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Update Summary

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UPDATE 53

OCTOBER 2024

AUSTRALIAN SUCCESSION LAW

Material Code 42608567

Print Post Approved PP255003/004052

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UPDATED COMMENTARY

Author Madeleine Harland has updated caselaw and commentary in the below chapters.

Grant of Probate and LOA

Introduction and general background - Jurisdiction

Initially, it is noted that the *Succession Act 2023* (SA) will repeal the *Administration and Probate Act 1919* (SA) and come into effect on 1 January 2025. This legislation will be added to the service in the near future. See [405.110].

Protection of personal representative, third parties and beneficiaries

Under general law, a revocation order renders a grant ineffective from the date the order takes effect, not void ab initio: *Estate Re Kouvakas* [2014] NSWSC 786; *Grainger v Walker* [1995] ANZ ConvR 134. See [405.430].

Determining where to obtain a grant and foreign grants

A narrow exception to the territorial limitation of a grant of representation exists where the personal representative obtains possession of movable assets of the deceased which were brought into the jurisdiction after the deceased's death and before any person in a foreign country has obtained a good title thereto. In this instance, the movable assets vest in the personal representative by virtue of the grant of representation, and he or she is entitled to deal with them: *Re Liu* (2023) 142 SASR 451; [2023] SASC 32. See [405.670].

General administration (administration on total intestacy)

The court may appoint an entirely independent person – such as a solicitor – as the administrator, where there is concern as to the character and fitness as to the person otherwise entitled to the grant: see *Re Legler* [2024] NSWSC 726; *Re Legler (No 2)* [2024] NSWSC 908. See [405.990].

Caveats

The court has a general discretion on costs. Whilst the usual rule is that costs follow the event, the court may award indemnity costs in special circumstances: see *Cartledge v Bryan (No 2)* [2023] VSC 436. See [405.1090].

Special or Limited Grants

Durante dementia (“during insanity or incapacity”) and durante corporis aut animi vitio (“during the debility of the body”)

Incapacity is a question of degree, and where a nominated executor has a moderate degree of incapacity, but the administration of the estate is not a complex task, it may be appropriate that the nominated executor is appointed as executor: see *Re Glendon* [2023] QSC 284. See [410.250].

Personal Representative

Duty to account

A failure on the part of a personal representative to comply with a court order to produce an account of the administration of the estate will be treated as contempt of court: *Fahey v Bird (No 2)* [2023] VSC 540. See [415.530].

Power to institute proceedings

In Western Australia, the court rules provide that where a person has been a party to any proceeding in the capacity as personal representative or trustee, unless the court otherwise orders he or she is entitled to the costs of those proceedings out of the estate. The court may otherwise order only if the personal representative or trustee acted unreasonably, or for their own benefit rather than for the benefit of the estate: see *Kenworthy-Groen v Grove* [2023] WASC 87 (S). The position in New South Wales is similar, except that the provision relevantly extends to trustees only. See [415.730].

Renunciation by personal representative

A grant of leave to renounce probate is not a release of any liability arising from intermeddling: see *Re Kleinlehrer* [2024] NSWSC 648. See [415.1030].

Passing over of personal representative

The court may appoint an entirely independent executor, such as a solicitor: *Coffey v O'Halloran* [2024] VSCA 52. Similarly, the court has a jurisdiction to pass over the appointment of a person entitled to a grant of administration and appoint a different representative, if this is necessary for the due and proper administration of the estate: see *Re Legler* [2024] NSWSC 726. See [415.1230].

The Administration Process

Assets – Overview

The representative may apply to the court for orders seeking orders for production of documents relating to the assets (and liabilities) of the estate: see *Ghosh v Ghosh* [2024] VSC 259. See [420.150].

