NSW BAR ASSOCIATION

PROBATE LAW & PRACTICE

COMMON ISSUES ARISING IN A SELECTION OF PROBATE MATTERS

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1. This paper addresses, in brief, common issues arising in new instructions to make an application for:

    a. A special (or limited) grant of administration;
    b. A statutory will;
    c. Revocation of a grant of probate or administration;

The Registrar's delegation

2. Most applications for probate or administration are dealt with by a Registrar in Chambers.

3. Three sources of the Registrar's authority are –

    a. Part 78 Rule 94(1) of the *Supreme Court Rules* 1970 (NSW);

    b. Directions by the Chief Justice of NSW issued pursuant to s 13 of the *Civil Procedure Act* 2005 (NSW);

    c. Matters referred to the Registrar pursuant to Part 78 Rule 94(2) of the *Supreme Court Rules* 1970 (NSW).

4. Pursuant to Part 78 Rule 94 of the *Supreme Court Rules* 1970 (NSW) the Registrar may exercise the functions of the Court in respect of all proceedings under the *Probate and Administration Act* 1898, Chapter 2 of the *Succession Act* 2006 or Part 78 of the *Supreme Court Rules* 1970 (NSW), other than:

    a. On the hearing of proceedings for contempt;
    b. On the hearing of an application for a statutory will, or leave to bring such an application,
    c. On the hearing of an application for an order under s 67 (to assign an administration bond) or under s 89 (to dispose of moneys held by an executor or

administrator or the NSW Trustee) of the *Probate and Administration Act* 1898 (NSW);

d. On hearing of contested proceedings for a grant of probate or administration, the resealing of a foreign grant, the rectification of a will, determination of whether an interested witness can benefit under a will, the determination of an application in respect of an informal testamentary document, an order under s 68 (an application by surety for relief), s 84 (an application for payment of a legacy or residuary bequest) or s 84A (interest on legacies) of the *Probate and Administration Act* 1898 (NSW), or an order under rule 51 (assigning a guardian) or 71 (that a caveat cease to be in force) of Part 78 of the *Supreme Court Rules* 1970 (NSW).

5. The Registrar is, by virtue of Pt 78 R 94(3) of the *Supreme Court Rules* 1970 (NSW), expressly given the power to revoke a grant of probate or administration when made in error, to revoke a grant of probate or administration where the application is not contested, to pass accounts and determine commission, and to determine applications under s 21 of the *Status of Children Act* 1996 (NSW) for a declaration of parentage in connection with uncontested proceedings for the grant of probate or administration or for the resealing of a foreign grant.

A special (or limited) grant of administration

6. The nature of a special (or limited) grant of administration is referred to in the paper "Probate Law and Practice: An Introduction" paragraphs 40 to 45 and schedule paragraphs 27 to 36 presented by Lindsay J today. Applications are also dealt with in more detail in the paper "The Concept of Special Administration of a Deceased Estate" published on the Supreme Court website.

7. A number of precedents are offered in Appendix 4 [Comm 5] to S Janes, D Liebhold and P Studdert, *Wills Probate and Administration Law in New South Wales Second Edition*, Lawbook Co 2020. A Form of Orders is also offered in Annexure B (IV) to the paper presented by Lindsay J today.

8. At a basic level special (or limited) grants of administration are appropriate where it is necessary for a person to have the authority to take some step in the name of the deceased person prior to the issue of a final grant of probate or administration.

9. Understanding the tasks requiring immediate attention, and the impediments to the making of a final grant of probate or administration (including what steps are still to be taken, and how long they are expected to take), is critical to the framing of an application for a special (or limited) grant of administration.

10. If the impediments to obtaining a final grant of probate or administration are resolvable within a short period of time, the cost-benefit of applying for a special (or limited) grant of administration needs to be considered.

11. The Registrar's delegation under Pt 78 R 94 of the *Supreme Court Rules* 1970 (NSW) gives the Registrar the power to make an uncontested application for a special (or limited) grant of administration, although if there is other contentious business requiring attention, or in the case of urgency, an application might be made in the Succession List.

12. It is the powers given to the special administrator that are important, rather than the Latin label, although the Latin label informs consideration of the facts which must be established by evidence in order for the application to be successful.

Administration pendente lite

13. If there are proceedings concerning the validity of the deceased's testamentary instruments, or a contest as to the entitlement to a grant of Letters of Administration, the application is an application for administration *pendente lite*. In such an application a full suite of powers should be given to the administrator.

Administration ad colligenda bona

14. In cases where an urgent grant is necessary to collect and preserve the estate assets, the application is an application for administration *ad colligenda bona defuncti*. In those cases, special attention should be given to drafting the powers necessary to meet the presenting problem.

Administration ad litem

15. If the application is for a grant of administration for the purpose of conduct of proceedings other than probate proceedings, the application is an application for administration *ad litem*.

16. The authority of a litigant to represent the estate of a deceased person in the pre-grant period is a vital question which warrants early consideration.

17. As a plaintiff, some of the earlier authorities (eg *Byers v Overton Investments Pty Ltd* (2000) 182 ATLR 757, upheld on appeal *Byers v Overton Investments Pty Ltd* (2001) 186 ALR 280) suggest that proceedings commenced prior to grant (and without a special grant) are a nullity and required to be dismissed.

18. More recent authorities (*Hewitt v Gardiner* [2009] NSWSC 705; *Re Estate Nitopi, deceased* [2018] NSWSC 1560) have found ways to overcome the issue of "nullity" in the *Uniform Civil Procedure Rules* 2005 (NSW) by appointing a plaintiff as representative of an estate some time after proceedings have been commenced.

19. For family provision proceedings, provided the defendant is identified as the appropriate defendant to the claim, orders are routinely made pursuant to s 91 of the *Succession Act* 2006 (NSW) to enable the application to be dealt with. Importantly, following amendment to the section in 2018, the Court now has the power to grant administration for the purpose of the application to any person considered appropriate (in contrast to the earlier iteration of the legislation which required, artificially, the grant to be made to the applicant).

20. In family provision cases, even if an order is made at an earlier time appointing the defendant to represent the estate of a deceased person pursuant to r 7.10 of the *Uniform Civil Procedure Rules* 2005 (NSW), no final orders can be made against the actual estate of the deceased until either a final grant of probate or administration, or a s 91 grant is made.

21. The one exception is where orders are made solely against notional estate: *Wheat v Whisby* [2013] NSWSC 537; see also *Curnow v Curnow* [2014] NSWSC 896.

22. In other cases where the legal personal representative of a deceased estate is the proper defendant, consideration should be given at an early stage to an application for administration ad litem to enable the claim to proceed. (Alternatively, consideration might be given to waiting until a final grant of probate or administration is made.)

23. In those cases early consideration should also be given as to the way in which any judgement might be enforced in the absence of a final grant of probate or administration.

24. In the rare case the Court might order that the proceedings continue in the absence of a representative of the estate (eg *Bayside Council v Estate of Goodman* [2019] NSWSC 530).

25. Practitioners should be aware, where a litigant dies after commencing proceedings, or after proceedings are commenced against them, of the effect of r 6.31 of the *Uniform Civil Procedure Rules* 2005 (NSW).

Application for a statutory will

26. The power of the Court to authorise the making of a will for a person who lacks testamentary capacity, and for a minor, was introduced with the *Succession Act* 2006 (NSW) ("**the Act**") which commenced on 1 March 2008. Chapter 2, Pt 2.2, Div 1 of the Act deals with applications in respect of a minor. Div 2 deals with applications in respect of a person who lacks testamentary capacity.

27. Part 2.2 Division 2 will apply where a minor lacks testamentary capacity (as a matter of fact, not just by reason of their minority)[1].

28. Section 19 of the Act provides that an applicant for an order authorising the making of a statutory will must obtain the leave of the Court. The information listed in s 19(2) of the Act must be provided for the purpose of the application for leave. Section 20 of the Act provides that on the hearing of the application for leave, the Court may grant leave and allow the application to proceed under section 18, and, if satisfied of the matters in section 22 of the Act, make the order.

[1] Section 18(4) of the Act

29. It is important to note the key differences between the substantive requirements and the mechanics of execution for a statutory will for a minor in contrast to a statutory will for a person lacking testamentary capacity, as follows:

S	Requirement – minors	S	Requirement – persons lacking testamentary capacity
16(4)(a)	The minor understands the nature and effect of the proposed will or alteration and the extent of property disposed of by it.	22(a)	There is reason to believe that the person is, or is reasonably likely to be, incapable of making a will.
16(4)(b)	The proposed will accurately reflects the intentions of the minor.	22(b)	The proposed will is, or is reasonably likely to be, one that would have been made by the person.
16(4)(c)	It is reasonable in all of the circumstances that the order should be made.	22(c)	It is or may be appropriate for the order to be made.
		22(d)	The applicant is the appropriate person to make the application.
		22(e)	Adequate steps have been taken to allow representation, as the Court considers appropriate, of persons with a legitimate interest.
16(5)	A will is not properly executed unless executed in accordance with Part 2.1 (of the Act); one of the witnesses is the Registrar; and any other conditions of the authorisation (if any) are complied with.	23(1)	A will is properly executed if it is in writing and signed by the Registrar and sealed with the seal of the Court

30. The evidence and submissions on an application for leave, and for the authorisation of a statutory will, should address each matter that the Court is required to consider under s 16 (for minors) or ss 19 and 22 of the Act (for persons lacking testamentary capacity).

31. In respect of evidence concerning testamentary capacity, see *Fenwick Re, Application of J R Fenwick & Re Charles* [2009] NSWSC 530 at [127] – [135].

32. In New South Wales s 22(b) of the Act uses the words "is, or is reasonably likely to be, one that would have been made by the person". Those words might be considered to be subjective in a lost capacity case: *Re Will of Jane* [2011] NSWSC 624 at [73] and [76]. In a "nil capacity" case it is easier to see objective considerations as relevant: *Fenwick* at [171] – [173].

33. The best interests of the putative will-maker are relevant: *W v H* [2014] NSWSC 1696 at [72]; *Re RB, a protected estate family settlement* [2015] NSWSC 70 at [59].

34. Ultimately the issue of whether these matters are subjective or objective may be an academic question of little consequence. The ultimate issue is whether objective type considerations are a satisfactory proxy for the text of the legislation: *A Limited v J* [2017] NSWSC 736 at [77].

35. The Court may order that the person the subject of the application be separately represented: s 25 *Succession Act* 2006 (NSW) particularly where the plaintiff is the sole beneficiary of the proposed statutory will (*Re Will of Alexa* [2020] NSWSC 560 at [4] – [10]).

36. The legislation is spectacularly inconsistent across the states and territories particularly as to the requirement that the Court be satisfied that the Will would have been made by the person. R Williams and S McCullough, *Statutory Will Applications: A Practical Guide*, Lexisnexis Butterworths, 2014, is a useful early text dealing with applications across Australia.

Revocation applications

37. The Court has an inherent power to revoke a grant of Probate or Administration. The Court also has the power to revoke a grant of administration pursuant to s 66 of the *Probate and Administration Act* 1898 (NSW).

38. It has been said that the grant of Probate may be revoked where the executor(s) have breached the oath that they gave when they applied for a grant of Probate that they would administer the estate according to law (*Bates v Messner* (1967) 67 SR (NSW)

187 at 191 per Asprey JA) or where the proper administration of the estate has been either "put in jeopardy" or prevented by the acts or omissions of the executor, or by matters personal to him such as mental infirmity, ill health or by proof of matters establishing that the executor is not a fit and proper person (*Mavrideros v Mack* [1998] NSWCA 286; (1998) 45 NSWLR 80 per Sheller JA at 108).

39. Supervening events constituting grounds for revocation of the grant may include breach of trust or gross misconduct, or gross delay and inefficiency: *Mavrideros v Mack* (1998) 45 NSWLR 80.

40. In considering an application to revoke a grant of probate or administration the Court will have regard to the due and proper administration of the deceased's estate and the interests of justice. There is an element of case management governed by the purposive character of the probate jurisdiction: *Cole v Paisley* [2016] NSWSC 349 at [52] – [55].

41. If a grant of probate or administration is revoked the executor or administrator under the revoked grant will be bound to duly account and to pay and transfer all money and property received by, or vested in, him or her or them, but shall not be liable for any money or property paid or transferred in good faith under the grant prior to the revocation: s 40D *Probate and Administration Act* 1898 (NSW). Regardless of the operation of s 40D of the Act, there should usually be a consequential order which requires the filing of accounts, and an order which deals with the transfer of the property from the old executor to the new executor: *Morgan v McRae* [2001] NSWSC 1017 at [24].

42. An application for revocation of a grant of probate must be pleaded by Statement of Claim: Pt 78 R 48 *Supreme Court Rules* 1970 (NSW). Notice of Proceedings would need to be served on each non-consenting beneficiary (Part 89 R 57 *Supreme Court Rules* 1970 (NSW)). A non-exhaustive list of the matters which an applicant should address in an application to revoke a grant is set out in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [320].

43. If the grant of Probate is revoked then a grant of Letters of Administration with the Will annexed should issue. The Court will often be more inclined to appoint an independent person as administrator rather than a party, particularly where there has been conflict between the applicant and one or more of the other beneficiaries. If an

independent person is appointed he or she would normally require orders entitling him or her to charge professional fees to the estate. For a Form of Order see *de Angelis v Laundy* [2014] NSWSC 456 paragraph 75(e).

44. Not all delay, or dispute, in the administration of a deceased estate leads naturally to an application to revoke the grant of probate or administration. Revocation applications are rarely by consent, they are costly, and can lead to further delay in the administration of an estate.

45. Parties should consider confronting administration problems directly by asking the Court to determine the underlying controversy, either pursuant to part 54.3 of the *Uniform Civil Procedure Rules* 2005 (NSW) or s 84 *Probate and Administration Act* 1898 (NSW).

46. A beneficiary of a trust who complains to the Court about the administration is entitled, where the Court is satisfied that there is no question which requires its decision, to an appropriate specific order for performance of the trust: *McLean v Burns Philp Trustee Co Pty Ltd & Ors* (1985) 2 NSWLR 623 (a case concerning an application for general administration of a trust, noting that rule 54.6 of the *Uniform Civil Procedure Rules* 2005 (NSW) now provides that the Court is not required to order general administration). In *McLean v Burns Philp*, Young J said at 634:

> *"In equity, no-one ever has an absolute right to relief. Equity still varies as the Chancellor's foot, even after Lord Eldon's standardization. What is meant is that whilst the relief was still for the discretion of the Court, if a standard set of facts were posed, then the Court would usually give relief in such a case, or as it is sometimes said, would give relief ex debito justiciae".*

47. Section 84 of the *Probate and Administration Act* 1898 (NSW) empowers the Court to make such order as it thinks fit if an executor refuses or neglects to pay or hand over a bequest or legacy. In S Janes, D Liebhold & P Studdert, *Wills Probate and Administration Law in New South Wales 2nd Edition*, Lawbook Co Thomson Reuters, 2020, the commentary to the section at [PAA.84.10] says: "*..It seems that the section should be used only where the matter is free from doubt, where there is no conflict of rights of rival demands and there are liquid assets sufficient to meet the legacy or bequest*."

48. Diving into the nature of the issue arising in the administration, and crafting a remedy to address the issue directly, may result in the issue being determined, or resolved, more quickly and cheaply than requiring the grant of probate and administration to be revoked and requiring a new grant of administration to be issued.

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2 March 2022