

## Overcoming Challenges in Estate Administration

### 2024 Intensive Conference

Thursday 14 March 2024, 1pm-2pm – Novotel Canberra

#### Explore strategies for managing executors

1. Can you have joint and several executors if the Will provides for this? Will this require an explanation to the Court, if not all executors apply?
2. All named executors -v- less than all named executors, by Renunciation of Reserving Leave?
3. Renunciation:

#### **ADMINISTRATION AND PROBATE ACT 1929 - SECT 20**

##### **Renunciation or non-appearance by executor**

(1) This section applies if—

- (a) the person appointed executor by a will renounces probate of the will; or
- (b) the person appointed executor by a will survives the testator but dies without having taken out probate of the will; or
- (c) an application is made in the Supreme Court under section 25 (Failure of executor to prove will) in relation to the person appointed executor by a will and the person does not file in the court a notice of intention to respond or defence within the time required by the rules.

(2) The person's rights as executor of the will cease, and the representation of the testator and the administration of the testator's estate are taken, without further renunciation, to devolve as if the person had not been appointed executor.

4. Reserving leave:

#### **ADMINISTRATION AND PROBATE ACT 1929 - SECT 10B**

##### **Grant to single executor reserving leave to others to apply**

The Supreme Court may, if it considers appropriate, grant probate to 1 or more of the executors named in a will reserving leave to the executor who has not renounced, or the executors who have not renounced, to come in and apply for a grant of probate at a future time.

5. Current Court practice requires something from each executor who is seeking to reserve leave.

The Consent to Administration (Form 3.10) is designated for use in applications for Grants of Administration (rules 3007 & 3008 CPR), not in applications for a Grant of Probate.

An Affidavit in proper form (as to which see *Court Procedures Rules 2006 (ACT)* div 6.10.2 and form 6.11) confirming that:

- a. they are another institute executor named in the will; and
  - b. they consent to a grant of probate being granted to [name of institute executor] on the condition that, pursuant to *Administration and Probate Act 1929 (ACT)* s 10B, the Court reserves leave for her/him to come in and apply for a grant of probate at a future time.
6. Who is the client? What happens if an executor who has reserved leave becomes concerned?
7. An Executor out of the jurisdiction can appoint someone in the Territory to act for them under Power of Attorney:

#### **ADMINISTRATION AND PROBATE ACT 1929 - SECT 22**

##### **Administration under power of attorney**

- (1) *If a person entitled to probate or administration of a deceased estate is out of the jurisdiction, and has appointed a person within the jurisdiction under a power of attorney to exercise that entitlement, the Supreme Court may grant administration to the attorney on behalf of the entitled person on the terms the court considers appropriate.*
- (2) *The grant of administration under subsection (1) continues in force despite the death of the donor of the power of attorney, subject to the terms of the grant.*

#### **Clarifying family trees**

8. Don't simply reply on the descriptor on the death certificate.
9. Reg 3010(1)(c) of the *Court Procedures Rules 2006 (ACT)* requires the applicant for probate to specify their relationship to the deceased.
10. "Marriage" is defined in s5 of the *Marriage Act 1961 (Cwlth)* to mean the union of 2 people to the exclusion of all others, voluntarily entered into for life.
11. "Partner" is defined in s44 of the *Probate & Administration Act 1929 (ACT)*:
- partner**—*an intestate's partner is either of the following:*
- (a) *the spouse, civil union partner or civil partner of the intestate when the intestate died;*
  - (b) *the eligible partner of the intestate.*

So, to analyse this, "Partner" includes:

- o A person who was married to the intestate immediately before the intestate's death.
- o A person who was a party to a relationship with the intestate immediately before the intestate's death within the meaning of the Civil Unions Act 2012 (ACT).

- o A person who was a party to a relationship with the intestate immediately before the intestate's death within the meaning of the Civil Partnerships Act 2012 (ACT). This Act was repealed in September 2012.
- o An Eligible Partner of the intestate. An Eligible Partner is also defined in s44 of the *Probate & Administration Act 1929 (ACT)*:

**eligible partner**, of an intestate, means someone, other than the spouse, civil union partner or civil partner of the intestate, who—

(a) was the intestate's domestic partner when the intestate died; and

(b) either—

(i) had been the intestate's domestic partner continuously for 2 or more years when the intestate died; or

(ii) is the parent of the intestate's child, if the child was under 18 years old when the intestate died.

For the meaning of **domestic partner**, see s169 of the *Legislation Act 2001 (ACT)*:

**169 References to domestic partner and domestic partnership**

- (1) In an Act or statutory instrument, a reference to a person's domestic partner is a reference to someone who lives with the person in a domestic partnership, and includes a reference to a spouse, civil union partner or civil partner of the person.

*Note* The Macquarie dictionary, (1997) defines spouse as 'either member of a married pair in relation to the other; one's husband or wife'.

- (2) In an Act or statutory instrument, a domestic partnership is the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis.

**Example—indicators to decide whether 2 people are in a domestic partnership**

- 1 the length of their relationship
- 2 whether they are living together
- 3 if they are living together—how long and under what circumstances they have lived together
- 4 whether there is a sexual relationship between them
- 5 their degree of financial dependence or interdependence, and any arrangements for financial support, between or by them
- 6 the ownership, use and acquisition of their property, including any property that they own individually
- 7 their degree of mutual commitment to a shared life
- 8 whether they mutually care for and support children
- 9 the performance of household duties
- 10 the reputation, and public aspects, of the relationship between them

*Note* An example is part of the Act, is not exhaustive and may extend, but does not limit, the meaning of the provision in which it appears (see s 126 and s 132).

- (3) In an Act or statutory instrument, a reference to a domestic partnership includes a reference to a marriage, a civil union and a civil partnership.

So, the definition of "Partner" extends to a person who was the intestate's domestic partner immediately before the intestate's death and the relationship has been in existence for a continuous period of two years, or resulted in the birth of a child who was under 18 years when the intestate died.

## 12. What about for family provision purposes:

**FAMILY PROVISION ACT 1969 - SECT 7****Eligibility**

- (1) *Subject to this section, each of the following persons is entitled to make application to the Supreme Court for provision out of the estate of a deceased person:*
- (a) *a partner of the deceased person;*
  - (b) *a person (other than a partner of the deceased person) who was in a domestic relationship with the deceased person for 2 or more years continuously at any time;*
  - (c) *a child of the deceased person;*
  - (d) *a stepchild of the deceased person;*
  - (e) *a grandchild of the deceased person;*
  - (f) *a parent of the deceased person.*
- (2) *A stepchild of a deceased person is not entitled to make an application to the Supreme Court for provision out of the estate of the deceased person unless the stepchild was maintained by the deceased person immediately before his or her death.*
- (3) *A grandchild of a deceased person is not entitled to make an application to the Supreme Court for provision out of the estate of the deceased person unless—*
- (a) *the parent of the grandchild who was a child of the deceased person died before the deceased person died; or*
  - (b) *a parent of the grandchild was alive on the day the deceased person died but the grandchild, immediately before the deceased person died—*
    - (i) *was not maintained by a parent; and*
    - (ii) *was maintained by the deceased person.*
- (4) *A parent of a deceased person is not entitled to make an application to the Supreme Court for provision out of the estate of the deceased person unless—*
- (a) *the parent was maintained by the deceased person immediately before his or her death; or*
  - (b) *the deceased person was not survived by any partner or any of the children of the deceased person.*
- .....
- (9) *In this section:*

*"domestic relationship"—see the Domestic Relationships Act 1994, section 3.*

*"partner", of a deceased person, means someone who—*

- (a) *was the domestic partner of the person at any time; and*
- (b) *either—*
  - (i) *was the person's spouse, civil union partner or civil partner at any time; or*
  - (ii) *was the person's domestic partner continuously for 2 or more years at any time; or*

(iii) *is the parent of a child of the person.*

Note For the meaning of **domestic partner**, see *Legislation Act*, s 169.

### **DOMESTIC RELATIONSHIPS ACT 1994 - SECT 3**

#### **Meaning of domestic relationship**

(1) *In this Act:*

"domestic relationship" means a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage.

(2) For subsection (1)—

- (a) a personal relationship may exist between people although they are not members of the same household; and
- (b) *a personal relationship is not taken to exist between people only because one of them provides a service for the other—*
  - (i) *for fee or reward; or*
  - (ii) *on behalf of another person (including a government or body corporate); or*
  - (iii) *on behalf of an organisation the principal objects or purposes of which are charitable or benevolent.*

### 13. Who are the issue?

Reference to the issue of a person is a reference to that person's lineal descendants. Issue includes the person's children, grandchildren, great grandchildren etc. Adopted children are treated as children of their adopting parents: s43 of the *Adoption Act 1993 (ACT)*.

An adopted child ceases to be regarded in law as the child of the birth parents and the birth parents cease to be regarded as the parents of the adopted child: s43(1)(b) of the *Adoption Act 1993 (ACT)*.

A person will be included in the definition of "issue" whether or not that person's parents were married to each other: s38 of the *Parentage Act 2004 (ACT)*.

Parentage may be established by presumption. The presumptions of parentage are set out in ss7 to 11 of the *Parentage Act 2004 (ACT)*. Parentage may be presumed:

- o from the fact that the child was born to a woman who was married or in a civil union or civil partnership: s7 of the *Parentage Act 2004 (ACT)*. The child is then presumed to be a child of the woman and her husband or partner;
- o if at any time during the period beginning not earlier than 44 weeks and ending not less than 20 weeks before the birth, the woman was in a domestic partnership with a man but was not married to him: s8 of the *Parentage Act 2004 (ACT)*;
- o if the names of parents have been entered as the child's parents in the Births Deaths and Marriages register: s9 of the *Parentage Act 2004 (ACT)*;
- o if a court has found a person to be a child's parent: s10 of the *Parentage Act 2004 (ACT)*;

- o if the birth is the result of fertilisation procedures, in which case various presumptions apply as set out in s11 of the *Parentage Act 2004 (ACT)*.

The definition of "issue" does not include stepchildren of the intestate.

Whether a stepchild can proceed with a claim upon the estate of a deceased person, whether testate or intestate, will depend upon the stepchild's eligibility to do so pursuant to the definitions contained within the *Family Provision Act 1969 (ACT)*.

### **Obtaining necessary consents in estate administration**

14. Who has to consent for the purposes of paragraphs 12-14 of the approved form 3.13?

15. When applying for a Grant of Administration:

#### ***COURT PROCEDURES RULES 2006 - REG 3007***

***Grant of administration***—notice of intention to apply to be served on non-applicant domestic partner or next of kin

- (1) *This rule applies to an application for grant of administration of the estate of a deceased person made by only 1 or some of the people entitled to be administrators of the estate.*

*Note* See the *Administration and Probate Act 1929, s12* for the people eligible to be administrators.

- (2) *At least 14 days before the day the application is filed in the court, the applicant must serve notice of the application on each person (a "relevant person") who—*
- (a) *is a domestic partner or next of kin of the deceased person; and*
  - (b) *if the person is a next of kin of the deceased person—is an adult; and*
  - (c) *is not the applicant or 1 of the applicants; and*
  - (d) *has not consented to the application.*

*Note 1* See approved form 3.10 (*Consent to administration of estate*)

#### ***ADMINISTRATION AND PROBATE ACT 1929 - SECT 12***

##### ***Eligible administrators***

- (1) *The Supreme Court may grant administration of an intestate estate to any of the following persons, subject to this section:*
- (a) *the partner of the intestate;*
  - (b) *1 or more of the next of kin of the intestate;*
  - (c) *if the intestate is survived by 2 partners—either partner, or both partners conjointly;*
  - (d) *a partner or partners of the intestate conjointly with 1 or more of the next of kin of the intestate;*
  - (e) *any other person (whether or not a creditor of the intestate) the court considers appropriate.*

- (2) *The Supreme Court must only grant administration of an intestate estate to a person who is at least 18 years old.*
- (3) *The Supreme Court must not grant administration of an intestate estate to a person mentioned in subsection (1) (e) if there is anyone else to whom administration may be granted under this section who—*
  - (a) *in the court's opinion, can be trusted with administration of the estate; and*
  - (b) *applies to be granted administration of the estate.*
- (4) *In this section:*  
*"partner", in relation to an intestate—see section 44.*

16. Next of Kin is outlined in S49C of the Administration and Probate Act 1929 (ACT):

**ADMINISTRATION AND PROBATE ACT 1929 - SECT 49C**

**How distribution to next of kin is made**

- (1) *If, under this Act, the next of kin of an intestate are entitled to the intestate estate, the persons entitled to that intestate estate must be ascertained as follows:*
  - (a) *the brothers and sisters of the intestate who survived the intestate, and the issue of a brother or sister of the intestate who died before the intestate, being issue who survived the intestate, are entitled to the intestate estate;*
  - (b) *if the intestate is not survived by any persons entitled to the intestate estate under paragraph (a) but is survived by 1 or more grandparents—the grandparent is entitled to the intestate estate or the grandparents are entitled to the intestate estate in equal shares;*
  - (c) *if the intestate is not survived by any persons entitled to the intestate estate under paragraph (a) or (b)—the uncles and aunts of the intestate who survived the intestate and the issue of such an uncle or aunt who died before the intestate, being issue who survived the intestate, are entitled to the intestate estate.*

**Discover essential evidence requirements**

17. In the CPR, a Grant of Representation applies to a Grant of Probate, a Grant of Letters of Administration with the Will Annexed and a Grant of Administration.

18. See the requirements in:

- a. Reg 3005 of the *Court Procedures Rules 2006 (ACT)* for all Grants of Representation;
- b. Reg 3010(1) of the *Court Procedures Rules 2006 (ACT)* for all Grants of Representation;
  - the relationship (if any) of the applicant to the deceased person
  - reason for taking more than 6 months
  - domicile, giving jurisdiction if no assets
- c. Reg 3010(2) of the *Court Procedures Rules 2006 (ACT)* for Grants of Probate and Grants of Letters of Administration with the Will Annexed;

- d. Reg 3010(3) of the *Court Procedures Rules 2006 (ACT)* for Grants of Administration – No Will;
- What searches do you make?
  - The names and interests of everyone with a beneficial interest
- e. Reg 3010(6) of the *Court Procedures Rules 2006 (ACT)* for all Grants of Representation;
- any document (other than the last will of the deceased person) claiming to contain the testamentary intentions of the deceased person that is in the possession of the applicant or other person making the affidavit [See example on page 9]
- e.g. Personal Chattels lists, post-Will additions
- for each person with a beneficial interest in the estate—documents sufficient to prove the person's identity and the relationship (if any) of the person to the deceased person.

### **Uncover tips to navigate potential pitfalls.**

19. CGT and Conveyance Duty on in-specie transfers of real property as a death benefit payment to a beneficiary from a SMSF.

It is hoped that this paper has been of assistance in identifying steps which can improve the way in which you assist in the administration of an estate in the course of your practice. <sup>1</sup>

### **Andrew Freer | Principal | KJB Law**

Grd Floor, 10 Corinna Street, Woden ACT 2606

PO Box 105, Woden ACT 2606 | DX 24009 Woden ACT

+61 2 6281 0999 | +61 2 6282 1114 | [andrew@kjblaw.com.au](mailto:andrew@kjblaw.com.au) | [www.kjblaw.com.au](http://www.kjblaw.com.au)

---

<sup>1</sup> Usual Disclaimer applies



**Distribution of Personal Effects and Household Items**

Addition to the will of [redacted] dated [redacted]

I wish the distribution of personal effects to be made in the following manner.

To my grandson [redacted]

~~My Mazda 2 car, or any car that replaces it.~~ ?

X [redacted]

To my granddaughter [redacted]

Tahitian green pearl necklace and earrings. Gold heavy chain ...the one I constantly wear.

~~Early 1900s "Lion Box". This belonged to my grandmother, your great, great grandmother. Please take care of it.~~

[redacted]

To my granddaughter [redacted]

Diamond earrings. Opal pendant and chain. This belonged to your GG. My beautiful watch, a present from Grandad.

~~Georgian English Tea Caddy. This was given to me by your great Aunt [redacted]~~

X [redacted]

To my granddaughter [redacted]

Crystal locket/pendant. Chain with diamond heart. Gold chain bracelet. All these were presents from Grandad

~~Georgian Glove Box. I bought this myself in a place called Midhurst in Hampshire...a special English box.~~

X [redacted]

In the event that I am survived by my husband I ask that he distribute any monies held in my ING and CBA accounts, and any monies that may be raised after tax on the sale of the shares in my Commonwealth Securities share Portfolio, as follows.

50% ~~\$200,000~~ 25% of the total value to each of my sons [redacted] and [redacted]

820,000 10% of the total value to each of my grandchildren [redacted] Winnie.

X [redacted]

820,000 10% of the total value to be distributed equally amongst the Cancer Council, Medicines Sans Frontiers and the Save the Children Organisation. To Re Myeloma Foundal

X [redacted]

Signed: [redacted]

Dated: [redacted]