EXECUTORS OF UNPROVED WILLS: STATUS AND DEVOLUTION OF TITLE IN AUSTRALIA

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Many estates of deceased persons are administered in Australia by an executor who does not obtain probate of the will. This article considers the authority of such an executor to act, the source of his or her title (if any) to assets of the estate, and suggests the proper legal bases upon which those assets may be dealt with. It is shown that a fundamental difference in approach exists in this country as between those jurisdictions in which executorial title derives solely from the grant of probate, and those in which it rests upon some other basis.

An individual executor will often accept that office by beginning to perform its functions.[1] In due course the will is likely to be proved and a grant of probate obtained. Inevitably there must be some delay before the latter occurs, and during this period certain executorial duties will probably have been carried out. Delay in obtaining probate may, for a wide variety of reasons, be considerable.

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1. This article is concerned only with executors. It is not concerned with administrators of estates of deceased persons, either upon intestacy or with the will annexed, or as the recipients of limited grants. An administrator is appointed by the Supreme Court: the grant alone *confers* the office. An executor is appointed by the will alone: the grant merely *confirms* the office. See D Parry & J Clark *The Law of Succession* 9th edn (London: Sweet & Maxwell, 1983) 168 where this apt comparison is made. In this article the expression "an (or "the") executor" is used, according to the context, to include more than one executor, unless the contrary is indicated.

   Any act, or actions, on the part of a named executor which show an intention to accept the office may constitute an acceptance of it. As to acceptance by conduct, see E V Williams, H C Mortimer & J H G Sunnucks *Executors, Administrators & Probate* 16th edn (London: Sweet & Maxwell, 1982) 37–40. See also *Cash v The Nominal Defendant* (1969) 90 WN (Pt 1) (NSW) 77; *The New York Breweries Co Ltd v A-G* [1899] AC 62.

Sometimes a grant may never be obtained by a given executor. In respect of other wills a grant may never be obtained at all: the will may never be proved. The reasons for this include the executor's ignorance, neglect, physical or mental disability, unwillingness to take the trouble or incur the expense of obtaining a grant, or sheer reluctance to get involved with the legal system. Of course, in most estates, other than those where the asset value is small, the executor is likely sooner or later to be forced to obtain the grant because it will prove impossible to deal with certain assets without it.

In some cases, however, it may be perfectly possible for the executor fully, and properly, to administer the estate without a grant of probate.[2] 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

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2. "Executors have power to act before they take out probate, but if they act in relation to ... assets (within the jurisdiction) they cannot thereafter renounce but may be peremptorily ordered to do so." *IRC v Stype Investments (Jersey) Ltd* [1982] 1 Ch 456; Templeman LJ, 473. This article proceeds upon the assumption that, in a given case, no such citation or other proceedings against an executor to compel the taking out of probate has been made or instituted.

The question whether an executor who has accepted the office by conduct, but who has not proved the will, is properly described as an executor de son tort is one as to which various judges and commentators have taken opposing positions. Cf eg the views expressed in *Halsbury's Laws of England* vol 17 (4th edn 1973) 702, and in Williams et al id, 92–93 (against such a characterisation), with that of Parry & Clark id, 408; G L Certoma *The Law of Succession in New South Wales* (Sydney: Law Book Co, 1987) 232 and *Tristram & Coote's Probate Practice* (26th edn) (London: Butterworths, 1978) 440 (in favour of it). See also id, *Cash v The Nominal Defendant*, which is probably to this effect, although distinguishable on the ground that the named executors had obtained probate in another jurisdiction.

Older authorities, however, are unanimous in the view that an executor who has accepted the office by conduct cannot be an executor de son tort, at least in the same jurisdiction: Swinburne on Executors Pt 4 s 23 Pl 1; Godolphin's Orphan's Legacy Pt 2 c 8 s 1; Wentworth on the Office of Executors 14th edn ch 14, 320; S Toller *The Law of Executors & Administrators* 5th edn (London: Butterworths, 1822) 37. The point was expressly decided by the Court of Exchequer (on its equity side) in *Rogers v Frank* (1827) 1 Y & J 409; 148 ER 730. See also *Hall v Elliot* (1791) Peake 86; *Sykes v Sykes* (1870) LR 5 CP 113; *Peters v Leeder* (1878) 47 LJQB 573. Such an executor is simply the lawful executor, and is accountable as such for his or her dealings with estate assets following, if necessary, the taking out of probate if ordered by the Court. This liability is probably quite independent of such statutory provisions expressly dealing with an executor de son tort as s 33 of the Administration and Probate Act 1958 (Vic) and s 54 of the Succession Act 1981 (Qld) (generally corresponding to ss 28 and 29 of the Administration of Estates Act 1925 (UK)). See also F C Hutley "The Executor De Son Tort in the Law of New South Wales" (1952) 25 ALJ 716.

be produced by the executor to the relevant authority or institution. On the other hand, if the estate assets consist only of tangible chattels and, say, various small cash deposits,[3] then the executor may well be able to administer them without a grant and regardless of their total value, which could be considerable.

So long as probate has not been obtained an executor's position is sometimes thought to be more or less precarious. But this need not necessarily be so to any significant extent. As will be seen, in all Australian jurisdictions an executor derives status — the authority to act as the testator's lawfully-constituted representative — from the will alone, not from the grant of probate.[4] The grant is evidence of the executor's status and in some jurisdictions it also operates to confer title to the estate assets upon the executor.[5] But probate is not essential to the existence of the office. Even where a grant has been obtained (whether in common form or in solemn form) it is always revocable by the Supreme Court. For this reason, every executor's position is, at least in theory, potentially precarious: proceedings for revocation of probate may always be brought, notwithstanding that an existing grant might have been made in solemn form following a substantial trial.

This article considers aspects of the status and devolution of title to a testator's property under the general law[6] upon an executor of an unproved will in Australia. It assumes the appointment of an executor of full age and capacity under the terms of a provable will, that is, under the validly executed last will of a free and capable testator. It also assumes an executor, so appointed, who has accepted the office by conduct.

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3. Various statutory provisions in force throughout Australia, both of state and federal law, apply to small cash deposits and life insurance policy proceeds. The following are cited as examples only: Life Insurance Act 1945 (Cth) s 103; Administration Act 1903 (WA) s 139; Administration & Probate Act 1919 (SA) ss 71, 72. The following provisions otherwise facilitate the administration of small estates: Wills, Probate & Administration Act 1898 (NSW) ss 101–105; Administration & Probate Act 1958 (Vic) ss 71–79; Administration Act 1903 (WA) s 55; Administration & Probate Act 1929 (ACT) ss 75–79; Administration & Probate Act (NT) ss 106–110.
4. But the will alone is not enough. The office is constituted by the fact of acceptance of appointment by the executor following a legally valid appointment by the testator. Both elements of fact and law must be present. Where they are found to co-exist the office exists.
5. These jurisdictions are ACT, NSW, NT and WA.
6. This article does not deal with particular statutory provisions requiring the production of a grant of representation as an essential element in certain dealings with particular types of property, eg the registration of instruments affecting Torrens title land, or corporate securities.

STATUS

There is no statutory provision in any Australian jurisdiction expressly empowering a testator to appoint an executor. The reason is that from time immemorial the appointment of an executor as the person who will represent the testator after death has been regarded in English law as absolutely inherent in the act of testation itself. A will need not be in any respect dispositive. A will which merely appoints an executor, but which contains no further provision, may be a valid will.[7] The appointment of an executor is a sufficient condition of probate, provided the will is otherwise valid.[8] An executor, therefore, who has accepted the office derives executorial status not from any grant of probate, nor from the provisions of any statute, but from the will itself.[9] The grant is merely "the *proof* of executorship",[10] or "the official *recognition* of his or her standing to deal with the testator's property".[11]

It follows that a will is itself juridically effective both to create the power of acceptance of the office by the named executor, and to invest the office in

7. *Brownrigg v Pike* (1882) 7 PD 61–64; *Re Lancaster* (1859) 1 Sw & Tr 464; 164 ER 815. E Williams *Williams on Executors* 8th edn (London: Stevens) 231, states the rule: "The bare nomination of an executor without giving any legacy or appointing anything to be done by him is sufficient to make a will, and as a will it is to be proved."

8. *In re Carlton* [1924] VLR 237; *Re Jordan's Goods* [1868] LR 1 P & D 555; *Re Leese's Goods* (1862) 2 Sw & Tr 442; *Tristram & Coote's Probate Practice* supra n 2, 37. For a long time the appointment of an executor was also regarded as a *necessary* condition of a valid will: see W Holdsworth *A History of English Law* vol 3 (London, Sweet & Maxwell, 1922) 537.

9. *Biles v Caesar* [1957] 1 WLR 156; Lord Denning, 159 and Hodson LJ, 160; *Meyappa Chetty v Supramanian Chetty* ("*Chetty v Chetty*") [1916] 1 AC 603; Lord Parker 608:

> It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights in action, vests in him upon the testator's death, and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends on probate, but because the production of probate is the only way in which, by the Rules of the Court, he is allowed to prove his title.

See also *Thompson v Reynolds* (1827) 3 C & P 123; 172 ER 352; *Woolley v Clark* (1822) 5 B & Ald 744; 106 ER 1363; *Hensloe's Case* (1599) 9 Co Rep 36b; 77 ER 784; J Comyn *A Digest of the Laws of England* (Dublin: Luke White, 1785) "Administration" B 9 & 10; Toller supra n 2 sect iv. The principle is of ancient origin: F Pollock & F W Maitland *History of English Law* vol 2 (London: Cambridge UP, 1968) 315. See the extensive discussion of the sui generis nature of the office by Isaacs J in *Union Bank of Australia v Harrison, Jones & Devlin Ltd* (1910) 11 CLR 492, 514–520.

10. Williams et al supra n 1.

11. I J Hardingham, M A Neave & H A J Ford *Wills & Intestacy in Australia & New Zealand* 2nd edn (Sydney, Law Book Co, 1983) 3.

an accepting executor, from the date of the testator's death, notwithstanding that the will has not been, and may never in fact be, proved in the Supreme Court. In this respect the entire testamentary act, both in relation to the appointment of the executor and to its dispositive provisions, is effective in and of itself. It does not depend upon the official exercise of the authority of the Crown, as exercised by the Court, either as to investiture with the office or as to its proof or recognition. As Pollock and Maitland said:

> From ancient times it has been one of the fundamental qualities of a will in our system of law that 'it can make a representative of the testator'.[12]

The effect of a grant of probate in relation to an executor's status is, of course, both *probative*, in the sense that a court will accept it as conclusive evidence of the appointment so long as the grant itself is unrevoked,[13] and also *recognitive*, in the sense that what the court itself will recognise the world at large must also recognise — for the obvious reason that the rights and liabilities of third parties must ultimately depend upon their recourse to the court. Thus, in both of these senses, the grant may also constitute a document of title, no less and no more. An executor's title under a grant might well, in given circumstances, be insufficient, as for example where Torrens legislation requires the registration of an instrument as a precondition to registration of title to land. But equally, many other assets, such as tangible chattels, cash deposits and other choses in action, might well prove capable of administration without production of the grant of probate evidencing an executor's title thereto.

There is, therefore, no rule of law that an executor who has accepted the office must prove the will.[14] This has never been regarded as one of the essential duties of the office. Nor does an action lie against an executor for neglect to take out probate. "Negligence" in this regard is mere neglect to

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12. Pollock & Maitland supra n 9, 315. Maitland called the peculiar ability of a testator to appoint an executor "the 'hereditative' quality of a testament, on account of the similarity in function of the Roman haeres to the modern executor": S J Bailey *Law of Wills* 6th edn (London: Pitman, 1967) 61.
13. *Whicker v Hume* (1858) 7 HL Cas 124, 143, 156, 165; *Re Barrance* [1910] 2 Ch 419; *In Re Wernher: Wernher v Beit* [1918] 1 Ch 339, 350, 351.
14. The civil remedy for failure to take out a grant is by citation. If an executor has acted, he or she can be compelled to take probate: *Halsbury's Laws of England* supra n 2, 763; *Maudant v Clark* (1886) LR 1 P & D 592. Modern legislation which sets out the duties of personal representatives does not list proof of the will as one of those duties. See eg Succession Act 1981 (Qld) s 52; Administration of Estates Act 1925 (Eng) s 25; Administration of Estates Act 1971 (Eng) s 9. See also Comyn supra n 9; Toller supra n 2, sect iv.

prove the existence of the office the acceptance of which estops an executor from denying.[15] The true position is that an executor should prove the will when it is necessary to produce a grant of probate in order to discharge the duties of the office in accordance with the law. Sometimes this will be expressly required by subordinate legislation and it is always required if an executor needs to plead or assert the office in court proceedings.[16] These requirements, however, go to the establishment or proof of the office residing in the executor and not to the lawful existence of the office itself.

DEVOLUTION OF TITLE

1. History

Immediately prior to the statutory reforms of the late nineteenth century and later, the general position in English law was that the executor succeeded to the personal property of the testator whereas realty descended directly to the heir at law or devisee. In each case, title to the property derived directly from the will, which in effect operated as a conveyance. The executor received the assets as owner, without distinction between legal and equitable title, but nevertheless in a fiduciary capacity for purposes of the due administration of the estate. Thus Comyn's Digest[17] tells us that:

> [T]he property of the Goods is vested in the Executor before Probate. And he may administer them. Or give and alienate them ... An Executor ... has the Property of the

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15. *In Re Stevens: Cooke v Stevens* [1897] 1 Ch 422, 434; [1898] 1 Ch 162, 177. Failure to do so does not render an executor liable in damages for negligence, but it may lead to a loss to, or waste of, estate assets and thereby render the executor liable in an action of devastavit.

16. Although an executor cannot assert the office in any court without producing the grant of probate, a court may accept evidence of the terms of a will in the absence of a grant, provided that these are not in issue in the proceedings: *Whitmore v Lambert* [1953] 1 WLR 495:

> An executor cannot maintain actions before probate except those founded on his actual possession; for in actions where he sues in his representative character he may be compelled, by the course of pleading to produce the probate at the trial or ... at an earlier stage of the action ... Though an executor cannot maintain actions before probate, except upon his actual possesssion, yet he may *commence* the action before probate, and may continue the same as far as that step where the production of the probate becomes necessary.

Williams et al supra n 1, 87–89.

17. Id, Williams et al 238 & ff. For a full discussion of the early history before the reign of Edward I, see Pollock & Maitland supra n 9, 334–337, 340–348; Holdsworth supra n 8 534–595. For a shorter account of the later history, see T F T Plucknett *A Concise History of the Common Law* 5th edn (London: Butterworths, 1956) 711–746.

> Goods of his Testator ... vested in him before his actual Possession ... And therefore may have Trover, Trespass etc against him who takes them before he has actual Possession of them ... And though he do not prove the Will for a long time after the death of the Testator, yet the Property shall be adjudged in him immediately upon his Death.

By section 1 of the Land Transfer Act 1897 (UK) it was provided that realty should thenceforth devolve directly upon the executor, a provision now contained in section 1 of the Administration of Estates Act 1925 (UK) and in a variety of forms in Australian legislation. But it was never necessary for legislation to "vest" a testator's personal estate in an executor:[18] this devolved directly upon the executor by force of the will and was historically the reason why an executor came to be known as the testator's "personal" representative.[19] The current law in England, therefore, is that the whole of a testator's real and personal property devolves upon the executor by force of the will alone. A subsequent grant of probate merely "enables the executor to prove that this has occurred".[20]

The consequence of this is that because "an executor derives all his authority from the will ... he may lawfully perform almost every act which is incident to the office"[21] provided that he or she is of full age. It remains to be seen to what extent this is true in Australia at the present time.

2. Australia: two different systems

In Australia, each State and mainland Territory has enacted legislation directly affecting the vesting of title to a testator's property in an executor. A basic difference in approach to this matter is disclosed by those jurisdictions which provide for the vesting of a testator's property, as from the date of death and until a grant of representation, in a Public Trustee, and those jurisdictions

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18. As to chattels real, see Administration of Estates Act 1925 (Eng) s 2. The relevant Australian legislation is discussed, infra p 255.
19. The belief that the phrase "personal representative" merely denotes one who represents a deceased person "personally" is mistaken (such a usage being either redundant, tautologous or both). The real meaning of the phrase derives from the historical fact here alluded to: see eg Parry & Clark supra n 1, 209: "After 1897 the *personal* representatives also became the *real* representatives of the deceased." Bailey supra n 12, 8 is to the same effect. For a concise statement of the history of devolution of title, see the several judgments of Street CJ and Maxwell J in *Ex parte the Public Trustee; Re Birch* (1951) 51 SR (NSW) 345.
20. Parry & Clark supra n 1, 169.
21. Williams et al supra n 1, 85–86; *Re Stevens* supra n 15, 429–430; Toller supra n 2, 45; *Wankford v Wankford* (1704) 1 Salk 229; 91 ER 265.

which make no such provision. Jurisdictions of the former kind are New South Wales,[22] Western Australia,[23] the Australian Capital Territory[24] and the Northern Territory.[25] Jurisdictions of the latter kind are Victoria, Queensland, South Australia and Tasmania.

In New South Wales and Western Australia the relevant legislation provides that upon the death of any person, whether testate or intestate, the whole of the deceased's property is "deemed to vest" in the Public Trustee.[26] Upon the making of a grant of probate or administration, it is also provided that the Public Trustee's title is, in effect, divested and vested in the personal representative named in the grant, the title being backdated to the date of the deceased's death.[27] The Public Trustee drops out of the picture (unless, of course, the grant of representation is in fact made in favour of the Public Trustee). In the Northern Territory the effect of the legislation is similar to that just described.[28]

In the Australian Capital Territory the relevant legislation[29] does not provide for the back-dating of title to the date of the testator's death, although (as in the Northern Territory), the provision does not apply to property which has been administered at the date of the grant.

As will be seen, in these four jurisdictions an executor's title to estate assets derives by force of these provisions solely from the grant. For purposes of this discussion they will be called "grant-title" jurisdictions.

In Victoria, Queensland, South Australia and Tasmania, by contrast, the position regarding title to a testator's property in the absence of a grant of probate is very different. The simplest provisions are found in Queensland. Here, section 45 of the Succession Act 1981 expressly provides that the whole property of the deceased person devolves from death upon the executor, and in the absence of an executor, or of an executor who is able and willing to act, upon the Public Trustee. Upon a grant of probate, this title is in effect withdrawn from any executor named in the will who does not obtain the grant in favour of an executor who does.[30] The entire matter of devolution

22. Wills, Probate & Administration Act 1898 (NSW) s 61.
23. Public Trustee Act 1941 (WA) s 9.
24. Administration & Probate Act 1929 (ACT) ss 38A & 39.
25. Administration & Probate Act 1969 (NT) ss 51 & 52; Public Trustee Act 1979 (NT) s 46.
26. Supra n 22; Public Trustee Act 1941 (WA) s 9.
27. Supra n 22, s 44; Administration Act 1903 (WA) s 8.
28. Administration & Probate Act supra n 25, s 52. Property which has been administered at the date of the grant is excepted.
29. Supra n 24, s 39.
30. Succession Act 1981 (Qld) s 45(2), (3).

of title is (as in New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory) regulated by the Act, but in a fundamentally different way. It should also be observed that in Queensland the executor's title to estate assets, whether before or after the grant of probate, is wholly statutory.

In South Australia and Tasmania statutory provisions withdraw devolutionary title to land from the heir at law or devisee, as the case may be, and vest it in the personal representative. In South Australia this occurs, somewhat elliptically, "after the death of the owner";[31] in Tasmania it occurs as from the death of the owner.[32] In neither State is it provided that devolutionary title of an executor to the deceased's personal property is withdrawn until a grant of probate is obtained. In these States, therefore, an executor's title to estate assets derives from the will in the case of personalty and from the legislation in the case of realty.

The most interesting case of devolutionary title, however, is that of Victoria. There, section 13 of the Administration and Probate Act 1958 provides that upon a grant of probate, the testator's "hereditaments" shall vest as from the death of the testator in the executor to whom the grant is made, and if more than one, jointly. However, the law of Victoria contains no statutory provision withdrawing devolutionary title from an executor prior to, or in the absence of, a grant of probate: section 13 merely withdraws it from an executor who does not obtain a grant in favour of an executor who does.[33] The position in Victoria, therefore, is that an executor of an unproved will has devolutionary title to the testator's personal estate; and the testator's real estate still remains in the heir at law or devisee, as the case may be, by operation of law.[34]

3. Problems in the grant-title jurisdictions

As has been seen, in New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory an executor's title to the entire estate assets derives not from the will but solely from the grant of probate. As Mason J said in *Bone v Commissioner of Stamp Duties*[35] this has a further

31. Administration & Probate Act 1919 (SA) s 46(1).
32. Administration & Probate Act 1935 (Tas) s 4(1).
33. Cf Wills, Probate & Administration Act 1898 (NSW) s 44; Administration Act supra n 27, s 8; infra p 258.
34. See L McCredie *Wills, Probate & the Administration of the Estates of Deceased Persons in Victoria* 2nd edn (Sydney: Butterworths, 1982) 111.
35. [1974] 48 ALJR 310, 316.

consequence:

> The effect of [sections 44 and 61 of the Wills, Probate & Administration Act 1898 (NSW)] has been to place the title of the executor on a similar footing to that of the administrator at common law; the executor's title now flows from the grant of probate, in the meantime the estate is in the Public Trustee ...

In *Daily Pty Ltd v White*[36] Herron J had already held that a purported assignment of a tenancy by an executor before probate was of no effect in New South Wales because title to the property was vested in the Public Trustee by force of section 61 of the Wills, Probate & Administration Act 1898. It seems to follow that in the four jurisdictions in which an executor's title flows from the grant alone, an executor has no power to deal with estate assets until probate is granted to that executor.[37]

The effect of this type of legislation is possibly more significant than its framers may have intended. For many years it was thought that provisions such as section 61 of the New South Wales Act and section 9 of the Public Trustee Act 1941 (WA) conferred a purely formal, or "repository", title upon the Public Trustee, thus preventing a hiatus that might cause the property to become bona vacantia.

For example, in *Re Birch*,[38] the Full Court of the New South Wales Supreme Court, following *Re Broughton*[39] and a thorough examination of the point by both Street CJ and Maxwell J, held that until a grant of representation section 61 makes the Public Trustee a mere "formal repository"[40] of the legal estate in the property of the deceased, with which the Public Trustee is "notionally vested",[41] and that beyond this he has "no powers, functions or active duties to perform with respect to the property".[42] Maxwell J, however, agreed that: "the effect of section 44 is to place both an executor and an administrator on the same footing; each derives his title from the grant and upon the grant his title relates back to the death of the person."[43]

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36. (1946) 63 WN (NSW) 262.
37. But see the discussion infra, p 261. Another view is that "in New South Wales ... there has been the creation of a new institution by the amalgamation of the incidents of both offices at common law, not the assimilation of the one to the other": R C Hutley, R A Woodman & O Wood *Cases and Materials on Succession* 3rd edn (Sydney: Butterworths, 1984) 492.
38. Supra n 19.
39. (1902) 19 WN (NSW) 69.
40. *Re Birch* supra n 19; Street CJ, 350; Maxwell J, 358; *Re Broughton* id, 70.
41. Id, Maxwell J, 360, citing with approval Lord Goddard CJ in *Egerton v Rutter* [1951] 1 KB 472.
42. Supra n 19, Street CJ, 350.
43. Id, 353.

But for the weight of authority supporting it, it might have been argued that this conclusion is wrong. This flows from the fact that section 44 of the Wills, Probate & Administration Act 1898 (NSW) and section 8 of the Administration Act 1903 (WA) merely "vest" the testator's property exclusively in the executor actually named in the grant (as distinct from others not so named), but without intending to abolish the devolutionary title which up to that point in time resides in an executor who has accepted the office. Arguably the policy of this provision, it might be argued, is to regulate title to the property of deceased persons upon the making of the grant of representation, not to interfere with an executor's devolutionary title prior to the grant. The argument that these provisions deal comprehensively with title prior to the grant is met by the consideration that their apparent purpose is merely to prevent a hiatus in title where no executor exists or to provide a mere "formal repository" at which legal process can be served. This is why section 61 of the New South Wales Act and section 9 of the Public Trustee Act 1941 (WA) do not "vest" title in the Public Trustee prior to the grant. They merely provide that it "shall be *deemed* to be [so] vested". Despite Maxwell J's dictum, it might be said that *Re Birch* itself strongly supports this view: it is the reason why Street C J agreed with *Re Broughton* that prior to the grant the Public Trustee is "a mere formal repository of the legal estate",[44] and why Maxwell J himself thought that the Public Trustee was merely "notionally invested"[45] with it. These considerations apply with equal force to the law in Western Australia.

In *Andrews v Hogan,*[46] however, the High Court, peremptorily and without any discussion of the point, held that section 61 of the New South Wales Act does confer a status of some significance upon the Public Trustee, and that he or she was the proper person to be served with a notice to quit leased premises prior to the grant. It follows that an executor having accepted the office would not, at least in New South Wales, be proper person to be so served until the grant has been obtained.[47]

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44. Id, 350. See also *Oxford Meat Co Pty Ltd v McDonald* (1963) 63 SR (NSW) 423.
45. *Re Birch* supra n 19, 360.
46. (1952) 86 CLR 223.
47. In *Andrews v Hogan* ibid, executors had been appointed by the will. They had accepted the office by conduct, but no grant of probate had, at the relevant time, been obtained. Dixon CJ, 231 said: "[I]t is at least clear that on the death of [the testatrix] the weekly tenancy of the premises vested in [the Public Trustee] ... "; Kitto J, 254 said: "No representation of the estate has been taken out, and her property therefore remains vested in the Public Trustee by section 61 [of the Wills, Probate & Administration Act 1898 (NSW)]."

In Western Australia the position with regard to devolution of title appears to be the same as in New South Wales. In *Re Cameron*,[48] Wallace J had to consider whether the Public Trustee should be treated as representing the estate of a deceased person for purposes of legal proceedings in the absence of a grant of representation and against the Public Trustee's wishes. Section 9 of the Public Trustee Act 1941 (WA) is seemingly in all material respects the same as section 61 of the New South Wales Act. Wallace J conceded that the Public Trustee is more than a mere "formal repository" of the legal estate, but only for the "momentary holding purpose prevailing between death and the point of probate or administration and to satisfy the need to give ownership to real and personal estate".[49] Accordingly, it was held that the Public Trustee should not be required to perform active duties such as representing the estate in legal proceedings. *Andrews v Hogan* was distinguished, Wallace J pointing out that the Public Trustee was not a party to the proceedings in that case and that nothing in *Andrews v Hogan* casts doubt on the authority of *Re Birch* on this point.

Whatever be the present state of the law relating to the nature and extent of a Public Trustee's active duties with regard to estates of deceased persons prior to a grant of representation, it at least seems clear that legal title to the whole of a testator's property resides in the Public Trustee in New South Wales, Western Australia, the Australian Capital Territory and the Northern Territory prior to the grant by force of the relevant statutory provisions. It is also evident that these provisions have abolished an executor's common law devolutionary title to a testator's personal property.

4. Administration of assets

The full implications of this position are illustrated by the earlier decision of Herron J in *Daily Pty Ltd v White*.[50] That case raises the question, given the established law that an executor derives representational status from the will alone, coupled with acceptance of the office, what are his or her rights, if any, with respect to estate assets in the absence of a grant? Does the authority of the office alone confer any such rights in the grant-title jurisdictions?

To take a simple example, if marauding creditors or legatees descend upon the premises of a deceased testator and attempt to appropriate valuable

48. [1982] WAR 55.
49. Id, 58.
50. Supra n 36.

chattels under colour of title, is an executor, having accepted the office but without a grant of probate, powerless in the grant-title jurisdictions to do anything about it? Must the executor apply to the Public Trustee to take action? At common law, and in the non grant-title jurisdictions, these assets belong to the executor as from the moment of the testator's death. By asserting title the executor may take whatever steps are necessary to protect them for the estate. It would be a very different matter if all the steps necessary for this purpose had to be inefficiently routed through the Public Trustee.

In addition, the question arises, what is the legal effect in a grant-title jurisdiction of an executor without a grant purporting to deal with estate assets, in the ordinary course of administration, vis-a-vis creditors and beneficiaries? As to this Herron J said in *Daily Pty Ltd v White*:

> [The executor] is not possessed of the legal estate in the deceased's property, and he therefore cannot dispose of it. He may purport to do so, and if subsequently probate is granted, section 44 will operate to render valid such transactions when it is shown that they are for the benefit of the estate, or have been made in due course of administration.[51]

(i) Non grant-title jurisdictions

As has been seen, devolution of title to estate assets to an executor in Victoria, Queensland, South Australia and Tasmania is either by force of the will alone or by the will coupled with statute. It follows that an executor so invested with title may pass it to a third party, whether as purchaser or as volunteer. There is no separate equitable estate to be taken account of while the estate is in due course of administration and therefore no occasion for the equitable doctrine of notice.[52] As a matter of law the property may simply be sold or given. Whether an executor can sell or give estate assets to a purchaser or donee without producing a grant of probate to prove title is a question of practicalities, not of law, as the purchaser or donee might decline to accept the property without proof of the executor's title to sell or give it. However, it might often be the case, especially in relation to small estates, that an executor can in fact do this, if necessary producing the will as prima facie

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51. Id, 263.

52. It was established in *Commissioner of Stamp Duties (Qld) v Livingston* [1965] AC 694 that the whole of the property of a deceased person which "came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests ... for the purpose of carrying out the functions and duties of administration." (Lord Radcliffe, 707). An executor administering estate assets is always, of course, in a fiduciary position vis-a-vis the creditors and beneficiaries of the estate.

proof of the office. There must be many, perhaps a great many, small estates that are in fact administered annually in Australia in this way and they would appear to be administered properly in these jurisdictions.

(ii) Grant-title jurisdictions

What is the position in the grant-title jurisdictions of the many small estates that must be administered in them by an executor without a grant? If the executor has no title to the property, then he or she has no title to pass. If the implications of *Daily Pty Ltd v White, Andrews v Hogan* and *Bone v Commissioner of Stamp Duties* are correct it seems logically, but absurdly, to follow that if the will is never proved then the estate assets must belong to the Public Trustee indefinitely or at least until the Public Trustee assents to their transfer to third persons and transfers them accordingly. What then is the position in respect of a purported transfer to a purchaser, or assent to a beneficiary, by an executor of an unproved will?

Two possibilities suggest themselves. The first is that in these jurisdictions the executor must always own the full equitable title to estate assets so long as the legal title resides in the Public Trustee. The basis of this suggestion is that, pending the grant, the Public Trustee must hold the property upon trust for somebody, and that because the executor lawfully represents the testator for the purposes of administering the assets by the authority of the will and because in accordance with *Livingston's* case the assets must be administered without regard to equitable interests claimed under the will,[53] the Public Trustee's duties can only be towards the executor, and to nobody else, so long as the executor is acting properly in that capacity. There is, it is suggested, no equitable title that the Public Trustee must recognise as residing in creditors or beneficiaries, provided an executor duly appointed by the will has accepted the office. This, by another route, is what leads to the accepted conclusion that in the grant-title jurisdictions the Public Trustee's title is bare, "notional"[54] or for "momentary holding purposes"[55] only.

If this analysis is correct, it follows further that the Public Trustee must carry out any proper directions of an executor where a transfer, or assent to a transfer, of estate assets cannot either lawfully, or practically, otherwise be achieved. To put it another way, the executor may, it is suggested, extinguish the statutory trust under section 61 of the Wills, Probate & Administration

53. There is no division of title in the assets belonging to the executor, but the executor is always a fiduciary: see supra n 36.
54. Supra n 41.
55. Supra n 48.

Act 1898 (NSW) or section 9 of the Public Trustee Act 1941 (WA) pro tanto with respect to particular assets by his or her proper administration of them, precisely because the Public Trustee's legal title is merely notional.

The second mode by which it is suggested that an executor of an unproved will may deal with estate assets is by reliance upon his or her authority, deriving from the will, to transmit the testator's title as the testator's representative. Here it is suggested that in the grant-title jurisdictions an executor, although not the legal owner of the estate assets, may in the absence of a grant, effect a valid transmission of title by representation (except in relation to property the subject of statutorily-regulated registered title). This is different from a transfer of title by ownership. We are not here dealing so much with a case of "nemo dat non quod habet", as with the case of an executor lawfully clothed with the office of representation properly performing the legal duties incident to that office. He or she is in effect the duly authorized agent of a principal who, being dead, cannot act in person.

As has been seen, it is not an essential incident of the office that a grant of probate be obtained. If, say, in the case of tangible chattels an executor is able to perform actions that would constitute a valid transfer of title (if the executor had title to transfer) then the authority of the will alone, it is suggested, is legally sufficient to make the executor's actions a valid transmission of the testator's title. Here too the Public Trustee has no legal right or title to frustrate an executor's actions in this regard.

Which of these analyses is correct? It is submitted that they are both legally correct and that whichever is preferred may depend upon the property in question in a given situation. In the case, say, of less valuable tangible chattels in the possession of an executor of an unproved will, transmission of the testator's title may be perfectly practicable. In the case of more valuable assets the consent, if not the assent, of the Public Trustee may, as a practical matter, need to be obtained: here the Public Trustee may need to be satisfied that his statutory duties of trusteeship, minimal though they may be, have been lawfully terminated.

CONCLUSION

In all Australian jurisdictions executorial status continues to be derived not from a grant of probate, nor from any legislative provision, but solely from the will under which the appointment is made.

Many small, and even some larger, estates of deceased persons may lawfully and properly be administered at common law by an executor named in the deceased's will without a grant of probate. This may be the case in all

Australian jurisdictions, notwithstanding that in new South Wales, Western Australia, the Australian Capital Territory and the Northern Territory an executor's legal title to the estate assets derives, by statute, from the grant of probate and not from the will or by statute as elsewhere.

Although in these jurisdictions the Public Trustee may have some legal capacities incident to a bare or notional statutory title in the absence of a grant of probate to an executor, this title, being bare or notional, exists primarily for the benefit of the executor. It is submitted that the executor without a grant in these jurisdictions has lawfully authority to direct the Public Trustee to consent or, where necessary, assent to transfers or transmissions of estate assets to third persons.

It is not legally correct to conclude that in the grant-title jurisdictions the position of an executor without a grant has been assimilated to that of an administrator or a mere potential administrator. The office of executor is historically and juridically fundamentally different from that of an administrator and remains so, except for incidental statutory changes, throughout Australia.