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2024 Intensive Conference

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Recent Developments In Estate Legislation And Case Law

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Eligibility

Family Provision Act 1969 (ACT)

Former S 7(3)(b):

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) 1 or both of the parents of the grandchild was alive at the date of the death of the deceased person and the grandchild was not maintained by that parent or by either of those parents immediately before the death of the deceased person.

New s 7(3)(b) effective 12 December 2023

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.

Notice before distribution of assets

Administration and Probate Act 1929 (ACT) s 64

(1) The executor or administrator of the estate of a testator or intestate may distribute the assets of the estate, or part of the assets, among the people entitled only if the executor or administrator—

(a) gave public notice for creditors or anyone else to give the executor or administrator their claims against the estate within the time stated in the notice; and

(b) had regard to each claim the executor or administrator received within the time stated in the notice; **and**

(c) applied under the Births, Deaths and Marriages Registration Act 1997 for a search of the register for information about the parents or any children—

(i) of the deceased person; or

(ii) of any other person known by the executor or administrator to be relevant to the distribution of the assets; and

(d) had taken into account any relevant information or documents obtained from the registrar-general as a result of the search.

(2) A notice under subsection (1)(a) must state that—

(a) after the later of the time set out in the notice and **6 months after the date of death of the deceased person**, the executor or administrator intends to distribute the deceased person's estate; and

(b) in the distribution of the deceased person's estate, the executor or administrator will only have regard to claims which are notified to the executor or administrator at the time of the distribution.

Note Public notice given under subsection (1)(a) is also required before making a distribution under the following provisions:

(a) the Family Provision Act 1969, s 21 (Protection of administrator);

(b) the Trustee Act 1925, s 60 (Distribution after notice).

(3) The executor or administrator is not liable to any person for any distributed assets if the executor or administrator—

(a) complied with subsection (1) (c) and (d); and

(b) did not have notice of the person's claim when the distribution was made.

New s 64 effective 12 December 2023

64 (1) An executor or administrator of a deceased person's estate may give public notice before distributing the assets of the estate.

Note 1 Public notice may be given before making a distribution under the following provisions:

(a) the Family Provision Act 1969, s 21 (Protection of administrator);

(b) the Trustee Act 1925, s 60 (Distribution after notice).

Note 2 If a form is approved for a particular purpose under the Court Procedures Act 2004, s 8 the form must be used for that purpose.

(2) The public notice must state that—

(a) a creditor or anyone else may give the executor or administrator their claim against the estate within the period stated in the notice, being at least 1 month after the notice is given; and

(b) the executor or administrator intends to distribute the estate after the later of the following:

(i) the end of the period stated in the notice;

(ii) 6 months after the day probate or administration was granted; and

(c) the executor or administrator will only consider claims that are given to the executor or administrator when distributing the estate.

(3) The executor or administrator must consider each claim given within the period stated in the notice.

(4) The executor or administrator is not liable to any person for any distributed assets if the executor or administrator—

(a) gave notice under subsection (1); and

(b) did not have notice of the person's claim when the distribution was made.

Administration and Probate Act 1929—Form 1—Notice of intended distribution

***Any person** with a claim against the estate of the deceased person, who died on (date) must send particulars of the claim to*[me/us], within *[**30days**/(specified longer period)] after the day this notice is published. After that time *[and after 6 months **after the date of death of the deceased**] *[I/we]intend to distribute the property in the estate having regard only to the claims of which *[I/we]had notice at the time of the distribution.*

In the Estate of Gray [2023] ACTSC 241 (1 September 2023)

- Compliant notice of intended distribution published in the Canberra Times:

> *[57] …the applicant submitted that there are no notice requirements in either the Probate Act or the Family Provisions Act that requires the executor to specifically draw attention to the operation of the Family Provisions Act. The applicant submitted that the scheme of the two Acts read together is that a potential claimant under the Family Provisions Act is assumed to be aware of their rights and the possible consequences if they see a notice under the Probate Act. I agree with this submission.*

- [48]: Public notice under s 64(1)(a) is not defined in the Act, but it is defined in the *Legislation Act 2001* (ACT) as a dated notice on an ACT government website or notice in a daily newspaper circulating generally in the ACT.
- Emailed letter and notice to the potential applicant and response from potential applicant confirming receipt
- No suggestion of a claim from the potential applicant
- Application under the *Births, Deaths and Marriages Registration Act 1997* (ACT) for a search of the ACT Register for information about the parents or any children of the deceased
- [68]: *The two conditions for protection under s 21 are that the administrator has published a notice in compliance with s 64 (see s 21(b)), and that the administrator does not have notice of any application or application for extension of time under the Family Provision Act (see s 21(a)).*
- [79]: *In this case, there is no evidence that the person who claimed to be Ms Gagnon had notified the executor of a proposed or potential family provision claim. Indeed, in her correspondence with the executor, she had not made any enquiries about the legacies under the Will and had made no suggestion of any purported entitlement to assets of the estate. Hence, I do not need to determine the question of whether or not an executor would be protected from personal liability if they made an interim distribution while on notice of a potential claim under the ACT Family Provision Act because no such notice has been given.*

Thomson Geer
Lawyers

Forfeiture

Administration and Probate Act 1929 (ACT)

New s 49DA:

Effect of disclaimer or forfeiture

(1) This section applies if a person would be entitled to take an interest in an intestate estate but either—

(a) disclaims the interest; or

(b) is precluded by the forfeiture rule from obtaining the interest.

(2) The person is taken to have died before the deceased person.

(3) In this section: forfeiture rule—see the Forfeiture Act 1991, dictionary.

Thomson Geer
Lawyers

Personal chattels

Administration and Probate Act 1929 (ACT)

Former s 44 definition:

personal chattels, in relation to an intestate, means—

(a) the articles of household or personal use or adornment, plated articles, china, glassware, pictures, prints, linen, jewellery, clothing, books, musical instruments or apparatus, scientific instruments or apparatus, wines, liquors, consumable stores and domestic animals of the intestate; and

(b) the motor cars and accessories of the intestate;

but does not include—

(c) any chattels of the intestate used exclusively for business purposes; or

(d) money and securities for money of the intestate.

New definition effective 12 December 2023

personal chattels, in relation to an intestate, means the tangible personal property of the intestate, other than the following:

(a) property used exclusively for a business purpose;

(b) banknotes or coins, unless they are part of a collection made in pursuit of a hobby or another non-commercial purpose;

(c) property held as a security;

(d) property in which the intestate invested as a hedge against inflation or adverse currency movements, such as gold bullion or uncut diamonds;

(e) an interest in land.

Wills deposited with the ACT Supreme Court

Wills Act 1968 (ACT)

Current s 32

32 Wills may be deposited with registrar

(1) Subject to subsection (2), a person may deposit his or her will in the office of the registrar.

(2) The registrar may refuse to allow a will to be deposited under subsection (1) unless—

(a) the will is enclosed in a sealed envelope or cover; and

(b) the envelope or cover has written on it—

(i) the full name, occupation (if any) and address of the testator, or some other means of readily identifying the testator; and

(ii) the full name, occupation and address of the executor, or of each executor, named in the will.

(3) The registrar shall cause a will deposited under subsection (1) to be kept safely at that office until it is dealt with in accordance with subsections (4) and (5).

(4) If a person whose will is deposited in the office of the registrar under subsection (1) requests the registrar to do so, the registrar shall cause the will to be delivered to that person.

(5) If the registrar is satisfied that a person whose will is deposited in the office of the registrar under subsection (1) is dead, the registrar shall—

(a) cause the will to be delivered to the executor or 1 of the executors named on the envelope or cover in which the will is sealed or, if such an executor cannot be found or refuses to accept the will, to the person (if any) that a judge of the Supreme Court directs; or

(b) with the permission of a judge of the Supreme Court, cause the will to be destroyed.

New s 32 (not yet commenced)

32 Wills deposited with registrar

(1) This section applies to a will deposited in the office of the registrar.

(2) The registrar may do any of the following:

(a) deposit the will with the public trustee and guardian;

(b) give the public trustee and guardian identifying information about the will;

(c) if satisfied that the whole of the estate has been distributed, and with the permission of a judge—destroy the will.

(3) The registrar must keep records of the following:

(a) any will deposited with the public trustee and guardian, including the date it was deposited;

(b) any will given to a person, including the date and person to whom it was given;

(c) any will destroyed, including the date of destruction.

(4) In this section:

identifying information, about a will, means information about the testator or will that the public trustee and guardian uses to maintain its register of legal records.

register of legal records, of the public trustee and guardian, means a register kept under the Public Trustee and Guardian Act 1985, section 23A.

Note: Wills held by legal practitioners

- Property entrusted to a solicitor for safekeeping is held by the solicitor as a bailee (see *Hawkins v Clayton* 164 CLR 539 and *The Public Trustee of Queensland as a Corporation Sole* [2012] QSC 178).
- The maintenance of a safe custody packet gives rise to a new relationship, that of bailment. There is an obligation on the solicitor (bailee) not to part with possession of the bailed property other than in accordance with the former client's (bailor) instructions. This requires solicitors to obtain express instructions from each of their clients in order to transfer their safe custody to another firm.

Claim by partner to dwelling house

Administration and Probate Act 1929 (ACT) s 49G

(1) Subject to this division, if the intestate estate of an intestate who is survived by a partner comprises or includes an interest in a dwelling house where the partner was residing at the date of the intestate's death, **the partner may elect to have that interest appropriated under the *Trustee Act 1925*, section 46 in or towards the satisfaction of any interest of the partner in the real and personal property of the intestate**.

(2) An election under this section may be exercised within a period of 1 year after the date representation in the estate of the intestate is granted by the Supreme Court or within any extended period the court allows.

(3) If—

(a) probate of a will of the intestate has been revoked on the ground that the will was invalid; or

(b) a question whether a person had an interest in the estate of the intestate, or a question about the nature of an interest claimed in the estate of the intestate, had not been determined at the time when administration of the estate was granted or first granted; or

(c) the Supreme Court, for any other reason affecting the administration or distribution of the estate, considers it proper to do so;

the court may extend the period specified in subsection (2).

(4) An election by a partner must be given in writing—

(a) if the partner is not a personal representative of the intestate—to the personal representative, or to each personal representative, of the intestate; or

(b) if the partner is 1 of the personal representatives of the intestate—to the other personal representative, or to each other personal representative, of the intestate; or

(c) if the partner is the sole personal representative of the intestate—to the registrar.

(5) An election is not revocable except with the consent of the personal representative or of each personal representative of the intestate.

(6) A partner may require the personal representative of the intestate to have the interest in the dwelling house valued, and to inform the partner of the result of that valuation, before deciding whether to exercise the right given by this division.

Manna v Manna and Anor [2008] ACTSC 10

- [24]: *Section 49G of the [Act] is not materially different from s 61D of the [Wills, Probate and Administration Act 1898 (NSW)]. In my view, s 49G would serve no useful function if it did no more than credit the value of the surviving partner's interest in the intestate estate against the deceased's interest in the matrimonial home leaving the surviving partner, if she or he could, to pay out the other beneficiaries the sums provided for by the Sixth Schedule*.
- [52]: *... the plaintiff was entitled to the deceased's interest in the matrimonial home if she elected, as she did, to have it* ***without reduction by reference to any interest the defendants otherwise might have had***.

Raad v Gedeon [2022] ACTSC 337 (6 December 2022)

- [15]:…*The Act permits the defendant to appropriate the house, but only to the extent of her interest as otherwise prescribed under the Act. The section does not entitle the widow to adjust her statutory interest (that is, increase her entitlement). It is simply that s 49G permits her to elect to take that interest in the form of part of the matrimonial home.*
- [30]:…*what is important about s 49G is that it gives the surviving partner the priority over an appropriation of the family home – effectively a right of first refusal. Absent s 49G, any beneficiary may seek appropriation of an asset of the estate, but the right is in the discretion of the trustee, who may be a different person from the partner. With the overlay of s 49G on the general rights of appropriation under s 46 of the Trustee Act, the partner has a year to decide (s 49G(2)) whether to remain in the house or to move. If she (in this case) elects in favour of appropriation, the trustee cannot refuse. Further, where both the partner and the issue of the estate desire to appropriate the house, the surviving partner has priority.*

Settling claims on estates

Richardson v Richardson [2022] ACTSC 363

- The Court's role in making orders in family provision proceedings involves more than "placing a rubber stamp on the transaction" (see [34])
- Mossop referred (at [39]) to the correct approach under the *Family Provision Act 1969* (ACT) to be as follows:
  - The statute requires certain thresholds to be met before an order can be made adjusting property interests.
  - Those thresholds must be met even where there is agreement compromising a claim.
  - The fact of an agreement is a very significant matter for the court in determining whether to make orders in accordance with that agreement, even where one party to the agreement opposes giving effect to it.
  - That is particularly so where the parties to the agreement were represented by a solicitor and counsel at the time that the agreement was entered into.
  - The significance of the agreement arises because:
    - settlements of such proceedings are to be encouraged as a matter of policy; and
    - the parties, rather than the court, will have the best knowledge of the facts of the case and the interests of the parties.
  - The orders proposed by an agreement must be assessed in light of the fact that:
    - it has been reached without a trial in circumstances that relieve the parties from the risks and costs of proceeding further with their dispute; and
    - a range of outcomes are possible having regard to the evaluative nature of the judgment required by the FP Act and the range of judicial officers who may hear the case.
  - The circumstances in which agreements to compromise a claim will not be implemented by orders of the court are not closed. However, if the proposed orders lie outside the range of possible outcomes, that may indicate that the compromise is for a purpose extraneous to those of the Act and should not be implemented.
  - Where one party opposes the making of orders in accordance with a previously made compromise agreement, that will require the court to consider the underlying facts to a greater extent, in order to ascertain whether there would be some injustice in giving effect to the agreement. But mere opposition from a party that previously entered such an agreement is insufficient to require trial of the action or indicate that it is unjust to give effect to the agreement.

Rijven v Lynam and Rijven [2023] ACTSC 265

[39] Finally, it is important to observe that this case, and the recent case of Richardson, are not to be viewed as requiring detailed affidavit evidence to be prepared and put before the Court in every case where the parties reach a settlement and seek orders by consent under the FP Act. The expressed objective of maintaining proportionality of costs in estate disputes (as to which see Richardson at [114]-[116]) would be defeated if such affidavit evidence were required every time consent orders resolving a family provision claim were brought before the court. Similarly, where a settlement is reached before any affidavit evidence has been prepared, it would plainly be undesirable for further material to then be prepared in order to establish the Court's jurisdiction and the appropriateness of the orders sought by consent.

[40] The present case is better seen as an example of the importance of executors recognising the role that they perform in cases brought under the FP Act, including an appreciation of the representative capacity in which they act when they participate in, and settle, a proceeding under the FP Act. There will be cases where orders by consent finally resolving a proceeding may not require any supporting material or submissions at all. In other cases, what is required to support orders being made by consent may be slight or more substantive. Much will depend on the nature and age of the beneficiaries, the various interests involved, and the proposed extent of interference with the terms of a will.

[41] A proper understanding of the executor's obligation in relation to the interests of all beneficiaries will assist executors firstly in placing before the Court the relevant material for the making of consent orders, and secondly, in ensuring that those who may need to be heard in relation to the orders have that opportunity.

Jurak v Latham [2023] NSWSC 1318

[180]: It must be established that the prerequisites to the exercise of the statutory power have been satisfied, and the fact that the parties have agreed between themselves on a particular outcome does not relieve the Court from being so satisfied of the jurisdictional requirements...

Executor’s commission

In the Estate of Woodrow: Application for Executor's Commission [2023] ACTSC 129 (30 May 2023)

- Estate assets
  - The estate is not overly large but is larger than the estates for most Australians. Larger estates tend to attract a lower rate of commission: *Re Estate Gowing* at [55].
  - The estate was relatively simple, albeit with two complications involving income and capital gains tax issues.
  - The assets were comprised largely of shares and various bank deposits. Although there were more than a few of each, each was relatively easily administered.
- The total time spent by the two executors as revealed in the evidence provided is 125 hours rounded off.
- Commission allowed:
  - 0.25% on capital realisations
  - 2.0% on income collections
  - 0.5% on assets transferred in specie

Interim administration

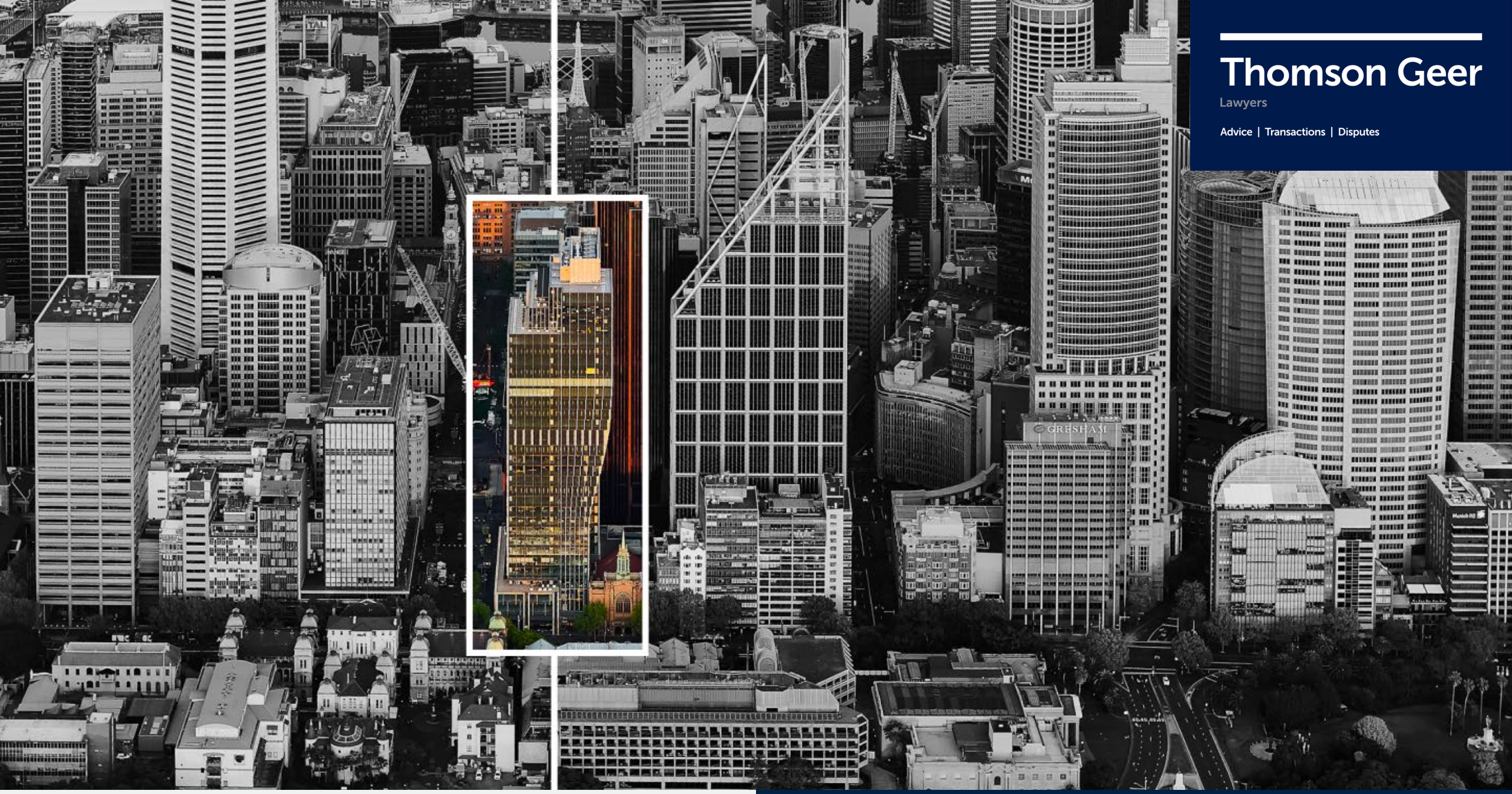
In the Estate of Cervo [2023] ACTSC 283 (11 October 2023)

- Application under s 23 of the *Administration and Probate Act 1929* (ACT) seeking the appointment of a special administrator *ad colligenda bona defuncti* or an administrator *pendente lite*.
- There is no statutory criteria or considerations identified in the Act to which the Court must have regard before making an order pursuant to s 23. No ACT authority.
- Her Honour considered the following factors identified by Justice Freeburn in *Angus McInnes MacDonald (as one of the executors of the will of Muriel Ann MacDonald deceased) v Hamish MacDonald (as one of the executors of the will of Muriel Ann MacDonald deceased)* [2023] QSC 149 at [25] to be useful considerations for the purposes of determining the outcome of the application:
  - it is desirable and there is an obvious advantage in having the estate administered by someone who stands quite outside the litigious battle;
  - a factor to consider is the nature and extent of the issues to be fought in the litigation;
  - another factor is the nature of the title tasks required of the administrator - a confined task or a task confined to managing a specific asset will involve different considerations compared with the broad management of complex estate;
  - it is relevant to consider the candidate's suitability and qualifications for the role;
  - any cost or other practical advantages or disadvantages is a factor to consider, as well as the views of the beneficiaries and the choice of executors made by the deceased; and
  - at the core of the discretion, of course, is the purpose of the appointment, namely for the benefit of the estate to get in the assets of the estate manage them and preserve them.

Rectification

In the Estate of Karina June Tyson [2023] ACTSC 358 (28 November 2023)

- s 12A of the *Wills Act* confers two separate sources of power to rectify a will. The first (s 12A(1)) is a power to rectify a will where the will fails to carry out the testator's actual intention when making the will. The second (s 12A(2)) is a power to rectify a will to give effect to the "probable intention" of the testator, so as to address circumstances or events that were not known, anticipated, or fully appreciated by the testator, or which occurred at or after the death of the testator.
- It is apparent that, at the time that the testator made the Will in 1999, she did not anticipate that she would later accrue further assets of substantial value. Accordingly, I am satisfied that the acquisition of the Narrabundah property and the PSS fund are properly characterised as "circumstances or events [which] were not known to, or anticipated by, the testator" at the time of making the Will: s 12A(2)(a)(i) of the *Wills Act*.
- I am also satisfied that the application of the provisions of the Will according to their tenor would fail to give effect to the testator's probable intention if she had known or anticipated that she would subsequently accrue these assets. Specifically:
  - In my view, the testator's probable intention can be discerned from the face of the Will. The Will provides that the primary financial component of the testator's Estate – namely, the contents of the ANZ bank account and the term deposits – were to be left to the plaintiff to distribute to their broader family. I am satisfied that this demonstrates that the plaintiff's probable intention was that any assets acquired by her in the future should be dealt with in the same manner. This probable intention is also confirmed by the evidence in the affidavit evidence of the testator's family members.
  - This probable intention does not accord with the provisions of the Will. As the Will did not include a residuary clause, the further assets acquired by the testator after making the Will would, under general laws of intestacy, be inherited solely by the first and second defendants, who are the testator's next of kin.



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