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Update Summary

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AUSTRALIAN SUCCESSION LAW

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This update was compiled by Madeleine Harland and significant developments addressed include the following.

Grant of Probate and LOA

Proof or presumption of death

Recent cases where a person has disappeared without any direct or indirect evidence of death and the court has considered whether a grant of representation may proceed, on the basis of a presumption of death, including *Re Chambers* [2023] SASC 34; *Re Park* [2022] WASC 230; and *Re Morison* [2022] NSWSC 1758, have been added.

The author also notes the related jurisdiction of the registrar to grant leave to an applicant to swear to the death of a person for the purpose of obtaining a grant of representation. See [405.210].

Solemn form

Where parties to contentious litigation reach a compromise regarding the version of the will which should be subject to an appropriate grant in solemn form, the court will weigh this in the exercise of its overall discretion. See [405.850].

Personal representative

Duty to propound all testamentary instruments

It is noted that , as set out in *Re Nagy* [2023] QSC 63, the court has power, at common law, to grant probate of a copy of a will, where it is established that (1) there was actually a will or a document purporting to embody the testamentary intentions of a deceased person; (2) that will or document revoked all previous wills; (3) the applicant overcomes the presumption that if the will cannot be produced to the court, it was destroyed by the testator with the intention of revoking it; (4) there is evidence of the terms of the will; and (5) the will was duly executed or that the deceased person intended the document to constitute his or her will. See [415.390].

Power to institute proceedings

For recent authority regarding costs of litigation concerning the estate, which are ultimately in the discretion of the court, see *Re Nash (No 3)* [2023] SASC 81; *Sullivan v Greig (No 2)* [2023] QSC 119; *Colo Simo v Colosimo (No 2)* [2023] VSC 134; *Magjera v Cekan (No 2)* [2023] SASC 47. See [415.730].

Right to commission

A personal representative has a statutory right to apply for commission, by virtue of his or her office: see *Re Woodrow* [2023] ACTSC 129; *Re* [2023] ACTSC 186; *Re McLaren* [2022] QSC 276. See [415.910].

Renunciation by personal representative

The author notes that a renunciation may be revoked with leave of the court. The central consideration in the exercise of discretion to grant leave is whether the retraction will be for the benefit of the estate: *Re Van Brakel* [2023] QSC 67. See [415.1030].

The Administration Process

Marshalling of assets

For a helpful discussion of the principle of marshalling in the analogous context of insolvency proceedings, see *Callisi Pty Ltd v Sterling & Freeman Advisory Pty Ltd* [2023] VSC 300. See [420.530].

