Executors Stepping Out of Line

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:

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

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.

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.

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.

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.

**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.

**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) A creditor of the estate;
- (b) 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;
- (c) A person (not being a beneficiary of the estate) selected at random by the Court;
- (d) 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.

I have not dealt with the position of estates of persons having died on or before 31 January 1981. That situation however is governed by s85 of the PAA.

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:
(a) The LPR may be required by the Court on the application of an interested person to produce and verify accounts – s85(2);
(b) The LPR who wishes to claim commission must first file verified accounts (s86(20));
(c) 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 disbursement 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.

**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.

**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.

**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”.
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 granted 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.”

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:

¹ Morgan v MacRae [2001] NSWS 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.
(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?

(a) 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.\(^15\)

(b) 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

---

8. *Rutter v McCusker*, as above at [25].
9. Ibid.
10. Ibid.
11. Ibid at 26.
12. Ibid.
13. Ibid.
15. Ibid.
must be a reasonably high level of risk arising in the future.\textsuperscript{16} The standard must be high and flexible.\textsuperscript{17} This standard is not set too low in respect of executors because a court should respect the intention of the testator, "a matter which is not a consideration in other situations of conflict."\textsuperscript{18}

(c) 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.\textsuperscript{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.

\textsuperscript{16} Ibid at 30.
\textsuperscript{17} Ibid.
\textsuperscript{18} Ibid at 30-31.
\textsuperscript{19} Ibid at 41.
Challenging the Appointment of an Executor

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 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.

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.

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”. 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.

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.

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. A court will not lightly interfere with the discretion of a testator to appoint a particular person as his executor.

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.

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.

The presumption extends to a judgment by the testator that it would be discharged notwithstanding potential conflict of interest which the appointment would create. 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.

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. If a court considers

---

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.
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]
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.

**General nature of jurisdiction to pass over or remove personal representative**

Courts are concerned about the due and proper administration of an estate and the interests of beneficiaries. The jurisdiction of a court, whether statutory or inherent, is a supervisory and a protective one. No general rule can be laid down for the removal of executors or trustees.

The conviction and imprisonment of an executor will be a basis for excluding that person: *Re S* [1968] P 302. In *Re S*, the executor was the wife of the deceased. She admitted to killing her husband and was found guilty of manslaughter by reason of diminished responsibility. The daughters of the deceased applied to be appointed administrators of the estate and the order was made and the wife executor was passed over as she could not act as executor whilst imprisoned.

**Inherent power to pass over an executor**

The Supreme Court of New South Wales possesses an inherent power to pass over an executor.

**Statutory Provisions**

Section 74 of the PAA permits a court to pass over an executor by providing power to appoint an administrator to adopt and take over the role of executor. If an executor is not willing and competent to take probate or is resident outside the jurisdiction, a court may, if it thinks it necessary or convenient, appoint an administrator. This discretion is very wide. Such an order is, in effect, a passing over of the executor.

Section 75 of the PAA provides that where an executor neglects or refuses to prove a will or to renounce probate within a relatively short time from the death of a testator or is unknown or cannot be found, a court may, upon the application of any person interested in the estate, Public Trustee or any creditor of the testator order that probate be granted to such executor or order that administration be granted to such person as appears just.

---

30  *Baldwin v Greenland* [2007] 1 Qd R 117 at [44] per the Court of Appeal.
31  *Miller v Cameron* (1936) 54 CLR 572 at 579 per Starke J.
32  See *Bowler v Bowler* unreported, SC (NSW), Young J, No 103687/1989, 7 June 1990 at 4 where his Honour collected the authorities for this proposition.
33  *Bath British and Malayan Trustees Ltd* [1969] 2 NSWR 114 at 118 per Helsham J.
Revocation of Grant

Courts have an inherent power to revoke a grant of probate and a statutory power to revoke a grant of administration. 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. There is nothing in the nature of the inherent power which limits the form of order which such an order may take.

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;

(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, 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;

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

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

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. A court cannot simply strike out the name of one executor from a grant and continue on without revoking the grant. A fresh grant should be made because a grant is a public document and often must be produced to third parties as proof that the holder is the personal representative and thus enable him or her to administer the estate. A grant must be and appear to be complete on its face “so that third parties

34 Section 66 PAA in relation to grants of administration.
35 Protilio v Protilio [1999] NSWSC 57 at [28] per Bryson J.
36 Ibid.
37 NSW: Probate and Administration Act 1898 (NSW), ss 40 and 40C.
38 Re Gillard (deceased) [1949] VLR 378.
39 Re Estate of Mack [1962] NSWR 1029 per Myers J.
40 Re Estate of Mack [1962] NSWR 1029 per Myers J.
41 Bates v Messner [1967] 1 NSW 638 at 642 per Asprey JA.
43 Morgan v MacRae, as above at [23].
44 Gorman v McGuire, as above.
may act upon it without concern that it may have subsequently been varied as to the continuance in office of one of the named executors.”

Where a grant to two executors is revoked however and a new grant is issued to one of the original executors, a court does not require that continuing executor to prove once more all of the matters which were proved in order to obtain the original grant.

**Conduct of personal representative**

There appear to be four types of conduct which are the subject of applications for the removal of an executor or trustee. They are:

(a) Positive misconduct. Where a personal representative or trustee has engaged in abuse of trust or acts or omissions which endanger trust property “or to show a want of honesty, or a want of proper capacity to execute the duties or a want of reasonable fidelity”, he or she should be removed from office.

(b) Circumstances where a personal representative has been wilful in the dereliction of his or her duties in respect of the administration of an estate;

(c) Circumstances where a personal representative has not been wilful but where he or she has not done that which he or she, as a personal representative, would, objectively, have been expected to have performed in the office of personal representative; and

(d) circumstances where a personal representative has been remiss but the conduct is not sufficiently grave to warrant removal from office.

The applicable test is that a court must be satisfied that the administration of the trust is in jeopardy or is likely to be so placed and the interests of beneficiaries will suffer before it removes a personal representative.

**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.

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.

In a useful decision of the Supreme Court of South Australia, Justice Besanko in *Re Estate of Crane* 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.

---

45 Ibid.
47 Letterstedt v Broers (1884) 9 App Cas 371 at 385-7 per the Privy Council.
49 Re Goods of Loveday [1900] P 154 at 156 per Sir Francis Jeune P.
(b) where the sole executor is in prison;  
(c) an executor had neglected his or her duties;  
(d) an executor had intermeddled in an estate and then refused to take a grant;  
(e) an executor is absent abroad;  
(f) an executor is suffering from ill-health;  
(g) an executor is of unsound mind;  
(h) an executor is not competent to take probate;  
(i) an executor has disappeared; and  
(j) the estate is insolvent.

The following should be added to that list:

(k) where a named executor had taken no steps to obtain probate;  
(l) where a person was the subject of a warrant for his arrest and disappeared without trace prior to the death of the testator;  
(m) where prior to his death, a testator allegedly sold property to one executor for undervalue;  
(n) drunkenness;  
(o) lack of management ability;  
(p) where a trustee becomes bankrupt (unless the testator was aware of this fact).

---

52 Re Estate of Drawmer (dec) (1913) 108 LT 732.
53 Re Estate of Potticary [1927] P 202 at 204 per Hill J.
54 Re Estate of Biggs [1966] P 118, [1966] 1 All ER 538 per Rees J.
56 Re Galbraith (deceased); [1951] P 422, [1951] 2 All ER 470 per Karminski J.
58 Re Goods of Stewart (1875) LR 3 PD 244.
59 Re Sawtell (1862) 2 Sw & Tr 448, 164 ER 1070 at 1071 per Sir Cresswell.
60 Ex parte Leguia; re Estate of Ashworth [1934] P 80.
61 Re Estate of Ray (deceased) (1926) 136 LT 640 per Lord Merrivale P.
62 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).
65 Ibid.
66 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
(q) where a spouse of an intestate person was divorced from him or her and could not be located;\

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

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

**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;
2. if the personal representative was removed, there would be further delay to the finalisation of the estate;
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;
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; and
5. the imminent winding up of the estate and the prospects of a final distribution in the immediate future.

---

67 **Re Estate of Frost** [1905] P 140 at 141 per Bargrave Deane J.
68 **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).
70 See Conflict.
71 Ibid.
72 **Gibson v Buchanan** [2004] NSWSC 957 at [41] per Palmer J.
74 Ibid at [6].
Disputes between co-executors

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.

Problems where grant of probate and person who has leave to come in and prove will wishes double probate

In the example above, problems may arise if the grantee opposes the other/s named executor/s taking, in effect, a double grant.

Procedurally, the executor with leave reserved will need to apply for a double probate. The executor with the grant (the grantee) will seek revocation of the leave reserved to that person by the original grant of probate.

Issues between the grantee and the person with leave reserved may be so contentious and the subject of rejection by one or both parties that a court will be unable to decide the issues in a summary manner and will order a trial in respect of the issue.75

Revocation of grant with consent of executors

Circumstances may occur where executors may agree that one of them should be removed from office because of conflict between that person and the proper administration of the estate or where all acknowledge that the administration is being hampered by irreconcilable differences between them.

A joint grant should be revoked where one executor acknowledges that there is an actual or potential conflict between himself/herself and the administration of an estate and the others consent to an order for the revocation.76 If the person seeking the revocation order commences proceedings for such relief77 was aware of the issue at the time of making the application for the grant, then it’s possible the person will not get his costs because s/he created the problem.78

There is little assistance from the authorities as to whether executors pursuant to a grant may seek a consensual revocation of that grant because of irreconcilable differences between them which has inhibited their ability, as executors, to properly administer an estate.

75 Tsaknis v Lilburne [2010] WASC 152 per EM Heenan J
76 Gorman v McGuire [2002] NSWSC1089 per Palmer J.
77 Ibid at [9].
78 Ibid at [15].
However, the overriding issue is the proper administration of the estate. In *Re Estate of Stuart deceased,* Gray J said that where the proper administration of an estate is frustrated by the dereliction in the duty to administer the estate brought about by irreconcilable differences and all of the executors consent to a revocation, the revocation is warranted and should be granted.

**Revocation of grant of letters of administration**

A grant of letters of administration in common form is an interlocutory order. A court exercising probate jurisdiction may revoke such a grant upon a proper case being established.

Section 66 of the PAA empowers the Supreme Court to set aside a grant of letters of administration. Section 40(D) provides for matters consequent on the revocation of a grant. The legislation does not define the bases upon which a grant may be revoked but it is clearly a matter which must be decided in the exercise of discretion by a court. The power to revoke is not exercised as of course or even as a matter of right. In considering whether to revoke or otherwise, a court must keep in view the due and proper administration of the estate in the interests of the parties beneficially entitled. The burden which an applicant has to prove the unfitness of an administrator is onerous and such a finding will not lightly be made.

A leading case on the principles in which a grant of administration may be revoked is *Mavrides v Mack.*

Circumstances where it has been held to be appropriate to revoke a grant include:

(a) Where the surname or first name of the deceased is “seriously” incorrect; and

(b) Where the grant has been obtained on a false or incorrect basis.

**Means of relief other than removal from office**

(a) A court has jurisdiction to take the execution of a trustee either partly or wholly under its control by making a general administration order whereby it gives directions as to the execution of the trust. Such a procedure is cumbersome and expensive and has been superseded by actions where nominated and specific relief is claimed. Nevertheless, a general administration order may be made which would permit a court to appoint a receiver to manage all or part of the trust property or to manage

---

80 *Re Estate of Stuart (deceased)* ibid at [26].
81 *Richardson v Reardon* [2006] NSWSC 1252 at [16] per Campbell J.
82 *Calder v Public Trustee* [2003] NSWCA 187 at [5] per the Court of Appeal.
85 *Lubis v Walters* [2009] NTSC 23 at [47] per Angel J.
87 Ibid.
88 Ibid.
89 *McLean v Burns Philip Trustee Co Pty Ltd* (1985) 2 NSWLR 623 at 633 ff per Young J.
90 *Pope v DRP Nominees Pty Ltd* (1999) 74 SASR 78, [1999] SASC 337 at [41] per the Full Court.
some piece of litigation for the protection of trust property without removing the trustee.\(^\text{91}\)

(d) Rules of Court\(^\text{92}\) provide that a court may give directions in respect of the administration of an estate or, where there is a trust, the *Trustee Act 1925 (NSW)* provides the same relief.

(e) Another means of achieving a remedy of expediting the administration of an estate without the removal of an office holder may be to seek directions as to failure to pass accounts.\(^\text{93}\)

*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.

---

\(^\text{91}\) See *v Hardman [2002] NSWSC 287* at [18] per Bryson J.

\(^\text{92}\) See, for example NSW: *Uniform Civil Procedure Rules, 2005 (NSW)*, R 54.3; NT: *Supreme Court Rules*, Order 54; SA: *Supreme Court Rules*, Rule 206; Vic: *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*, Order 54, Rule 2; WA: *Rules of the Supreme Court 1971 Order 58*, Rule 2.

\(^\text{93}\) *Re Estate of Rogers v Rogers [2009] WASC 358* at [33]ff per E M Heenan J.
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 Tamberrin 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.

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.

**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.
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:

(a) The property is distributed at least 6 months after the deceased’s death, and
(b) The LPR has given notice in the approved form\(^\text{94}\) that the LPR intends to distribute the property in the estate after the expiration of a specified time,
(c) The time specified in the notice is not less than 30 days after the notice is given, and
(d) The time specified in the notice has expired, and
(e) 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:

(a) The distribution was made in accordance with s93, and
(b) 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

\(^{94}\) From 1 March 2010 the approved for is Form 114.
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.

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.

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:

(a) consents to the distribution, or

(b) 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.

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:

**McGrath v Troy as administratrix 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.

**FACTS**

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.

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 for all estate practitioners.
Executor Commission Disputes

I have chosen for discussion two Supreme Court decisions on executor's commission.

*Re The Estate of D A Lindsay [2004] NSWSC 578*

This was an application for review of a decision of the Deputy Registrar concerning commission allowed on the estate. A, a solicitor, was the executor and trustee under the will which he had witnessed himself.

The Will contained a solicitor's charging clause. However, that clause could not be given effect to, as it amounted to a legacy to a beneficiary, and was ineffective pursuant to s 13 of the *Wills, Probate and Administration Act 1898*.

The estate of the deceased was a particularly simple one. He had a house, which appeared to have been unencumbered, some household furniture and belongings, and bank accounts.

There were only minor debts, of a domestic nature. Some work needed to be done to get the house into a saleable condition, including throwing out papers of the deceased. Because the deceased was a Buddhist, and had been involved with the RSL, ceremonies involving both Buddhist and RSL elements needed to be organised. The executor organised the cleaning of the house and its preparation for sale, negotiated with the agent for sale of the house, arranged for a headstone to be erected, and also carried out various negotiations with beneficiaries concerning payment of executor’s commission.

The Will made provision for the deceased’s residence to be given to a Buddhist charitable organisation and for the residue of the estate to be divided amongst five charitable or altruistic entities as tenants in common in equal shares.

There were various items of work which the executor did which were of a professional nature. There was an amount of $8,060.50 in costs and disbursements charged, on an ordinary basis, in connection with the obtaining of probate. There was a further amount of $1,406.50 for conveyancing costs and disbursements in connection with the sale of the house. There was a further amount of $275 for dealing with and lodging a land tax return.

The conveyancing costs and disbursements were ones which were not necessary for the administration of the estate, in accordance with the Will. They were, rather, brought about by the wish of the beneficiary of that legacy to have the house sold, rather than distributed to it in specie. Campbell J was of the view that it would not be right that those conveyancing costs and disbursements to be thrown upon the residuary estate and the solicitor could recover those costs from the specific legatee.

The probate costs, and the amount for the land tax return, were amounts which ought to be allowable as special commission. His Honour said:

“If the executor of the estate had not been a solicitor, the executor would have had to obtain professional assistance, and would have paid amounts like those contained in the two tax invoices. For that reason, it is proper to allow them as special commission. Further, it is proper to allow them even though the executor’s charging clause was invalidated. The special commission is allowed after the Court has considered the factors relevant to allowing it, and because of the benefit the estate..."
has derived from the work to which it relates. The fact that the charging clause in the Will is ineffective does not stop the Court from itself allowing the special commission for those reasons.

I am not persuaded that the other two amounts which were included in tax invoices, are amounts which relate to solicitor’s functions, as opposed to executorial functions. At least a large part of those amounts involved negotiations with the beneficiaries concerning the quantum of the commission of the executors. There is another amount which relates to an inscription to be placed near the deceased's remains at Rookwood. Generally the narrations in the tax invoices which have been presented do not make clear that what is being charged for is true solicitor's professional work, rather than executorial work. In these circumstances, I would allow the amount of $8,335.50 as special commission.”

The basis upon which commission for ordinary executorial work was sought included that there were multiple beneficiaries which were charitable, and that there were cultural factors which had to be attended to concerning the deceased’s funeral and in dealing with the various Buddhist beneficiaries, who are (it was submitted) “not in the cultural mainstream”.

His Honour did not regard that matter as one which takes the executor’s claim for commission outside the ordinary run of claims and said at [11-12]:

It will frequently happen that a deceased has specific wishes, concerning what is to happen concerning any funeral ceremonies and disposal of his or her remains, which an executor will need to take care to observe. I am not persuaded that the fact that the deceased was a Buddhist, or that some of the beneficiaries had Buddhist connections, imposed any unusual extent of obligations or duties on the executor.

That there were multiple beneficiaries is not a factor showing that this administration involved particular difficulties – there were five beneficiaries in all, and that is not a large number. The beneficiaries are all legal entities in their own right – it is not as though the executor was involved in making any decisions which involved questions of the law of charitable trusts – so the fact that the beneficiaries themselves had charitable or alternative objectives did not complicate the administration.”

A had proposed that he receive a commission of 2.5%, including GST, on the estate, which would give him a commission of $28,535.29. The solicitor representing the executor submitted that the major beneficiary, and two of the other four residuary beneficiaries, had agreed to the commission rate of 2.5% including GST and that was a matter which the Court should take into account. Campbell J said “once it is in Court, it is for the Court to exercise its own discretion about the appropriate rate of commission” and found given the size of the estate, the appropriate benchmark for commission was around 1% of the distributable estate. The total commission allowed (both ordinary and special) was $19,585.

The Deputy Registrar had allowed commission of $18,900. As a result of my exercising the discretion afresh, the executor was $685 better off, and also had the opportunity of claiming $1,406.50 conveyancing costs and disbursements from the beneficiary who requested that conveyancing work to be done. Consequently, the executor was about $2,000 better off. He sought costs in the sum of $1,650, on the basis that there had been two hours spent in Court, and three hours preparation, at $350 per hour. Campbell J held it was not an
appropriate way of calculating costs in such a matter as it would be wrong for the costs of an application for review to be disproportionately large by reference to the amount which had been recovered by means of the review and he allowed costs $1,000.


These proceedings were a review of a decision of a Supreme Court registrar passing the executors first accounts and allowing an executor (Hawkins) commission at the rate of 1% on the capital realisations, 2% on the income of the estate and 0.5% on assets transferred _in specie_. Legal costs of filing and passing of the accounts ‘plus fees’ were allowed. H was awarded approximately $61,000 commission.

The Parties

The applicant on the motion to review the Registrar’s decision was one of the major beneficiaries of the estate and a co-executor (Brown).

The first respondent was Hawkins, the second was the solicitor for the estate.

The Deceased died in 1995 aged 94 years. Her estate was worth $8.4M and comprised real estate, shares, other investments, cash at bank and some cash on hand.

The Will was made in 2000. It did not contain a provision as to the remuneration of the executors (of which she had appointed three). Mr Hawkins was a long-time friend of the deceased and was a retired Minister. Ms Brown was a niece. The third executor renounced probate.

Hawkins had initially applied to pass estate accounts from the date of death (17/12/05) to 1 August 2007 and for the assessment of commission. The application for commission was only made by Hawkins and not the other executor. That didn’t stop things as Slattery J was of the view that Brown was not precluded from making her own application.

In August 2006 one of the beneficiaries (Brown’s son) and Hawkins commenced proceedings against Brown to account for monies which he alleged were transferred to her during the deceased’s lifetime and were now held on behalf of the estate.

Those proceedings were heard by Ward J (_Barkley v Barkley Brown [2009] NSWSC 76_). Her Honour found that both Brown and her son had to account to the estate.

The existence and conduct of the account proceedings was relevant to the application for commission because Hawkins prepared for the account proceedings during the period which the claim for commission was made.

Slattery J summarised the legislative framework governing Hawkins’ claim for commission. Namely, s86(1)PAA relevantly provides:

“The Court may allow out of the assets of any deceased person to the deceased person’s executor,…in passing the accounts relating to the estate of the deceased person, such commission or percentage for the executor’s,…pains and trouble as is just and reasonable,….”
Brown made no criticism of Hawkins in so far as any entitlement to commission was concerned. The issues rather were:

- the type of activity on the part of the executor which will attract an award of commission;
- whether or not Hawkins had engaged in that kind of activity; and
- what is the appropriate quantum of commission for that activity.

The Admission of Fresh Evidence which was not before the Registrar

Brown sought the admission of further evidence which was not before the Registrar (mainly correspondence between the parties). His Honour allowed the fresh evidence to be admitted on the basis of what was by Helsham J in *In the Will of Sheppard* [1972] 2 NSWR 714 (a case which deals with the applicable principles to the conduct of a hearing of review by the Court of a decision by the Registrar on an application for executor’s commission).

That is:

(a) The review by the Court of the Registrar’s decision upon an application by an executor for commission gives the Court jurisdiction to review all aspects of the Registrar’s findings as well as his actual decision – jurisdiction is not restricted to cases where the Registrar has acted upon some mistaken principle (at 716G-717A).

(b) On the hearing of an appeal from or a review of a Registrar’s decision in relation to an application for executor’s commission the Court is entitled not only to all the matter available to the Registrar and the affidavit material in support of the appeal but also to any report from the Registrar made after the matters of appeal for review has been filed, setting out the Registrar’s reasons for his finding or order (at 717B-C).

The review of the registrar’s decision was brought under rr 49.19 and 49.20 UCPR. It followed that the review was not subject to the restrictions that apply to appeals. Brown did not have to demonstrate a material error of fact or principle in the Registrar’s decision. The Court may make its own decision on the review on the basis of the material presented to it by the exercise of a fresh discretion.

The Registrar had ignored the account proceedings in the exercise of his discretion in allowing commission. Slattery J found that this approach was incorrect.

Overview of Applicable Legal principles

His honour gives a useful overview of the Supreme Court’s jurisdiction to grant commission to executors. At [26] His Honour said:

“This jurisdiction is usually exercised on the basis that executors may charge by one rate of commission on capital and another rate of commission on income, rather than on a time charging basis. If, however the executor is a professional such as a solicitor or accountant, and the will permits the executor to charge professional fees to the estate, he or she is entitled to charge professional rates only for those tasks which are professional tasks: *Re the Estate of D A Lindsay* [2004] NSWSC 575 at [8]-[9].”
Brown advanced three arguments in support of her motion. All three were unsuccessful.

1. **The Large Estate Argument**

This argument was that if close attention is paid to the words of s86(1) it will be seen that an award of commission based upon a percentage is not appropriate for a large estate such as the present one because the provision of commission should be compensation for the executor’s “pains and troubles”. Awarding commission on a percentage basis in large estates will over compensate the executor without recognising what the executor actually did (and in effect, turns the executor into a significant beneficiary).

It was argued that commission should be calculated to compensate the executor for actual “pains and trouble”, namely, what he did and what his efforts were on behalf of the estate, rather than merely reaching a figure as a function of the total value of the estate.

Slattery J found at [32] that the argument was inconsistent with the direct language of the section, which clearly states that the Court can fix a percentage commission on account of “pains and trouble”. The legislation itself contemplates that the percentage selected shall be selected by the Court because of the Court’s assessment of the executor’s “pains and trouble”.

The argument also assumed, wrongly, that in exercising its discretion in a large estate the Court can take into account the fact that if the executor’s “pains and trouble” have not been very great, that a commission awarded as a percentage of the estate, which may be appropriate for a small estate, can be adjusted downwards for a larger estate: at [35]. The size of the estate does not require any particular limitation upon the rate of commission to be allowed.

Further, a large percentage may, at times be warranted, as large estates tend to be complex and have more involved. The argument failed to acknowledge this.

2. **The Executor’s Work Argument**

This argument was that Hawkins could not claim commission for all the work that he actually did in the account proceedings as that was not executor’s work.

Hawkins’ evidence was that he initiated and conducted the account proceedings and the claim for commission overlapped with his involvement in the litigation.

Brown argued that the Registrar’s exercise of discretion in fixing commission miscarried because the registrar appeared to take into account Hawkins’ conduct of the account proceedings which was legally impermissible.

The argument proceeded as follows:

1. Risk of double compensation: There is overlapping of compensation – Hawkins’ work on the account proceedings should be treated as a matter of costs of those proceedings rather than as compensation by way of commission;
2. Lack of hourly rate advanced by Hawkins to justify the amount of compensation for work that he did.
3. Hawkins was not a necessary party to the litigation as he did not seek any benefit for himself other than in costs and the beneficiary could bring the account proceedings himself. Thus, any work done by Hawkins was done as a witness (e.g., conferences with lawyers/counsel and attending Court) and not executor and was not to be rewarded by commission.

As to the first, his Honour said there was no risk of double compensation because “any award of costs in the account proceedings would be to compensate lawyers and other professionals involved”95 and it was easy to distinguish Hawkins’ work from such awards as he had no comparable professional expertise, himself being a retired priest.

His honour noted96 that

> “the authorities make clear that professional charges in the conduct of legal proceedings on behalf of an estate should be compensated separately from the “pains and trouble” of an executor in discharging executorial duties relation to such proceedings. The authorities recognise the distinction between the two for all types of executor’s work, whether in relation to legal proceedings or otherwise: In the Will of Sheppard [1972] 2 NSWLR 714, at 720A-D.”

Further, at [49] he said:

> “The rules for executor professionals and commission are clear. Generally the amount allowed against the estate for the rendering of professional services in connection with its administration would not be a matter affecting the quantum of commission to be allowed, and this is so whether the professional services are rendered and charged for by the executor or by some stranger to the estate: In the Will of Sheppard [1972] 2 NSWLR 714, at 720A. Where the terms of the will allow the executor to recover for non-professional and professional work at the executor’s professional rates and when non-professional charges are allowed out of the estate, the amount of the non-professional charges must be taken into account in fixing the quantum of the commission, so that the estate does not pay twice in respect of the same work: In the Will of T.S. Douglas deceased (1951) 51 SR (NSW) 282, Re Smith (1916) 16 SR (NSW) 422, at 425 and Eric Vance, Executors Commission (1969) Law Book Company at [143]-[144]. Likewise professional work done by an executor and not charged against the estate as professional fees may be taken into account in as a reason for increasing the allowance of commission: Re Craig (1952) 52 SR (NSW) 265.

The distinction between the supply of professional services and performing executor’s duties usually arises in relation to general estate administration unconnected with litigation. Although the receipt of money into and out of the estate may principally be conducted through retained solicitors, accountants or property professionals, the executor’s actions in selecting, co-ordinating, dealing with and making decisions in relation to the advice of these professionals are relevant factors

---

95 At [47].
96 At [48].
for the Court to take into account in the setting of commission. The discharge by professionals of substantial duties that could otherwise be discharged by an executor does not mean that executor is thereby not entitled to commission for the discharge of related executorial duties: Re the Estate of Ghidella [2005] QSC 106 at [15] and Macartney v Macartney (1909) VLR 183.

In Re the Estate of Ghidella [2005] QSC 106 at [15] the Supreme Court of Queensland was considering an executors’ claim for close to the maximum allowance of commission of 5% on income and 3% on corpus. Because the receipt and dispatch of money into and out of the estate in question were largely left to the retained solicitors, Jones J was not prepared to award the maximum commission. Nevertheless he did not deny the executors commission. Jones J looked at their actions overall including their actions in the supervision and maintenance of estate property which necessitated activity and care on the part of the executors and used this, at [15], to guide his selection of the appropriate percentage.

In the assessment of executors commission, litigation is treated in much the same way as any other estate asset or liability which needs to be administered. An executor may be compensated through an award of commission for his role as executor in an atmosphere of hostility and stress generated by litigation: In the estate of Stone (deceased): Patterson v Halliday [2003] VSC 298 at [27] - [34]. The fact that the executor is involved supervising the professionals involved in the litigation to maintain the estate’s interests in the litigation is a relevant consideration in assessing the proper percentage commission, provided the litigation is a necessary step in the administration of the estate.97

Not a necessary party?

As to this argument, his Honour considered the fact that in the account proceedings, Ward J was not asked to consider whether Hawkins was a necessary party. Hawkins, upon legal advice, chose to become a party in his capacity as executor. The advantage of his joinder was that it could not be later said that the estate was not bound by the result of the proceedings and reduced the risk of multiple proceedings.

Further, commission is assessed on the basis of the executor’s actual “pains and trouble”, being the responsibility anxiety and worry (“the pains”) and the actual work done (“the trouble”): In re Allan McLean (Deceased) (1911) 31 NZLR 139 at 144 cited by Slattery J at [59].

What Hawkins might have done but chose not to was irrelevant unless an allegation of misconduct was to be made (which was not the case).

Hawkins had given evidence as to the deceased’s mental capacity. It was argued this was not an executorial duty. His Honour found that Hawkins’ “presence at the Court, his involvement with the solicitors and counsel for Mr Barkley, and his giving evidence in support of a case for augmenting of the assets of the estate, can all be characterised as the discharge of executor’s duties. If the account proceedings had been conducted by the estate

97 At [53].
against a third party who was not a beneficiary Mr Hawkins would equally have had to attend Court, instruct legal representatives and possibly give evidence to discharge his duties as executor in relation to such litigation. Merely because the legal momentum of the proceedings is being driven by a co-plaintiff does not mean that Mr Hawkins' functions as an executor in relation to the litigation disappear.\textsuperscript{98}

Further, the account proceedings were necessary to complete the administration of the estate in accordance with the will so that correct distributions could be made to beneficiaries: at [61].

### Lack of Hourly Rate

This argument was that Hawkins should have produced an hourly rate which could be multiplied by the number of hours performed by him as executor so as to calculate a lump sum due to him.

The argument was rejected for two reasons: first, the Court's power under s86(1) is not limited by any statutory requirement that the commission must be justified according to a schedule of rates and hours. The Court awards commission for the discharge of executors duties without such a calculation even to executors who apply professional expertise which can be measured at market rates.

Second, how does one set an hourly rate where an executor has no relevant professional qualifications? It would not be appropriate for an executor to justify commission by reference to a non-existent market rate. In this case, how does one value in money the skill of a retired clergyman?

### The Quantum of the Award

The Registrar allowed commission at the rate of 1% on capital realised, 2% on income collected and 0.5% on assets transferred in specie. His Honour accepted that the rate of commission allowed was well within the proper exercise of the registrar's discretion. However, Slattery J approached the matter as a fresh exercise of discretion. Ultimately, in exercising that fresh discretion, his Honour still fixed commission at the same rate fixed by the Registrar. His Honour gave the following reasons:

1. The award appropriately reflected the rates of commission commonly allowed, being:
   (a) From 0.25% to 2% on capital realisations;
   (b) From 2% to 4% on income collections;
   (c) From 1% to 2% on assets transferred in specie.

2. Commission in the range of $10,000 - $15,000 (as submitted by Brown as being appropriate) was totally inadequate when compared with the usual awards in simpler cases. His Honour noted that in re the Estate of D A Lindsay Campbell J there awarded commission of 1.5% on income and 2% on capital in circumstances where the executors had retained solicitors to receive and transmit money in and out of the estate.

\textsuperscript{98} At [62].
3. The proposed $10,000 - $15,000 could not be justified. There was no clear formula as to how this range was arrived at.

4. The range of work performed by Hawkins as executor was quite involved and it was more “than signing a few cheques and attending a few meetings”. The stress of the account litigation was relevant.

5. Emphasis was given to the “pains” suffered by Hawkins as executor. “pains” includes anxiety and worry and there was much of this to be found.

6. His work and involvement in the account proceedings was beneficial to the estate where orders were made for Brown and Barkley to account to the estate for substantial sums of money received by them. The account was ordered by way of a deduction from any further distribution to them out of the estate plus interest thereon.

7. To award commission of $10,000 – $15,000 on an estate worth $8.4M would not give proper recognition to the “pains” actually suffered.

Ramena Kako
Barrister-at-Law
13 Wentworth Selborne Chambers
174-180 Phillip Street Sydney
E: rkako@wentworthchambers.com.au
Ph: 02 9232 7750