Herding cats

Dealing with recalcitrant executors and double probate[1]

WITH CHRISTINE SMYTH

11,167 probate lodgments were filed in Queensland in 2017-18.[2]

This was a 4.5% increase on the prior financial year, and a 21% increase over the last five years.[3]

Along with this there is an inevitable increase in matters being referred to the court involving disputes as to whom a grant might issue. While no data is available, one area in which I have anecdotally noticed an increase is applications for a grant with the power reserved – double probate.[4]

This occurs when there are multiple executors and one or more neither seek to apply for a grant nor renounce their role, and your executor client/s are wrangling with the recalcitrant co-executor/s on making the application. An executor might take this course as a means of minimising the estate's exposure to delays caused by obstinate and uncooperative executor/s who cause the estate administration to languish in a state of suspended aggravation.

Recalcitrant executors who refuse to engage in or seek to unilaterally direct matters without regard to the view of the remaining executors can significantly impact the costs and time in administering a deceased estate. Typically, they cavil over if or when probate should be sought, who may represent the executor/s in seeking probate, and/or there may be issues of conflict of interest unable to be resolved by mutual agreement.

While co-executors must act jointly,[5] there is an anomaly in the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) enabling one of multiple executors to apply for a grant in their sole name. There is no step by way of 'clearing off' in relation to the non-proving executor/s, which has to be evidenced. As a consequence an initial grant (reserving power) may issue, and if the other executor/s subsequently proves, two grants may be in circulation concurrently – double probate.

A grant of double probate was explained in *Tsaknis as Executor and Trustee of the Estate of Geoffrey Douglas Roland Lilburne (Dec) v Lilburne* [2010] WASC 152 by EM Heenan J as follows:

[44] "Where several executors are named in a will, if a grant of probate is made only to one or to some of them it is the practice of the court to reserve the power to make a like grant to those others who are competent to act and who have not renounced — Martyn JR and Caddick N, Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate* (19th ed., 2008) [25–14]. So, in this case where the late Geoffrey Lilburne made a will appointing both his son, Mr David Lilburne, and his son-in-law, Mr Tsaknis, as his named executors and trustees, and when the original application for the grant of probate was made only by Mr Tsaknis, the grant was made to him with, as already noted, leave being reserved for Mr David Lilburne to apply for probate, as he had not renounced his right to do so. When, as now, an executor who has not joined in applying or obtaining an original grant of probate but has been granted leave to apply, subsequently makes an application for probate, the ensuing grant, if it occurs, is known as a double probate. It is made in general terms and relates to the remaining unadministered estate at the date of the second or subsequent grant — *Halsbury's Laws of England* (4th ed., 2005) Vol. 17(2) [152]. It runs concurrently with the first grant if any of the first grantees are still living and it confers the same rights as an original grant. It follows that there may be several current grants of double probate — D'Costa R and Winegarten J, Tristram and Cootes: *Probate Practice* (29th ed., 2002) [13.122]."

Where your executor client/s determine to proceed with an application for a grant with the power reserved, there is a caution that solicitors might follow to ensure compliance with their duties under the Australian Solicitors Conduct Rules 2012 (Qld) (ASCR). It is recommended that, if a solicitor acts for a party who is proposing to obtain a grant reserving power, the solicitor might take reasonable steps to inform the executor/s for whom the power is reserved, of the proposed application, typically in writing and outside of the usual advertising process. This recommendation arises out of consideration of ASCRs r3.1 and 4.1.2.

Otherwise, the process of applying for the grant is substantially the same as an ordinary grant with a minor difference. Form 101 – Application for probate must contain a clause that probate be issued to the applicant/s "with power being reserved to make the same grant to [the non-proving executor/s] when s/he shall apply for a grant personally".

Aside from the duties under the ASCR, there is no requirement in the UCPR to prove anything further in respect of communications or service upon the non-proving executor. The matter does not need to be heard by a judge and can be determined by the Probate Registrar on the papers. Without anything more, the Probate Registrar will issue the grant, however the wording on the grant is as follows: "As one of the executors, power being reserved to make the same grant to [non-proving executor/s name] the other executor when s/he shall apply for a grant personally."

On the grant issuing, pursuant to s49(2) *Succession Act 1981* (Qld) the named executor/s is/are solely authorised under that Act to administer the estate pursuant to the grant's authority. Importantly, no other person, including the non-proving executor, can intermeddle in the estate administration. The grant is their unassailable authority to administer the estate. Only upon the non-proving executor/s obtaining their own grant (a double grant) can that executor/s assert their executorial authority. And should that occur…

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, and Consultant at Robbins Watson Solicitors. She is an Executive Committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, member of the QLS Specialist Accreditation Board, Proctor Editorial Committee, QLS Succession Law Committee and STEP, and an Associate Member of the Tax Institute.

Notes

1 See also 'What's new in Succession Law', *Proctor* December 2013 where I first commented on double probates. My thanks to Robbins Watson Law Clerk Rachel Mallard and Associate Solicitor Thomas Ashton for their assistance with updated research on this topic.

2 pc.gov.au/research/ongoing/report-on-government-services/2019/justice/courts/rogs-2019-partc-chapter7.pdf Table 7A.2.

3 courts.qld.gov.au/__data/assets/pdf_file/0020/606611/sc-ar-2017-18.pdf.

4 The Supreme Court records do not differentiate as to these grants.

5 *Loughnan v McConnell* [2006] QSC 359 at [49]: "The powers given by s49 of the *Succession Act 1981* to an executor are now co-extensive with those given to a trustee. …they are now obliged, as are trustees, to act jointly…"