The Position of Executors Before Grant[1]

RW White[2]

1 In *Darrington v Caldbeck* (1990) 20 NSWLR 212, Young J said "Section 61 has caused a tremendous amount of problem to persons affected by it over the years" (at 218).

2 Sections 44 and 61 of the *Probate and Administration Act 1898* (NSW) relevantly provide:

> "**44 Real and personal estate to vest in executor or administrator**
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> (1) Upon the grant of probate of the will or administration of the estate of any person dying after the passing of this Act, all real and personal estate which any such person dies seised or possessed of or entitled to in New South Wales, shall as from the death of such person pass to and become vested in the executor to whom probate has been granted or administrator for all the person's estate and interest therein in the manner following, that is to say—
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> (a) On testacy in the executor or administrator with the will annexed.
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> (b) On intestacy in the administrator.
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> (c) On partial intestacy in the executor or administrator with the will annexed.
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> …
>
> **61 Property of deceased to vest in NSW Trustee**
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> From and after the decease of any person dying testate or intestate, and until probate, or administration, or an order to collect is granted in respect of the deceased person's estate, the real and personal estate of such deceased person shall be deemed to be vested in the NSW Trustee in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England."
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> (Emphasis added)

3 In *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268 and on appeal in (2001) 109 FCR 554, the deceased, Mr Scott, had died on 23 November 1998.

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[1] A paper given for the Bar Association at the Bar Association Common Room, Sydney, on 27 June 2024.

[2] A Judge of Appeal of the NSW Supreme Court.

Ms Byers was appointed as executrix of his will and she was his sole beneficiary. Overton Investments owned a retirement village. On 30 August 1999, proceedings were commenced in the Federal Court in which the applicant was named as "Estate of Desmond Scott". The application was amended and an amended statement of claim was filed which named Ms Byers as the applicant. She pleaded that she was the executor of Mr Scott's estate.

4 Ms Byers did not obtain probate until 19 October 2000. The statement of claim included allegations that Mr Scott and his widow were induced to enter into a lease of a unit in the retirement village by misleading and deceptive conduct. By the time probate was granted, some of the causes of action were statute barred. Mr Scott's causes of action formed part of his estate.

5 Emmett J referred to observations of Mason and Stephen JJ in *Bone v Commissioner of Stamp Duties (NSW)* (1974) 132 CLR 38, as well as other decisions that have held that the effect of ss 44 and 61 is to place an executor in the same position as an administrator at common law. At common law, a testate's personal property, including choses in action, vested in the executor upon the testator's death. A grant of probate was an authentication of the executor's title. An administrator's title to the personal property of a person dying intestate was derived from the grant of letters of administration.

6 In 1740, Lord Hardwicke LC held that it was not an answer to the filing of a bill in Chancery that letters of administration were not taken out until after the filing of the bill (*Fell v Lutwidge* (1740) 2 Atk 120; 26 ER 475; (1740) Barn CH 319; 27 ER 662). It was later held that because an administrator derived title solely under the grant of letters of administration, the administrator could not institute an action before he obtained the grant (*Chetty v Chetty* [1916] AC 603; *Ingall v Moran* [1944] 1 KB 160). That continues to be the position in England (*Jennison v Jennison* [2022] EWCA Civ 1682). England does not have an equivalent of s 44(1).

7 Emmett J held that, prior to the grant of probate, Ms Byers had no title to the choses in action she sought to enforce, because that title was vested in the

Public Trustee under s 61. The “relation back” provision in s 44(1) was confined and limited to the operation of that doctrine at common law and did not apply to disturb the interests of other persons or interests affected during the period between death and grant and could not restore to the executor title to something which had ceased to exist in that interval (at [56]). In reaching these conclusions, Emmett J followed decisions of Yeldham J in *Marshall v DG Sundin & Co Pty Ltd* (1989) 16 NSWLR 463, Young J in *Darrington v Caldbeck*, and Isaacs J in *Ex parte Callan; re Smith* [1968] 1 NSWR 443.

8 It is not clear why his Honour considered that the asserted chose in action had ceased to exist after Mr Scott’s death when title to it was vested in the Public Trustee. If it were a reference to the statement of Asquith LJ in *Fred Long & Son Ltd v Burgess* [1950] KB 115 at 121 that the doctrine of relation back “cannot breathe new life into a corpse”, it was, with respect, inapt.

9 Emmett J’s decision and reasoning was upheld in the Full Court of the Federal Court (*Byers v Overton Investments Pty Ltd* (2001) 109 FCR 553).

10 In *Fussell v Deigan* [2018] NSWSC 1419, the deceased had entered into a contract for the sale of a property to Mr Fussell as purchaser. The completion date was five years after the contract date. The contract included a special condition that, should either party die prior to completion, then the other party could rescind the contract. Completion was due on 10 May 2017 but neither party sought to make arrangements to enable completion to take place. The vendor died two days later.

11 Four days after the vendor’s death, the solicitors for Mr Fussell wrote to the vendor’s solicitor, Ms Deigan, asking when settlement could be booked. Two days later, Ms Deigan, who was also the executor of the deceased vendor’s estate, gave notice of rescission. Probate of the deceased’s will was granted to Ms Deigan on 21 September 2017. On 16 October 2017, she served a second notice of rescission. On 17 October 2017, Mr Fussell commenced proceedings for specific performance and declarations that the notices of rescission were invalid.

12 The primary judge, Parker J, held that as a matter of construction of the contract, or implication, notice of rescission could not be given by the deceased vendor's executor before grant (at [289]-[295]). His Honour followed Emmett J in *Byers v Overton Investments Pty Ltd* in holding that the relation back provided by s 44(1) did not validate the notice of rescission.

13 An appeal was allowed (*Deigan v Fussell* [2019] NSWCA 299). I would have allowed the appeal on the basis that the executrix had authority derived from the will to give the notice of rescission before probate was granted, even though the deceased's chose in action was vested in the Public Trustee. I reasoned that the vesting of legal title in the Public Trustee under s 61 pending the grant of probate or letters of administration was made only to prevent an abeyance of legal ownership and did not otherwise affect the authority of an executor derived from the will to deal with the deceased's assets. I considered that the preferable construction of s 44 was that the position of administrators was assimilated retrospectively to that of an executor and not vice versa (at [77]), except so far as s 61 required. Because I considered that s 61 had a very limited operation having regard to the fact that "aforetime", that is, before 1857 in England, the Ordinary had no authority to deal with an intestate's assets and was only a formal repository of the legal title, s 61 did not require a different construction of s 44.

14 I also held that in any event the effect of s 44(1) retrospectively vesting title to the deceased's assets in the executrix would validate the notice:

> "[183] Even if they were, the rescission was for the benefit of the estate, and would fall within the general law principles of relation back applicable to administrators. In the present case, subject to the other issues on which the respondents dispute the validity of the notice of rescission, there was no particular time by which notice of rescission had to be effected such that it could not be later ratified (or retrospectively validated). There was no intervention of third party rights or change of position."

15 Accordingly, I held that the first notice of rescission was effective.

16 Parker J had held that the second notice was ineffective because the "estate" was in breach by failing to complete the sale from 30 May and Ms Deigan was taking advantage of the estate's own wrong in issuing the second notice.

17 I disagreed (at [223]-[227]).

18 Bathurst CJ agreed that the second notice of recsission given after probate was obtained was effective (at [4]). Macfarlan JA agreed. Bathurst CJ said:

> "[5] In those circumstances, it is not necessary for me to express an opinion on the question of whether Ms Deigan, although named as executrix in the will, could not before the grant of probate exercise the right of rescission on behalf of and for the benefit of the estate, or on the question of whether if she did her action was retrospectively validated. The issues involved in the latter question are of considerable complexity and as White JA with respect correctly points out the conclusion which he has reached is contrary to at least that of Emmett J in *Byers v Overton Investments Pty Ltd* (2000) 106 FCR 268; [2000] FCA 1761 and the same conclusion reached by the Full Court of the Federal Court in that case, (2001) 109 FCR 554; [2001] FCA 760 at [24]-[28]. Although there is great force in the reasoning of White JA, it does not seem to me appropriate to decide that the decision of the Full Court of the Federal Court was plainly wrong in circumstances where it is unnecessary to do so."

19 Macfarlan JA also expressed no opinion on that question (at [7]).

20 The order of the court was that the contract had been rescinded no later than on the date of the second notice of rescission.

21 Thus, in *Deigan v Fussell* the majority of the Court did not decide whether the notice of rescission given by the executor before probate was granted was effective when it was given, or was given retrospective efficacy on the grant of probate.

22 It follows that, should the same situation arise again where an executor, without having obtained a grant of probate, brings proceedings to enforce the deceased's chose in action, a judge of the Federal Court would be bound to follow the decision of the Full Court in *Byers* (*Generate Group Pty Ltd v Harris* [2023] FCA 605).

23 A single judge of a Supreme Court, or a lower State court, would also be bound to follow *Byers* unless satisfied that the decision was clearly wrong. A single judge would need to take into account that the majority in *Deigan v Fussell* was not prepared to express such an opinion, but said that this was because it was unnecessary to do so.

24 In *Cong v Shen (No 3)* [2021] NSWSC 947, Ward CJ in Eq (as her Honour then was) said:

> "[896] The divergence in the reasoning as between White JA in *Deigan* and that of the Full Court of the Federal Court gives rise to difficult issues of precedent for a primary judge. As a matter of comity, I am bound to follow the decision of an intermediate appellate court unless satisfied that it is plainly wrong. However, as a matter of precedent, I am bound by decisions of the Court of Appeal of this Court. Here, however, White JA's conclusion on the relevant issue was one that the fellow members of the Court of Appeal in *Deigan* did not consider it necessary there to determine; and hence it is a determination by a single judge of appeal after a considered view of the historical position and the detailed analysis of the relevant authorities.
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> [897] Had the issue been necessary here to determine then I would have followed his Honour's reasoning (as a matter of precedent and because, with respect to their Honours who have reached a contrary view, I consider it to be correct). However, in the present case I do not consider it necessary to make a determination that the Full Court of the Federal Court was plainly wrong on that issue because I consider that the Deed is not enforceable against Ms Shen for other reasons."

25 Her Honour's statement that she "would have followed" my reasoning in *Deigan v Fussell* was obiter.

26 Accordingly, for State judges, the question remains open.

27 What does s 61 mean when providing that pending grant of probate or administration, real and personal estate of the deceased is vested in the NSW Trustee "in the same manner and to the same extent as <u>aforetime</u> personal estate vested in the Ordinary in England"?

28 "Aforetime" means before 1857. Prior to 1857, jurisdiction in relation to the grant of probate or letters of administration of deceased estates was exercised by the ecclesiastical courts. The Ordinary was usually the Bishop of the diocese in

which the deceased resided. Where a deceased left a will appointing an executor title to the deceased's personal property vested in the executor on the testator's death. A grant of probate was only authentication of the deceased's title. Real estate passed directly to the devisee under the will or to the heir at law if there were an intestacy as to the real estate. In 1857 the *Court of Probate Act* (20 and 21 Vict c 77) abolished the ecclesiastical jurisdiction of the ecclesiastical courts. That Act was found defective by the next session the Parliament because of the fact that although the Judge of the Court of Probate was responsible for the grant of probate or letters of administration, in the case of intestacy, personalty still vested in the Ordinary.

29 The Ordinary therefore had title to an intestate's personal estate.

30 But the Ordinary had no authority to deal with that property. The Ordinary's only authority was to appoint an administrator to do so. But the administrator's title, unlike that of the executor, arose only on the grant of letters of administration.

31 In some, but not all cases, as a result of judicial decision, that title was treated as relating back to the date of death to provide protection to the deceased's estate against wrongs or to enforce rights appertaining to the estate arising between death and grant (*Deigan v Fussell* at [69]).

32 In the case of intestacy these rights were exercisable by the administrator (after grant). They were not exercisable by the Ordinary. The common law courts, being jealous of the Ordinary's jurisdiction, held that the Ordinary's only jurisdiction was to appoint an administrator. The common law courts even denied that the Ordinary had jurisdiction to supervise the administrator's administration (*Deigan v Fussell* at [84]-[90]). I summarised the position of the Ordinary as follows:

> "[93] In 1857 the Ordinary's role was not to administer an intestate's personal estate, but to appoint an administrator to do so. Until the grant of letters of administration title to the intestate's personal estate vested in the Ordinary, but the Ordinary had no administrative function. He could not deal with the estate."

33 The difficulties largely arise from the High Court's decision in *Andrews v Hogan* (1952) 86 CLR 223. There, a sublessee of residential premises died, leaving a will appointing her two sons as executors (and sole beneficiaries) of her estate. Before a grant of probate was obtained, the owner of the premises served a notice to quit on the Public Trustee and brought proceedings for possession against the sublessees. The High Court held that the deceased's weekly tenancy vested in the Public Trustee and that notice to quit served on the Public Trustee was effective to terminate that tenancy if the ground for termination were established. Both Dixon CJ and Fullagar J considered that the Public Trustee had some rights and powers. Dixon CJ considered that the Public Trustee could have the legal power to give directions about the property, citing Bucknill LJ in *Fred Long & Son Ltd v Burgess* [1950] 1 KB 115 at 119, that "…I see no reason why, in the case as a necessity, the President should not have legal power to give directions about the property. If he cannot do so, no-one can." Fullagar J considered that the vesting of the estate in the Public Trustee was a "positive act with some legal substance" and accepted that the Public Trustee would have power to surrender the lease (at 250-251).

34 The English provision considered in *Fred Long & Son Ltd v Burgess* was s 9 of the *Administration of Estates Act 1925,* which provided that where a person died intestate his real and personal estate, until administration was granted, should vest in the President of the Probate Court in the same manner and to the same extent as formerly, in the case of personal estate it vested in the Ordinary.

35 Remarkably, one might think, neither the English Court of Appeal in *Fred Long & Son v Burgess*, nor the High Court in *Andrews v Hogan* addressed what, prior to 1857, had been the effect of the vesting of an intestate's personal estate in the Ordinary in England.

36 This question had been addressed by Roper J in *Foy v Public Trustee* (1942) 42 SR (NSW) 209 and by the Full Court of the Supreme Court (Street CJ, Maxwell and Owen JJ) in *Public Trustee, Ex parte; Re Birch* (1951) 51 SR (NSW) 345. Roper J said that the Ordinary:

> "…did not represent the deceased. He could not sell his goods or maintain an action in respect of the estate…and no action could have been taken against him except where he had actually taken goods of the deceased into his possession or otherwise intermeddled in the administration".

37 In *Re Birch*, Maxwell J said that:

> "It would be strange indeed to regard as owner a person who for a limited time, ascertained by reference to the grant of probate or administration, had a form of title to property but could neither sell nor dispose of it nor enforce covenants in relation to it nor recover debts due to the deceased. In relation to the section when the estate was deemed to vest in the Chief Justice, A. H. Simpson C.J. in Eq. in In re Broughton said:
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> > 'I do not think that the Legislature intended to do more than make him a mere formal repository of the legal estate, until the Probate Court should grant probate or administration, and I am of opinion that it was never intended that he should thereby be put in the position of being joined as a party in litigious proceedings.'
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> With respect, I adopt his Honour's words in concluding that the Public Trustee is 'a mere formal repository of the legal estate' pending a grant of probate or administration."

38 In *Deigan v Fussell,* I argued that unless s 61 required otherwise, the effect of s 44 should not be that the position of an executor before grant should be assimilated to that of an administrator, but vice versa. I argued that if due regard were had to the very limited function of the Ordinary, although legal title to the deceased's assets was vested in the Ordinary pending grant, that did not affect the authority of an executor to deal with the assets before grant. In other words, because the legal title of the NSW Trustee was a merely formal title, the executor nonetheless had authority to deal with that title.

39 This was a point that had been made 30 years earlier by Crago in his article "Executors of unproved wills: status and devolution of title in Australia" (1993) 23 WALR 235, who said:

> "In some cases … it may be perfectly possible for the executor fully, and properly, to administer the estate without a grant of probate. Whether this can be done depends not so much upon the size of the estate as upon the nature of its assets. If, for example, the executor is required to obtain title by transmission to Torrens system land, to large cash deposits, or to become a member of a company, then a grant will almost certainly have to be produced by the executor to the relevant authority or institution. On the other hand, if the estate consists only of tangible chattels, and, say, various small cash deposits,

> then the executor may well be able to administer them without a grant and regardless of their total value, which could be considerable. [The reason being that various statutory provisions in force throughout Australia apply to small cash deposits, shares, and life insurance proceeds. Current examples include: ss 211 and 212 of the *Life Insurance Act 1995* (Cth) and s 1071B of the *Corporations Act 2001* (Cth)]."

40 In *Deigan v Fussell*, I sought to trace the legislative history in this State of the provisions which became ss 44 and 61 of the *Probate and Administration Act* (at [99]-[105]). I suggested that the perceived need for the immediate predecessor provision to s 61 (s 23 of the *Probate Act 1890* introduced in 1893) was probably to resolve doubts about the effectiveness of the relation back provisions in the predecessor provisions to s 44, so as to prevent an abeyance of seisin between death and grant and to preclude an argument that the assets of the deceased were for any period *bona vacantia* (at [106]-[112]). If this were the rationale for s 61, it may support a construction of s44 that the section was intended to assimilate the position of administrators to executors before grant and not to affect the executor's authority to deal with assets after death, except in so far as production of probate might be required, eg to transfer land.

41 My tipstaff's research suggests that banks will allow money to be disbursed from a deceased's account to pay funeral and testamentary expenses without a grant of probate. Protection for such expenses is provided by s 46A of the *Probate and Administration Act*. The Macquarie Bank and the Commonwealth Bank require an executor to produce a copy of the will to deal with the balance in a deceased's account of more than $100,000 ($80,000 in the case of the ANZ Bank). But in the case of a small estate where the deceased owned personal chattels, such as a motor vehicle, and had $50,000 in a bank account which the bank is prepared to release on production of the will, is it the case that the executor has no authority to transfer the moneys and the motor vehicle to the named beneficiary? The NSW Trustee has no beneficial interest in the assets and, I would argue, no authority to deal with them.

42 If the deceased had creditors then the executor would undoubtedly be exposed to personal claims for acting as executor *de son tort*. But could a creditor claim that the motor vehicle and any proceeds paid from the bank account (so far as

they could be traced) were still the property of the Public Trustee and held on behalf of the estate?

43 As long ago as 1946 a commentator in the Australian Law Journal, commenting on a decision of Herron J (as he then was) in *The Daily Pty Ltd v White* (1946) 63 WN (NSW) 262 lamented that the decision was:

> "... unsatisfactory because in holding that an executor has not power to assign a tenancy of the deceased testator until after the grant of probate it confuses the vesting of property with the right to dispose of it. Notwithstanding that the estate does not vest in the executor until grant of probate the executor is still the person nominated by the testator and there seems to be no reason why he cannot now, as he could in New South Wales prior to 1890, execute a conveyance, assignment or lease of the testator's property."

44 These are only some of the issues that in the current state of the law are unresolved.

45 Clearly, if time permits, where any such issue arises a client should be advised to seek an interim limited grant, either a grant of administration *ad litem* to bring proceedings on behalf of the estate or a grant of administration *ad colligenda bona* to be able to deal with assets or carry on a business to protect the estate.

46 But this may not always be possible. Take the case of a testator with a valuable option to purchase a property on favourable terms, who dies, whose option enures to the benefit of the estate, but must be exercised in a short period. Can his executor, before grant, exercise the option before the period for its exercise expires and then rely on the relation back provided by s 44(1)? *Byers* would say no, because in those circumstances, at common law, an administrator's title would not relate back to the deceased's death (*Holland v King* (1848) 6 CB 727; 136 ER 1433) and an executor would be in the same position. I would say yes, because the executor has authority by will to deal with the deceased's contractual right notwithstanding the vesting of legal title in the NSW Trustee. Andon a grant of probate or letters of administration, the title of either the executor or administrator would relate back to the date of death.

47 In *Deigan v Fussell*, I noted that such a case had arisen in *Carter v Hyde* (1923) 33 CLR 115, where both the parties and the Justices of the High Court assumed that the executrices could exercise the option before probate was granted. In *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, Gibbs J held that the effect of s 44 was to retrospectively validate the exercise of the option (at 77-78). His second reason concerning the effect of s 61 has been doubted, but I considered that this did not qualify his Honour's first reason based on s 44 (*Deigan v Fussell* at [165]-[166]).

48 At some time the issue will arise again. One can pity, or perhaps envy, the first instance judge who may be free to express his or her own views, but may be then bound by precedent. One can only pity the litigants. The sooner the issue is resolved the better.

49 I should also make reference to the converse position of a creditor wishing to bring either a personal claim or a claim *in rem* against a deceased estate before a grant of probate or administration.

50 A creditor may be entitled to a grant of administration under ss 63(d), 74, 75 or 76 of the *Probate and Administration Act*. Part 78 r 5 of the Supreme Court Rules regulates the procedure.

51 In *GEL Custodians Pty Ltd v The Estate of Wells* [2013] NSWSC 973, a mortgagor had died and the mortgagee wished to obtain possession. No one had taken out administration. A s 57(2)(b) notice was served on the NSW Trustee who said that s 61 did not enable it to take an active role. It later discovered that the Public Trustee had been appointed executor under an earlier will, but did not know whether the will had been revoked.

52 Davies J held, following *Andrews v Hogan* and other cases that held the NSW Trustee could be named as defendant:

> "[55] As far as proceedings being brought against the Public Trustee are concerned, Dixon CJ in *Andrews v Hogan* ,*Birch*, *Cameron* and *Atsas v Gertsch* say that proceedings cannot be taken against the Public Trustee simply as a

> result of s 61. Fullagar and McTiernan JJ in *Andrews v Hogan*, *Perpetual Trustee v Public Trustee* and Walsh J in *Holloway* (at 311) say to the contrary.
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> [56] The better view seems to me to be that authority generally supports the naming of the Public Trustee as a defendant where a grant has not been obtained. Two judges in *Andrews v Hogan* were of that opinion. The Full Court in *Perpetual Trustee v Public Trustee* expressly said so. Although they were not prepared to say that *Birch* did not lay down the law correctly, that part of *Birch* asserting that the Public Trustee could not be named as a defendant is entirely inconsistent with the ratio of the decision in *Perpetual Trustee v Public Trustee*. That decision was followed in *Holloway* (at 311). In any event, I am bound by it whatever the uncertainty in *Andrews v Hogan*."

53 To that extent, it appears that a creditor seeking an *in rem* remedy need not wait for the grant of probate or administration in order to bring their claim. Rather, they may bring an action against the NSW Trustee, vested with title to the relevant property, until such time that the grant is made.

54 It is to be hoped that, sooner rather than later, the High Court, may have the opportunity to revisit the issue.