RISKS IN DEALING WITH ASSETS OF A DECEASED ESTATE WITHOUT A GRANT

LESSONS FROM PUBLIC TRUSTEE V CBA & WESTPAC

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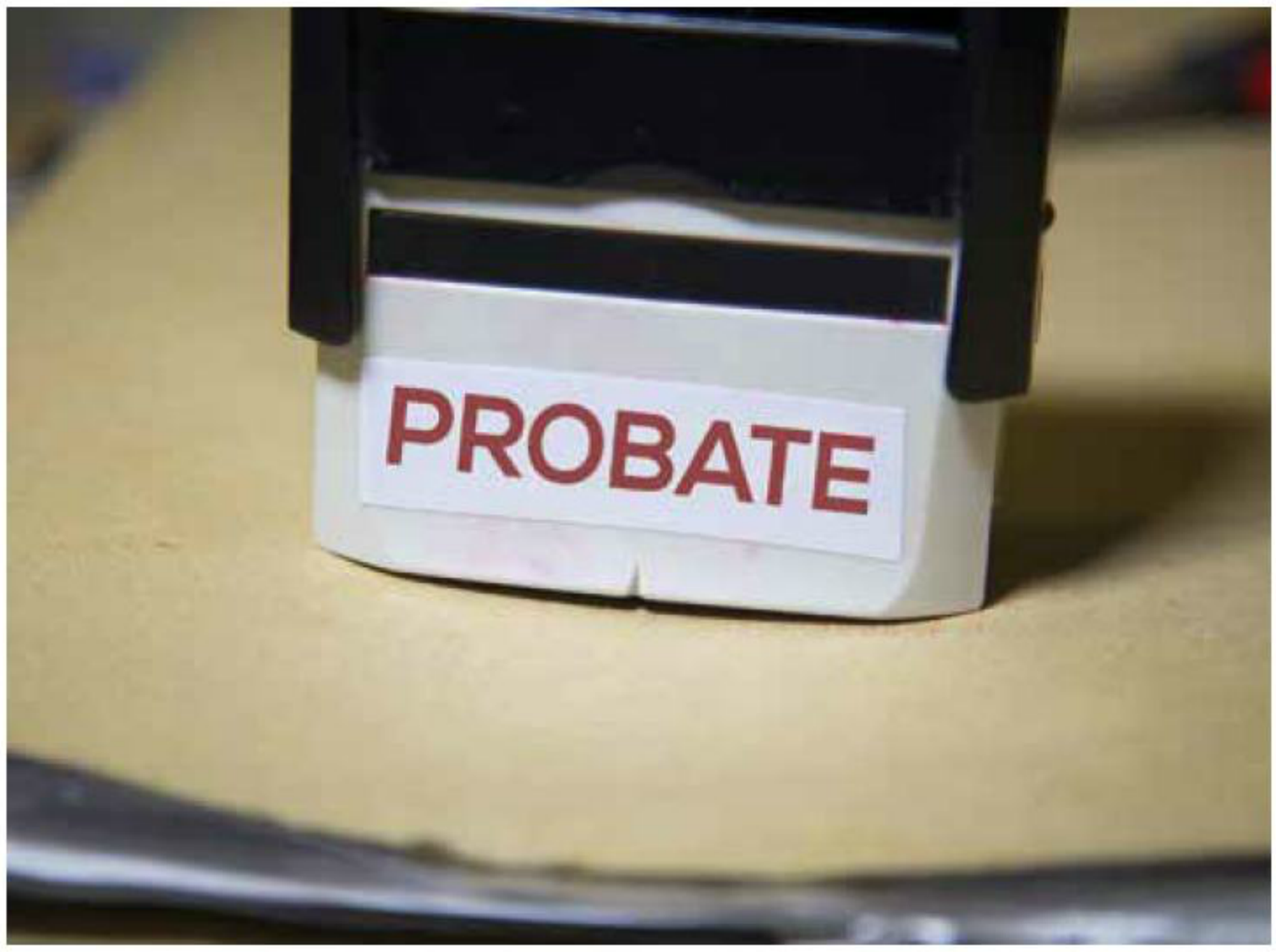
One of the fundamental duties of the legal personal representative of a deceased person is to get in the assets of the deceased. The assets may include, for example, monies on deposit with banks, monies lent by the deceased to third parties, and interest and dividends due to the deceased.

If the deceased died leaving a valid last will, and the will validly appoints an executor, the executor derives title from the will and the property of the deceased vests in the executor from the moment of the testator's death[1]. A grant of probate is evidence of that title such that the grant of probate of the will is said to have relation back to the time of the testator's death.

There are many things that the executor can do before having a grant of probate to administer the estate of the deceased. These include receiving or releasing debts which are owed to the deceased[2]. The exceptions to this general rule mainly relate to some forms of litigation as executor[3]. Generally an executor needs a grant of probate of the will in order to be able to litigate on behalf of the estate of the deceased[4].

The position of an executor should be contrasted with that of an administrator. There are two sorts of administrators of the estates of deceased persons. They are quite distinct. The first type is the administrator of the estate of a person who dies wholly intestate. That is, without the deceased leaving a valid will. In that situation there is a grant of letters of administration to the person with the highest priority to obtain the grant[5], and the intestate estate is distributed to beneficiaries who are entitled according to law[6]. The second type of administrator



is where there is a grant of letters of administration with will annexed. This occurs where the deceased dies leaving a valid will but instead of a grant of probate of the will issuing to an executor named in the will, an administrator takes a grant of letters of administration with will annexed instead. That can occur for a variety of reasons.[7]

In both these situations the administrator gets title to act from the grant of letters of administration by the Supreme Court. The general rule is that a party entitled to administration can do nothing until letters of administration are granted to him or her. That is because the administrator derives his or her authority entirely from the appointment by the Court[8].

Therefore, in the case where letters of administration are required to administer the estate of a deceased person, there is no person authorised either to receive the assets of the deceased person or to give releases to third parties for the delivery of monies or other assets to the estate until such time as there is a grant of letters of administration (whether with or without will annexed).

In the case of a will appointing an executor, the position is more complex. As noted above, the executor of a valid last will can generally receive assets and give releases to third parties before having a grant of probate. Some estate administrations can be completed without the practical need for the executor to obtain a grant of probate. If a person applies for a grant of probate or administration of the estate of a deceased person[9], the applicant must disclose to

the Court the assets and liabilities of the deceased person (which are known to the applicant at the time of making the application)[10]. That is done by the applicant for the grant filing a statement of assets and liabilities[11]. The Probate Registrar may issue a certificate of disclosure for assets thus disclosed[12]. In that situation, a person who deals with an asset of the estate of a deceased person that is required to be disclosed must satisfy himself or herself by examination of the Registrar's certificate or on the basis of some other reliable evidence that the asset has in fact been disclosed[13]. That applies where there has been a grant, and not in situations where there is yet no grant.

Therefore, whilst it may be lawful to deal with an asset of a deceased person (both as an executor and third party) **before** a grant of probate, there are risks if one chooses to do so.

If third parties choose to deal, before a grant of probate, with a person who claims to be the true executor of the estate of the deceased they are at risk if it turns out that the person was not in fact authorised to act on behalf of the estate of the deceased. That obviously applies even more in the case of letters of administration as no one has title to represent the estate until they obtain letters of administration. If third parties pay monies or transfer assets of the deceased person to the claimant without a grant of probate or of letters and administration and it turns out that another person is the true legal personal representative of the deceased person then the third party may be liable to the true legal personal representative for the wrongful payment or transfer of assets which the third party has made[14]. In practice the third party may need to pay again to the true legal personal representative.

> A grant of probate is evidence of that title such that the grant of probate of the will is said to have relation back to the time of the testator's death.

That was the situation which confronted two banks in the recent case of *Public Trustee v CBA and Westpac*[15], a decision of Bampton J in the Supreme Court. The deceased had left three wills, one made in 2002, others made in 2007 and 2008. The distribution of the estate differed markedly under each will. The deceased had accounts as a customer with two banks. After her death in 2008, a son of the deceased, who was the executor named in the 2008 will, asked the banks to close the

accounts and pay the money to him. He did this without having a grant of probate of the 2008 will, and sought to have the banks "waive" their usual requirement that he produce a grant of probate of the 2008 will. Three children of the deceased were the beneficiaries under the 2008 will. The banks indicated that they would close the accounts and pay the moneys to the son if their own internal requirements were met. The requirements of the banks differed, but generally involved the claimant executor giving an indemnity to the bank and written consents being given by the beneficiaries under the 2008 will.

After closing the accounts and obtaining payment from the banks in 2009, the executor under the 2008 will commenced a probate action in the Supreme Court in 2010 to prove the 2008 will. The testamentary capacity of the deceased was in issue in the proceedings. In 2012 the probate action was resolved by the parties agreeing to the 2002 will being admitted to probate and the estate being divided in a manner agreed by the parties in terms of compromise. The Supreme Court pronounced for the validity of the 2002 will and against the validity of the wills made in 2007 and 2008. Public Trustee was the executor under the 2002 will. Public Trustee then obtained the grant of probate of the 2002 will in 2013 and set about seeking to collect the assets of the estate including the monies held in the accounts with the two banks. The banks refused to pay Public Trustee and said that the bank accounts had been validly closed in 2009.

Public Trustee then sued the banks in proceedings in the Supreme Court to recover the debts which it said were payable to it as the true executor of the deceased's estate[16]. The banks raised a number of defences[17]. This article considers only the primary defence raised by the banks. The banks claimed that they were not liable to pay Public Trustee as they claimed that by paying the executor named in the 2008 will they had obtained a valid release and discharge from him which bound the estate of the deceased.

The Court rejected that defence. Bampton J held that the son named as the executor in the 2008 will was to be classified as an executor *de son tort*[18] because he had intermeddled by dealing with assets of the estate of the deceased, and had no lawful authority to do so because he was not the true executor of the estate of the deceased. That meant that the son became liable to account to Public Trustee (as the true executor) for assets which the son had illegitimately dealt with and had received from the banks.

However, the son's wrongdoing as an executor *de son tort* did not give a release and discharge to the banks on behalf of the estate of the deceased, and his acts were not binding on the true executor. Only the true lawful executor could give a release and discharge to the banks.

The risk issue for those dealing with or holding assets belonging to deceased persons is clear. You are at risk if you pay money or transfer assets without first establishing that the person you are dealing with, that is the claimant, holds a grant of probate or letters of administration of the deceased's estate. You are entitled to insist on production of the grant of probate or letters of administration before paying over the asset to the claimant. B

Endnotes

1 In relation to vesting of interests in land see s.46 of *Administration and Probate Act 1919*

2 See discussion of the actions which an executor can take before grant in Williams, Mortimer and Sunnucks' *Executors, Administrators and Probate* (19th edition, 2008) chapter 8.

3 See section 120 of *Administration and Probate Act 1919* which contains a general prohibition on a will being admissible or receivable in evidence, except in criminal proceedings, until administration of the estate has been issued or obtained. The will is admissible on the application for probate or letters of administration.

4 The position is complex and is described in chapter 8 of Williams, Mortimer and Sunnucks' *Executors, Administrators and Probate* (19th edition, 2008)

5 See Rule 34 of the Probate Rules 2015

6 That is in accordance with the rules set out in Part 3A of the *Administration and Probate Act 1919*

7 For example, the will may not appoint an executor, the appointment of executor may be invalid, or the appointed executor may renounce appointment or not seek to take the grant. The order of priority for appointment as administrator where the deceased leaves a will is set out in Rule 33 of the Probate Rules 2015

8 In the case of a person dying intestate, the intestate estate vests in Public Trustee until the grant of administration: see section 45 of the *Administration and Probate Act 1919*

9 By application for a grant made under the Probate Rules 2015

10 Section 121A of *Administration and Probate Act 1919*

11 Rule 8 of Probate Rules 2015

12 Form 57 and Rule 8(4) of Probate Rules 2015

13 Section 44(1) of *Administration and Probate Act 1919*. A breach of this is a summary offence: see section 44(2).

14 There is only limited statutory protection for an 'ADI' by section 72 of the *Administration and Probate Act 1919*. An 'ADI' means an authorised deposit-taking institution within the meaning of the *Banking Act 1959* (Cth.): section 4(1) of *Acts Interpretation Act 1915* (SA). Under section 72 in essence if the deceased customer's account with the ADI does not exceed $2,000 the ADI may pay the spouse or domestic partner of the deceased without probate of the will or letters of administration being produced, if 3 months has elapsed since the death of the deceased customer. Such a payment is valid and is an effectual release to the ADI against all claims and demands.

15 [2018] SASC 25

16 Public Trustee also had an alternative claim against the banks, namely that by paying the deceased's money in the bank accounts to the wrong executor the banks had made themselves executors *de son tort* of the deceased's estate and thus liable to Public Trustee as the true executor. Bampton J rejected this alternative claim. A discussion of the alternative claim is beyond the scope of this article.

17 The banks were partially successful in their defence of the proceedings as it was held they were entitled to differing equitable set-off amounts as the beneficiaries who had requested the closure of the accounts were also partial beneficiaries of the estate under the terms of compromise applying to the 2002 will. Bampton J said that the unique facts of the matter made it an exceptional case such that an equitable set-off was appropriate.

18 Meaning 'of his own wrong'.