



SIR NINIAN STEPHEN LECTURE



Tuesday 15 October, 2019



LIMITED GRANTS OF REPRESENTATION



The Honourable Justice Kate McMillan

Supreme Court of Victoria

15 October, 2019

INTRODUCTION TO LIMITED GRANTS



- Supreme Court has exclusive jurisdiction
- Volume - 20,812 applications granted in the last reporting period
- Categories of grants
 - 18,221 grants of probate
 - 1,991 grants upon intestacy
 - 410 grants of administration with the will annexed
 - 145 reseals of foreign grants
 - 44 miscellaneous grants, which include 44 limited grants (or one a week)

AD COLLIGENDA BONA DEFUNCTI



- Granted for the protection of an estate's assets pending delay in making a general grant
- Ends on the issue of a full grant of probate or administration
- See *Re Cohen deceased* [1975] VR 187, 189; *In the Estate of Rowell* (2006) 95 SASR 536 [2]-[3] (Debelle J)
- Examples...

AD COLLI – RUNNING A BUSINESS



1. Letters of administration *ad colligendum bona* of the estate of Jane Smith, deceased, be granted to the plaintiff, John Smith of 123 Fake Street, Brisbane, in the State of Queensland, industrial officer, subject to the limitations set out below.
2. The grant of letters of administration *ad colligendum bona* be limited for the purposes of:
 - a. vesting in the plaintiff as legal personal representative of the estate of the deceased all of the deceased's shareholding in Company A Pty Ltd (ACN ### ##);
 - b. exercising the rights vested in the legal personal representative of the deceased pursuant to s 201F(2) of the *Corporations Act 2001* (Cth) with respect to Company A Pty Ltd (ACN ### ##);
 - c. operating the bank accounts of Company A Pty Ltd (ACN ### ##), being:
 - i. Westpac account number ##-## ##; and
 - ii. Westpac account number ##-## ##–for the purposes of managing that company's business and ongoing affairs.
 - d. operating the deceased' s Commonwealth Bank account number ##-## ## to pay any liabilities of the estate of the deceased as and when they fall due; and
 - e. obtaining any legal, accounting, investment and other professional advice necessary for the proper administration of the estate of the deceased.
3. The grant of letters of administration *ad colligendum bona* be limited until a grant of probate or general administration be made, or until further order, and such administration shall proceed no further or otherwise than as aforesaid or in any other manner whatsoever.
4. The requirements that the plaintiff:
 - a. provide an administration guarantee in relation to his administration of the estate of the deceased pursuant to these orders; and
 - b. post a notice of his intention to apply for this grant on the Court's website–be dispensed with.
5. The plaintiff's costs of and incidental to this application be paid or retained out of the estate of the deceased.
6. Liberty to apply.

AD COLLI – APPOINTING COMPANY DIRECTOR



1. Letters of administration *ad colligenda bona* of the estate of the abovenamed John Smith deceased, late of 123 Fake Street, Melbourne in the State of Victoria, be granted to Jane Smith of 345 Fake Street, Melbourne in the State of Victoria.
2. The grant of letters of administration *ad colligenda bona* to the plaintiff be limited for the purposes only of:
 - a. exercising the rights vested in her as legal personal representative of the deceased, pursuant to s 201F(2)(a) of the *Corporations Act 2001* (Cth), and vesting in her all the deceased's shareholding in the proprietary companies, Company A Pty Ltd and Company B Pty Ltd, enabling her to exercise all rights attached to the deceased's shares in the said companies;
 - b. exercising the rights vested in her as legal personal representative of the deceased, pursuant to s 201G of the *Corporations Act 2001* (Cth), and vesting in her all the deceased's shareholding in the shared companies, Company D Pty Ltd and Company E Pty Ltd enabling her to exercise all rights attached to the deceased's shares in the said companies;
 - c. opening an account in the name of the plaintiff as administrator of the estate of John Smith into which any income of the estate is to be deposited, investing the proceeds of all such collection and receipts of investment appropriate for the investment of trust moneys and to those ends to operate a bank account for the estate of the deceased;
 - d. paying the costs and disbursements reasonably incurred by the plaintiff in the administration of the estate of the deceased for the limited purposes specified in these orders;
 - e. taking such steps as may be required and signing any documents necessary for the completion of the actions referred to herein.
3. The grant of letters of administration *ad colligenda bona* be limited until a grant of letters of administration be made or until such further order of this Court and such administration shall proceed no further or otherwise than as aforesaid in any other manner whatsoever.
4. The requirement that the plaintiff provide an administration guarantee in relation to her administration of the estate be dispensed with.
5. The requirement that the plaintiff post a notice of intention to apply for this grant on the Court's website be dispensed with.
6. The plaintiff's costs of and incidental to this application be paid out of the estate of the deceased.
7. Liberty to apply.

AD COLLI – LODGING A CAVEAT



1. Letters of administration *ad colligendum bona* of the estate of Jane Smith, deceased, be granted to John Smith of 123 Fake Street, Coburg in the State of Victoria.
2. The letters of administration *ad colligendum bona* be limited for the purpose of immediately lodging a caveat on behalf of the estate of the deceased on the title to the property situate at 345 Fake Road, Melbourne in the State of Victoria, being the land more particularly described in Certificate of Title Volume #### Folio ###, on the grounds of an implied, resulting or constructive trust.
3. The grant of letters of administration *ad colligendum bona* to the plaintiff be limited until a grant of probate or general administration be made, or until further order and such administration shall proceed no further or otherwise than as aforesaid or in any other manner whatsoever.
4. The requirements that the plaintiff:
 - a. provide any administration guarantee in relation to her administration of the estate pursuant to this order; and
 - b. post a notice of her intention to apply for this grant on the Court's website—be dispensed with.
5. The costs of the plaintiff of and incidental to this application be paid or retained out of the estate of the deceased on a trustee basis.
6. The application be adjourned to 10am on 18 October 2019 before the Judge in charge of the Trusts, Equity and Probate List.
7. Liberty to apply.

AD COLLI – APPOINTOR OF TRUST



1. Letters of administration *ad colligendum bona* of the estate of John Smith, deceased, be granted to Jane Smith of 123 Fake Street, Melbourne in the State of Victoria, subject to the limitations set out below.
2. The grant of letters of administration *ad colligendum bona* be limited for the purposes of acting as the appointor of the Trust as the legal personal representative of the deceased and exercising the powers of the appointor under the trust deed.
3. The grant of letters of administration *ad colligendum bona* to the plaintiff be limited until a grant of probate or general administration be made, or until further order, and such administration shall proceed no further or otherwise than as aforesaid or in any other manner whatsoever.
4. The requirements that the plaintiff:
 - a. provide any administration guarantee in relation to her administration of the estate pursuant to this order; and
 - b. post a notice of her intention to apply for this grant on the Court's website—
be dispensed with.
5. The costs of this application be paid or retained out of the estate of the deceased.
6. Liberty to apply.

PENDENTE LITE



- Granted to permit administration of an estate to continue while litigation of a claim to a full grant is pending.
- The object of the grant is to ensure that the estate is managed and preserved for the benefit of those eventually found to be entitled to it.
- Section 22(1) of the *Administration and Probate Act 1958*
- See also *In the Goods of Graves* (1828) 162 ER 597; *Salter v Salter* [1896] P 291
- Examples....

SECTION 22 OF THE APA



Administration pending litigation

1. Where any legal proceedings touching the validity of the will of a deceased person or for obtaining recalling or revoking any grant are pending the Court may grant administration of the estate of the deceased to an administrator who shall have all the rights and powers of a general administrator other than the right of distributing the residue of the estate and every such administrator shall be subject to the immediate control of the Court and act under its direction.
2. The Court may out of the estate of the deceased assign to any administrator appointed under this section such reasonable remuneration as the Court thinks fit.

PENDENTE LITE – TO SELL PROPERTY



1. Pursuant to s 22(1) of the *Administration and Probate Act 1958*, letters of administration *pendente lite* of the estate of John Smith, deceased, be granted to the plaintiff, Jane Smith, retiree, of 123 Fake Street, Melbourne, in the State of Victoria, subject to the limitations set out below.
2. The grant of letters of administration *pendente lite* be limited for the purposes of:
 - a. making an application under s 49 of the *Transfer of Land Act 1958* to transfer the proprietorship of the deceased's property from the name of the deceased to the plaintiff as legal personal representative of the estate of the deceased;
 - b. doing all acts and things and signing all documents necessary to facilitate the sale and transfer of the property situate at and known as 345 Fake Street, Melbourne, in the State of Victoria, being the land more particularly described in Certificate of Title Volume ##### Folio ### ('the deceased's property');
 - c. paying out of the proceeds of the sale of the deceased's property all costs associated with the sale and paying the net proceeds of sale to the plaintiff's solicitors, Soli & Co, to be held by them and invested in their name in investments appropriate for the investment of trust funds by the estate in any manner authorised by law;
 - d. executing all documents and operating any bank accounts to the extent necessary to give effect to the payment, collection, receipt and investment of the proceeds of the sale of the deceased's property;
 - e. using any moneys of the estate of the deceased to discharge the liabilities owed by the deceased to:
 - i. Fake City Council;
 - ii. Yarra Valley Water; and
 - iii. Origin Energy;
 - f. paying any liabilities of the estate of the deceased as and when they fall due; and
 - g. obtaining any legal, accounting, investment and other professional advice necessary for the proper administration of the estate.
3. The grant of letters of administration *pendente lite* be limited until a grant of probate or general administration be made, or until further order, and such administration shall proceed no further or otherwise than as aforesaid or in any other manner whatsoever.
4. The requirements that the plaintiff:
 - a. provide an administration guarantee in relation to her administration of the estate of the deceased pursuant to these orders; and
 - b. post a notice of her intention to apply for this grant on the Court's website—be dispensed with.
6. Liberty to apply.
7. The costs of and incidental to this application be paid or retained out of the estate of the deceased on an indemnity basis.

AD LITEM



- Administration for the suit, granted to provide a person to represent an estate in litigation
- Ad litem grant confers powers with respect to management of litigation on behalf of the estate.
- No specific provision or rule mentions administration *ad litem*. The Court assumes the inherent jurisdiction to make such an order where appropriate.
- See recent judgment of *Re Emmins* [2019] VSC 605
- Examples....

AD LITEM – SUPREME COURT PROCEEDING



1. Letters of administration *ad litem* of the estate of Jane Smith, deceased, be granted to John Smith of 123 Fake Street, Melbourne, in the State of Victoria.
2. The letters of administration *ad litem* be limited for the purposes of representing the estate of Jane Smith as defendant in proceeding S PRB 2019 #####.
3. The requirements that the plaintiff advertise this application pursuant to r 4.03(1) of the *Supreme Court (Administration and Probate) Rules 2014* and the requirement of an administration guarantee pursuant to s 57 of the *Administration and Probate Act 1958* be dispensed with.
4. This grant of letters of administration *ad litem* be limited until a grant of general administration be made, or until further order, and such administration shall proceed no further or otherwise than as aforesaid or any other manner whatsoever.
5. Costs reserved.
6. Liberty to apply.

AD LITEM – VCAT PROCEEDING



1. Pursuant to r 36.01 of the *Supreme Court (General Civil Procedure) Rules 2015*, the originating motion filed [date] be amended *nunc pro tunc* as follows:
 - a. delete the words 'pendente lite' and substitute in their place the words '*ad litem*'; and
 - b. delete the phrase 'under r 16.03 of the *Supreme Court (General Civil Procedure) Rules 2015* and pursuant to s 29(1) of the *Administration and Probate Act 1958*' and substitute in its place the phrase 'for letters of administration *ad litem* pursuant to the inherent jurisdiction of the Court'.
2. Pursuant to the inherent jurisdiction of the Court, letters of administration *ad litem* of the estate of Jane Smith, deceased, be granted to John Smith of 123 Fake Street, Melbourne in the State of Victoria.
3. The letters of administration *ad litem* be limited for the purposes of:
 - a. representing and having the conduct and carriage of VCAT proceeding number XX### and VCAT proceeding number XX### ('the proceedings');
 - b. if appropriate, compromising the proceedings upon such terms as the plaintiff may think fit;
 - c. giving consent on behalf of the estate of the deceased to the making of orders and the entry of judgment by the Tribunal to conclude the proceedings; and
 - d. otherwise prosecuting the proceedings to judgment and taking all such steps as may be appropriate to enforce any such judgment on behalf of the estate of the deceased.
4. This grant of letters of administration *ad litem* be limited until a grant of probate or general administration be made, or until further order of this Honourable Court and such administration shall proceed no further or otherwise than as aforesaid or in any other manner whatsoever.
5. The requirements that the plaintiff:
 - a. provide any administration guarantee in relation to his administration of the estate pursuant to this order; and
 - b. post a notice of his intention to apply for this grant on the Court's website;be dispensed with.
6. The costs of and incidental to this application be paid or retained out of the estate on a trustee basis.
7. Liberty to apply.

AD LITEM – RECOVERY OF PROPERTY



1. Letters of administration *ad litem* of the estate of John Smith, deceased, be granted to Jane Smith.
2. The letters of administration *ad litem* be limited for the purposes of:
 - a. investigating the transfer of the deceased property at 123 Fake Street, Melbourne in the State of Victoria, being the land more particularly described in Certificate of Title Volume ##### Folio ### to his daughter, Jenny Smith, who was registered as the proprietor on [date]; and
 - b. commencing any proceedings that the plaintiff may be advised to commence against Jenny Smith, or any other person or entity to recover into the deceased's estate the property at 123 Fake Street, Melbourne in the State of Victoria.
3. The requirements to advertise this application pursuant to r 4.03(1) of the *Supreme Court (Administration and Probate) Rules 2014* be dispensed with.
4. The requirement for an administration guarantee pursuant to section 57 of the *Administration and Probate Act 1958* be dispensed with.
5. This grant is limited until a grant of general administration may be made, or until further order, and such administration shall proceed no further or otherwise than as aforesaid or any other manner whatsoever.
6. Costs reserved.

OTHER TYPES OF LIMITED GRANTS



- *de bonis non administraies* - where an executor or administrator dies or goes missing before fully administering an estate and a replacement is necessary
- administration *durante minore aetate* - during the minority of an executor or other person entitled to a grant
- administration *durante absentia* - during the absence from the jurisdiction of an executor or other person entitled to a grant
- administration *durante dementia* - during the incapacity of an executor or administrator

ADMINISTRATION BONDS & GUARANTEES



- Power under s 57(1) of the *Administration and Probate Act 1958*
- In *the Estate of Freebairn*, Besanko J stated:

The guarantee is in effect a guarantee against the maladministration of the estate in South Australia. It is a guarantee against a breach by the administrator of his or her duties in administering the estate. The cases in which a guarantee is required are cases where the estate is vulnerable in the sense that there is an increased risk of maladministration or an increased difficulty in recovery should there be maladministration. The guarantee provides an additional assurance of the due and proper administration of the estate and an additional remedy should there be maladministration. The *Probate Rules 2004* contain requirements in relation to the guarantee: r 49.02.

- No proceeding shall be brought on a guarantee without the leave of the Court: s 57(3) of the *Administration and Probate Act 1958*

ADMINISTRATION BONDS & GUARANTEES



The power under r 7.01 of the *Administration and Probate Rules 2014* may be exercised if application is made for a grant of administration in the following circumstances:

- a. to a creditor of the deceased or the legal personal representative of a creditor applying in that capacity;
- b. to a person having no immediate beneficial interest in the estate of the deceased;
- c. to an attorney of a person entitled to a grant of administration;
- d. to the use and benefit of a minor or of some person incapable of managing his or her own affairs;
- e. to any person who appears to the Court or the Registrar to be resident outside the State of Victoria;
- f. to collect and preserve the assets of the deceased (being a grant formerly described as a grant *ad colligenda bona*);
- g. to bring or defend a proceeding (being a grant formerly described as a grant *ad litem*);
- h. under section 20, 22 or 24 of the Act; or
- i. in any other case where the Court or the Registrar considers that there are special circumstances making it desirable to act under paragraph (2).

ADMINISTRATION BONDS & GUARANTEES



- Rule 7.02 provides that the Court or Registrar may require a guarantee under s 57 of the Act, that the application be made jointly by two or more persons or that the application be made by a trustee company, as defined in the *Trustee Companies Act 1984*.
- The Court has a discretion whether or not to require a guarantee.
- See *Re Tratt* [1980] VR 657, 663 (Brooking J); *Re Curran* [2010] VSC 455 [26]
- The form of the guarantee is set out in Form 3-7A of the *Supreme Court (Administration and Probate) Rules 2014*: r 7.02. A surety shall justify by an affidavit of justification in the form as set out in Form 3-7B: r 7.03

SURETY'S GUARANTEE

[heading in accordance with Form 3-1A or 3-1B (as appropriate)]

WHEREAS _____ late of _____
died on _____ day of _____ 20____

AND WHEREAS _____ of _____
("the administrator") is the intended administrator of his or her estate.

NOW THEREFORE

1. I*, _____ of _____
guarantee that I will when lawfully required to do so make good any loss which any person interested in the administration of the estate of the deceased may suffer in consequence of the breach by the administrator of the administrator's duty—
 - (a) well and truly to collect and administer the estate of the deceased according to law and, if so required by the Court, deliver up the grant to the Court;
 - (b) if the Court or the Registrar requires, to make and file or cause to be made and filed a true and just account of the administration of the estate.
2. The giving of time to the administrator or any other forbearance or indulgence shall not in any way affect my liability under this guarantee.
3. The liability under this guarantee shall be continuing and shall be for the whole amount of the loss mentioned in paragraph 1 but my total liability shall not in any event exceed the sum of \$ _____.

DATED:

SIGNED SEALED AND DELIVERED

by the abovenamed

in the presence of

[THE COMMON SEAL of _____ was
affixed in the presence of _____]

**If made by more than one, this guarantee should be made jointly and severally*

AFFIDAVIT OF JUSTIFICATION

[heading in accordance with Form 3-1A or 3-1B (as appropriate)]

I, _____ of _____ in Victoria,
[occupation] make oath and say that—

1. I am over 18 years of age and under no legal disability.
2. After payment of all my debts and liabilities I am well and truly worth in real and personal property [or as the case may be] not less than the sum of \$* _____
3. Particulars of my property and the values thereof are as follows:

[NOTE—In setting out the property, real property must be distinguished from personal property, and a separate gross value for each particular parcel or item of real property or personal property must be stated.

- (a) When real property, the allotment, parish, street, etc. the area of land, whether there are buildings on the land, should be stated with sufficient accuracy to identify the land.
- (b) When personal property, the following particulars should be given, for example—
 - (1) Description of lease and number of years to run.
 - (2) Number of shares in bank, building society, trading company etc.
 - (3) Money on deposit or current account, giving name and address of bank, society etc.
 - (4) Money lent on mortgage and registered number of same.
 - (5) Household furniture and where kept.
 - (6) Stock in trade of a business and premises where kept.
 - (7) Farming implements, &c, where kept, and grain, quantity and where stored.
 - (8) Policy of life insurance, number of years in force with surrender value, and age of the life assured at time of making this affidavit.
 - (9) Live stock, number and kind and where pastured or kept.
 - (10) Good book debts only.

Cash in hand and depreciating assets such as furniture and motor vehicles are generally not accepted nor are persons who can only justify to life insurance or superannuation policies.]



PROBATE ONLINE UPDATE



- Planning has commenced for a new system that will allow applicants to submit a probate application online.
- A formal project board was formed in June 2019 and meets monthly to make decisions on some of the complexities of moving from a paper-based process to an online system.
- The probate project team is currently working on the system design and will have completed testing towards the end of 2019.
- It is expected that a small, targeted group of solicitors will be the initial users of the system, before a full launch occurs at a later date (a formal date has not yet been confirmed).



SIR NINIAN STEPHEN LECTURE



Tuesday, 15 October 2019