under s 15A, *Probate & Administration Act*, an appointment of a former spouse was deemed to have been omitted. The practical result of the position under s 13 is that in respect of appointments of executors, if the appointment of the substituted executor is contingent on death of the spouse who is named as executor, the substituted appointment will now take effect on termination of the marriage by divorce because the terms of the substitute appointment will have been satisfied. Finally, it is important to note that s 13 does not contain an equivalent of s 15A(2)(a) of the *Probate & Administration Act*, which provided that the Court could negative the effect of the section if it was satisfied that that at the time of the divorce the deceased did not intend to terminate the gift or appointment.
- **Para 11: Entitlements: The executor should describe the entitlements in accordance with the will, e.g. John Smith: $3,000.00, William Jones: life interest in 2 Scott St Sutherland, Peter Smith: ½ interest in remainder in 2**

Scott St Sutherland; Billy Smith: ½ interest in remainder in 2 Scott St Sutherland, Arthur Smith: residue.

- **Para 12: Disclosure of Assets: The requirements as to disclosure of property are set out in ss 81A and 81B, *Probate & Administration Act*. There is no obligation to disclose foreign and non-testamentary property. Where there is some doubt or dispute about which assets form part of the estate (or which debts are payable out of the estate), Mr Studdert advises practitioners to note the asset on the affidavit, followed by an asterisk with a footnote indicating that whether or not the asset is part of the estate is a matter of dispute.**
- **Para 13: Liabilities: As with assets, debts that are not payable out of the estate, such as a mortgage in respect of a property owned by the deceased and others as joint tenants, do not have to be disclosed.**

<u>Applications for Administration on Intestacy</u>

14. Mr Studdert discussed who is entitled to apply for letters of administration. A person applying for administration must have standing to apply for administration. The court will grant administration to a person with an interest unless there are special circumstances. It is important to remember that consent by other persons entitled to share in intestacy is not a special circumstance.

15. There are many instances in which the Court will grant administration to a person who is entitled to represent an interest. Among the most common are:

- **Infant beneficiary: the Court may grant administration to the guardian of an infant.**
- **Deceased beneficiary: If a beneficiary has survived the deceased and taken a vested interest but later dies, the Court may grant administration to the beneficiary's legal personal representative – i.e. the person who has obtained a grant in that person's estate in NSW: *Gertsch v Roberts, Estate of Gertsch* (1993) 35 NSWLR 631.**
- **Absent beneficiary: If a beneficiary is outside NSW, the Court may grant administration to that person's appointed attorney in NSW pursuant to s 72, *Probate & Administration Act*.**
- **Mentally incapable beneficiary: Where a beneficiary suffers from mental incapacity, the primary person entitled to be appointed administrator is that person's appointed manager. If there no manager the Court may appoint as administrator that person's enduring attorney provided that the attorney's powers under the power of attorney extend to appointment as administrator.**

If there is no manager or enduring attorney to apply for administration, the preference of the Court is to appoint the person who is likely represent the incapable's estate on death of the incapable.

- **Physically incapable beneficiary: where a beneficiary suffers from physical incapacity or there are other factors that would prevent the beneficiary from performing the office of administrator, the Court may grant administration to that person's nominee.**

16. **If there is no-one with standing to obtain a grant of administration, the Court prefers to grant administration to the NSW Trustee & Guardian.**

17. **If there is an applicant who does not have an interest or represent an interest, the court requires special circumstances to grant administration. The circumstances should be such that they would infringe upon the proper administration of the estate not to appoint the applicant, for example the beneficiary does not speak English or is unable to access a solicitor. The court will be seeking to avoid disputes between the representatives of the estate and the beneficiaries, and tends to appoint the person with the largest interest in the estate.**

18. **The affidavit of the administrator must address the searches that have been undertaken for a will. Intestacy must be proved as a matter of fact, and searches should include a search of the premises where the deceased resided and of the deceased's personal papers and records. Inquiries should also be made of the deceased's solicitor and banks, and of the NSW Trustee & Guardian as to whether they hold the will. The affidavit should also set out the beneficiaries and entitlements, describing the facts establishing the persons entitled. Essentially, what the plaintiff must do is account for each category of person who would be entitled in priority to him or her and prove who are the persons entitled in the category in which he or she is entitled.**

19. **In every application for administration the applicant must file an affidavit by a competent witness negativing any de facto relationship – Form 126. The deponent in the affidavit show competency, i.e. that he/she has personal knowledge of the deceased to be able to swear that there was no de facto relationship.**

20. **There are special rules where the plaintiff is the de facto spouse of the deceased. A person claiming to be the de facto spouse of the deceased must file an affidavit setting out the facts and circumstances relating to the relationship to show that it is a relationship that comes within the statutory definition of what is a de facto relationship. The factors that the Court takes into account in determining whether**

there is a de facto relationship were set out by Powell J in *Simonis v Perpetual Trustee Company Limited* (1987) 21 NSWLR 677 and are now included in s 21C, *Interpretation Act 1987* (NSW). It is important to remember that a de facto relationship must proved by setting out the facts and circumstances relating to the application to show that it comes within the statutory definition – it is not sufficient merely to assert a relationship.

21. Finally, the Rules provide that an applicant should prove who would otherwise be entitled to share in the estate. The applicant should either obtain the consent of those persons or serve them with notices of the proceedings. If the applicant cannot prove who would be otherwise entitled to the estate, they must get evidence from impartial witnesses corroborating the claim to be a de facto partner.

<u>Applications for Reseal</u>

22. The Court will only reseal a grant made in Her Majesty's dominion: s 107, *Probate & Administration Act*. This means that where a country is a republic, grants of probate made in that country cannot be resealed. In that case, it will be necessary to apply for an original grant of probate in NSW.

23. The Court will only reseal a document that comes within what s 3, *Probate & Administration Act* defines as a grant of probate or administration. This means that it has to be an original grant, an exemplification of the grant or another formal document under the seal of the foreign court.

24. The application for reseal should be brought by all living persons to whom the original grant was made, either personally or by their attorney.

25. Finally, Mr Studdert noted that the Court is reluctant to reseal a foreign grant that it would not have made itself.

BIOGRAPHY

Paul Studdert

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Paul Studdert was admitted to the Bar in 1979. He is a former Deputy Registrar of the Supreme Court of NSW. He is now a mediator of the Supreme Court of NSW practicing exclusively in probate.

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