CITATION:	*Proud v Arkell* [2019] NTSC 35
PARTIES:	PROUD, Jane As guardian *ad litem* for JAKE CHRISTOPHER MICHAEL MCARDLE (a minor) v ARKELL, Karen Louise
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	106 of 2018 (21842912)
DELIVERED:	22 May 2019
HEARING DATES:	30 January 2019
JUDGMENT OF:	Grant CJ

CATCHWORDS:

WILLS, PROBATE AND ADMINISTRATION – PROBATE AND LETTERS OF ADMINISTRATION – EXECUTORS AND ADMINISTRATORS – RIGHTS, POWERS AND DUTIES – ADMINISTRATION – PROCEEDINGS AGAINST EXECUTORS AND ADMINISTRATORS

Whether deceased domiciled in Western Australia at date of death – whether deceased left property in the Northern Territory at date of death – whether Court had jurisdiction to grant letters of administration – whether grant irregular – whether grant of letters of administration to defendant should be revoked – whether administrator's conduct in breach of fiduciary duty – whether conflict between duty as executor and personal interest as beneficiary – whether estate

funds may be applied in payment of legal costs without court authorisation – whether failure to file proper accounts relating to the administration of the estate.

Administration and Probate Act 1969 (NT) s 6, s 14, s 22, s 26, s 32, s 33, s 41, s 54, s 55, s 61, s 62, s 66, s 67, s 89, s 96, s 110A
De Facto Relationships Act 1991 (NT)
Domicile Act 1987 (NT) s 7, s 9
Supreme Court Rules 1987 (NT) r 22.01, r 22.03, r 22.04, r 22.05, r 22.06, r 54.02, r 88.11, r 88.24, r 88.27, r 88.41, r 88.27

Advance Civil Engineering Pty Ltd v Norbuilt Pty Ltd [1996] NTSC 45; *Agar v Hyde* (2000) 201 CLR 552; *Aldrich v Attorney-General* [1968] P 281; *Australian Can Co Pty Ltd v Levin and Co Pty Ltd* [1947] VLR 332; *Baldwin v Greenland* [2007] 1 Qd R 117; *Bates v Messner* (1967) 67 SR (NSW) 187; *Brabender v Brabender* [1949] VLR 69; *Budd v Silver* (1813) 2 Phill 115; *Civil and Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* [1991] NTSC 3; *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5; *Fancourt v Mercantile Credits Limited* [1983] HCA 25; *Fysh v Coote* [2000] VSCA 150; *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125*; Goods of Wilson* [1929] St R Qd 59; *Haque v Haque* (1962) 108 CLR 230; *Harrison v Mills* [1976] 1 NSWLR 42; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405; *Heller Financial Services Ltd v Solczaniuk* (1989) 99 FLR 304; *Hunter v Hunter* [1937] NZLR 794; [1938] NZLR 520; *In the Goods of Gill* (1828) 1 Hagg 342; *In the Goods of Loveday* [1900] P 154; *In the goods of Mary Carr* (1867) LRP and D; *In the Estate of Wayland* [1951] 2 All ER 1041; *Letterstedt v Broers* (1884) 9 App. Cas 371; *Lubis v Walters* [2009] NTSC 23; *Mavrideros v Mack* (1998) 45 NSWLR 80; *Miller v Cameron* (1936) 54 CLR 572; *Monty Financial Services Ltd and Anor v Delmo* [1996] 1 VR 65; *Passingham v Sherborn* (1846) 9 Beav 424.; *Re Atkinson (deceased)* [1971] VR 612; *Re Aylmore* [1971] VR 375; *Re Beddoe* (1893) 1 Ch 547; *Re Bowes* [1963] QWN 35; *Re Hall* [1923] QWN 40; *Re Registered Trade Mark "Certina"* (1970) 44 ALJR 191; *Riccardi v Riccardi* [2013] NSWSC 1655; *Shew v Police and Citizens Youth Club* [2013] NTSC 15; *Skaftouros v Dimos* [2002] VSC 198; *Sportsbet Pty Ltd v Moraitis* [2010] NTSC 24; *Sperrer v Rasla Pty Ltd* [2011] NTSC 2; *Thrifty Rent-a-Car Pty Ltd v Darwin Marketing Services Pty Ltd* [1987] NTSC 67, referred to.

Dal Pont & Mackie, *Law of Succession*, (Lexis-Nexis Butterworths, 2nd ed, 2017)
Principles of Australian Succession Law (LexisNexis Butterworths, 3rd ed, 2017)
Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*, 17th ed

REPRESENTATION:

Counsel:

Plaintiff:	MS Macdonald
Defendant:	T Liveris, D McConnel

Solicitors:

Plaintiff:	Halfpennys Lawyers as town agents for Macdonald Rudder
Defendant:	Withnalls Lawyers

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Proud v Arkell [2019] NTSC 35
No 106 of 2018 (21842912)

BETWEEN:

JANE PROUD as guardian ad litem for JAKE CHRISTOPHER MICHAEL MCARDLE (a minor)
Plaintiff

AND:

KAREN LOUISE ARKELL
Defendant

CORAM: GRANT CJ

REASONS FOR JUDGMENT

(Delivered 22 May 2019)

[1] Paul McArdle ("the deceased") died intestate at some time on 17 or 18 August 2017. These proceedings involve the administration of his estate. The Registrar of this Court granted letters of administration to the defendant on 24 October 2017. That grant was made on the basis of the defendant's depositions that she was the *de facto* partner of the deceased at the date of his death; that the deceased left property in this jurisdiction; that there were no claims against the estate other than those set out in the affidavit of assets and liabilities sworn by her on

17 October 2017; and that the gross value of the deceased's estate was in the order of $150,000.

[2] By Writ with Statement of Claim filed on 11 October 2018, the plaintiff pleads that the defendant was not the *de facto* partner of the deceased at any material time; that the deceased left no real or personal property in this jurisdiction; that on and from 1 September 2017 the deceased knew of the claim on the estate by the deceased's son (on whose behalf the proceeding is brought)[1]; that the net assets of the deceased's estate were in excess of $350,000; and that at the date of his death the deceased was domiciled in Western Australia.

[3] The plaintiff pleads that the consequences of those matters are that:

(a) the defendant is not a beneficiary of the deceased's estate;

(b) the defendant was not entitled to a grant of letters of administration of the deceased's estate by operation of s 32 of the *Administration and Probate Act 1969* (NT); and

(c) this Court had no jurisdiction to grant letters of administration to the defendant.

[4] The prayer for relief seeks final orders in the nature of a declaration that the defendant was not the *de facto* partner of the deceased at any material time; a declaration that the deceased was domiciled in Western Australia at the date of his death; the revocation of the grant of letters

1 The deceased's son attained majority after the proceedings had been commenced.

of administration to the defendant; in the event that it is found the deceased had assets within this jurisdiction, the grant of letters of administration to the deceased's son; and an accounting to the plaintiff for all assets of the estate and all disbursements therefrom.

[5] By her Defence the defendant pleads, *inter alia*, that she had been in a continuous *de facto* relationship with the deceased from in or about April 2012 until the time of his death; that she gave notice to the plaintiff on 7 September 2017 that she was the deceased's *de facto* partner and was entitled to apply for letters of administration in the Northern Territory; that the deceased left no real property in this jurisdiction (with the implication that he left personal property here); and that the deceased was working in New South Wales on a temporary basis at the time of his death but domiciled in the Northern Territory at the time of his death.

The interlocutory proceedings

[6] By summons filed on 8 November 2018 the plaintiff sought interlocutory orders that the grant of letters of administration be revoked; that the defendant pay all moneys forming part of the estate into court; that the defendant preserve the other assets of the estate and not deal with them; that the defendant file and serve an inventory of the assets of the estate; and that the defendant file and serve an account of dealings and transactions concerning the estate. In the alternative to revocation and payment into court, the summons sought orders that the

defendant deposit the grant of letters of administration into court and take no further action relating to the estate save for the protection and preservation of assets.

[7] In short form, the basis of the interlocutory application was as follows. The only significant asset of the estate was the proceeds of superannuation and life insurance paid to the defendant as administrator in July 2018 in the sum of $416,000. On 2 November 2018 the defendant's legal representatives informed the plaintiff that she had paid the estate to herself six months previously. That distribution was made in circumstances where the defendant was put on notice of the son's claim to the estate on 1 September 2017, together with the dispute in relation to the defendant's status as a *de facto* partner, the existence of any property in this jurisdiction, and the deceased's place of domicile. Those challenges had been formally advised to the defendant's legal representatives in the context of pre-suit communications on 1 August 2018. For the defendant to have distributed the estate to herself in those circumstances was said by the plaintiff to be in breach of her duty as a trustee of the estate and in breach of her fiduciary duties.

[8] When the interlocutory application came before the Court on 15 November 2018 the parties sought orders by consent that the defendant repay the moneys she paid to herself out of the assets of the estate within two days, and account to the plaintiff pursuant to s 89 of

the *Administration and Probate Act* for all moneys received and paid out by her as administrator of the estate within seven days. Those orders were made by consent and the application on summons was adjourned to 29 November 2018. The plaintiff also undertook to file an amended summons in accordance with directions made by the Associate Judge. Those amendments formalised the application for the orders which had been made by consent, and a further application for the execution by the defendant of an administration bond in the sum of $430,000 pursuant to s 26 of the *Administration and Probate Act* (which application had been refused). The amended summons was filed on 21 November 2018.

[9] When the application came back before the court on 29 November 2018, counsel for the plaintiff advised the Court that it would be pressing the application for summary judgment, and that the parties would be seeking certain further orders by consent in relation to the accounting to the plaintiff and dealing with the assets of the estate pending hearing of that application. Consent orders were made in the terms sought, and a timetable was fixed for the filing and service of any further affidavits, the filing and service of submissions, and the provision of particular discovery. The application for summary judgment made by summons filed on 21 November 2018 was adjourned to 30 January 2019 and heard on that day.

Application for summary judgment

[10] Rule 22.01(1)(b) of the *Supreme Court Rules 1987* (NT) provides that where the defendant has filed an appearance, the plaintiff may apply to the Court for judgment against the defendant on the ground that the defendant has no defence to the whole or part of a claim included in the writ or statement of claim. In such an application the plaintiff must prove its case as if it were before the court on trial, it may rely on affidavit evidence for that purpose, and it must establish that there is no defence available in affidavit material put forward by the defendant.[2]

[11] The rules governing the determination of applications of this kind are well established. Summary judgment should only be entered if there is no real question to be tried.[3] Where the ultimate outcome of the matter turns on the resolution of some disputed issue or issues of fact, it is essential that great care is exercised to ensure that a party is not deprived of opportunity for the trial of the case.[4] Where the case is clear, however, the exercise of the power will obviate the delay

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2 *Civil and Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* [1991] NTSC 3 at [58].

3 *Clarke v Union Bank of Australia Ltd* (1917) 23 CLR 5; *Fancourt v Mercantile Credits Limited* [1983] HCA 25 at [99]; *Thrifty Rent-a-Car Pty Ltd v Darwin Marketing Services Pty Ltd* [1987] NTSC 67 at [14]; *Heller Financial Services Ltd v Solczaniuk* [1989] NTSC 36 at [53]; 99 FLR 304.

4 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 (cited in *Advance Civil Engineering Pty Ltd v Norbuilt Pty Ltd* [1996] NTSC 45 at [33]); *Re Registered Trade Mark "Certina"* (1970) 44 ALJR 191 (cited in *Civil and Civic Pty Ltd v Pioneer Concrete (NT) Pty Ltd* [1991] NTSC 3 at [60]). Where there is a real case to be investigated either in fact or in law, leave to defend should be given: *Australian Can Co Pty Ltd v Levin and Co Pty Ltd* [1947] VLR 332 at 334 (cited with approval in *Thrifty Rent-a-Car Pty Ltd v Darwin Marketing Services Pty Ltd* [1987] NTSC 67 at [15]).

involved in a hearing and save unnecessary expense.[5] The test to be applied was summarised by the High Court in *Agar v Hyde* in the following terms:[6]

> It is of course, well accepted that a Court whose jurisdiction is regularly invoked … should not decide the issues raised in those proceedings in the summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the Court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.

[12] Rule 22.03 of the *Supreme Court Rules* provides that an application for judgment must be made by summons supported by an affidavit verifying the facts on which the claim or the part of the claim to which the application relates is based, and stating that in the belief of the deponent there is no defence. That verification may be made in general terms. An affidavit for that purpose may contain statements of fact based on information and belief.

[13] Rule 22.04 provides that the defendant may seek to adduce affidavit material showing cause against the application, which material may also contain a statement of fact based on information and belief if the grounds are set out. The plaintiff may then reply by affidavit if necessary pursuant to rule 22.05. On consideration of that affidavit

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5 *Re Registered Trade Mark "Certina"* (1970) 44 ALJR 191 at 192.

6 *Agar v Hyde* (2000) 201 CLR 552 at [57].

material, a defendant who shows a plausible defence will be given leave to defend under r 22.06(c) unless the plaintiff makes it clear that "there is in fact no real substantial question to be tried, no dispute as to facts or law sufficient to raise any real doubt that the plaintiff is entitled to judgment, [and] no real case to be investigated either in fact or in law".[7] As r 22.01(3) makes explicit, however, a defence of a proceeding or part of a proceeding need not be hopeless or bound to fail for it to have no reasonable prospect of success.

[14] The principles applying to those evidentiary provisions were summarised by Southwood J in *Sportsbet Pty Ltd v Moraitis* in the following terms:[8]

> (1) Unless the plaintiff makes a proper affidavit the defendant is not required to answer the application for judgment.
>
> (2) The court will give the plaintiff judgment unless the defendant shows cause against the application to the satisfaction of the Court. Cause may be shown by affidavit or otherwise.
>
> (3) The Court will normally require an affidavit by or on behalf of a defendant before a defendant will be granted leave to defend. The defendant is required to use such diligence as is reasonable in the circumstances to put before the Court in a summary form all of the evidence relied on by the defendant in defence of the plaintiff's claim.
>
> (4) The affidavit material relied upon by a defendant may contain statements of fact based on information and belief provided the source of the evidence is identified and the grounds of belief are set out. A defendant may also obtain leave to defend if the defendant tenders evidence which, though not

7 *Heller Financial Services Ltd v Solczaniuk* [1989] NTSC 36; 99 FLR 304 at [23].

8 *Sportsbet Pty Ltd v Moraitis* [2010] NTSC 24 at [12] (cited with approval in *Sperrer v Rasla Pty Ltd* [2011] NTSC 2; *Shew v Police and Citizens Youth Club* [2013] NTSC 15 at [9]).

evidence of the facts, shows such evidence exists and will be available at the trial.

(5) A defendant should condescend into particulars. The evidence of the defendant must deal specifically with the facts relied upon by the plaintiff in support of its application. The affidavit of the defendant should state clearly and concisely what facts are relied on as supporting the defence.

(6) The defendant must point to some material, legal or factual, that provides an arguable response to the claim and not leave it to the judicial officer hearing the application to trawl through the material to find an answer to the plaintiff's claim.

(7) The evidence of the defendant should show that there is a real case to be investigated either on the facts or in law.

(8) A defendant will be granted leave to defend if there are facts which, if true, would constitute a defence to the plaintiff's claim. The Court is reluctant to try a case on affidavit where there are facts in dispute.

(9) An important issue is whether the defendant's account of the facts has sufficient prima facie plausibility to merit further investigation. (Citations omitted)

[15] In satisfaction of the requirement in r 22.03(1) of the *Supreme Court Rules*, the summons filed by the plaintiff dated 21 November 2018 seeks the order for revocation of the grant of letters of administration in pursuance of r 22.01 and in the inherent jurisdiction of this Court.[9] In support of that application, affidavits made by the plaintiff on 1 November 2018, David Lang on 26 October and 5 November 2018, and James Barrett on 11 January 2019 were read into evidence. In

9 The plaintiff's application by summons is also said to be made in pursuance of s 26 of the *Administration and Probate Act 1969* (NT) and r 88.41 of the *Supreme Court Rules*. Section 26 of the *Administration and Probate Act* vests the Court with power to revoke administration at any time after it has been granted, or order the administrator to execute an administration bond. Rule 88.41 provides that where a proceeding has been commenced for revocation of a grant the court may order the administrator to deposit the grant in the Registry. While reference to those provisions identifies the source of the power for certain of the orders which the plaintiff seeks, the application remains one for summary judgment.

response, the defendant read affidavits made by her on 19 and 20 December 2018 and 25 January 2019.

[16] The bases on which the plaintiff claims an entitlement to summary judgment are:

(a) on the evidence, the deceased did not leave any property of value within the jurisdiction;

(b) the grant of letters of administration was irregular; and/or

(c) the grant should be revoked under s 26 of the *Administration and Probate Act 1969* (NT) because of the defendant's breach of court orders, the conduct of the defendant, the defendant's breach of trust in disbursing the assets of the estate for her own benefit in the knowledge of the plaintiff's claim, the fact that the defendant cannot give any bond as security or repay the money she has taken from the estate, and the fact that the deceased was domiciled in Western Australia at the date of his death.

[17] The plaintiff concedes that the resolution of the question whether the defendant was in a *de facto* relationship with the deceased at any material time, which is the subject of the plaintiff's affidavit made on 19 December 2018, is a question of fact which can only be resolved at trial.

Domicile

[18] It is necessary to make some comments at the outset concerning the domicile of the deceased. The plaintiff says that the issue of domicile governs entitlement on intestacy, and is therefore relevant to a number of issues arising in the application for summary judgment. The deceased possessed no immoveable property at the time of his death.[10] The succession of moveable property on intestacy is determined by the law of the domicile of the deceased at the time of his death.[11]

[19] If the deceased was domiciled in the Northern Territory at the date of his death, the distribution of the estate is governed by s 66 of the *Administration and Probate Act*. That section provides that the persons entitled to take an interest in the intestate estate, and the respective interests in that estate, are to be ascertained by reference to Schedule 6 to the Act. So far as is relevant for these purposes, that Schedule provides that a *de facto* partner will only qualify where "the de facto partner was the de facto partner of the intestate for a continuous period of not less than 2 years immediately preceding the intestate's death".

[20] The question whether a *de facto* relationship existed is determined by reference to the provisions of the *De Facto Relationships Act 1991*

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10 There is no suggestion in the materials that the deceased's occupancy of the property in which he was residing in New South Wales was a leasehold interest capable of characterisation as immoveable property giving rise to any entitlement on intestacy.

11 See *Haque v Haque* (1962) 108 CLR 230. That is one of the reasons why r 88.11 of the *Supreme Court Rules* provides that where it appears in a proceeding for a grant that the deceased was domiciled out of the Territory the Court may require evidence of the domicile of the deceased.

(NT). If the defendant does not satisfy that qualification and the added requirement of partnership for a continuous period of not less than two years immediately preceding the death, the deceased's son is entitled to the whole of the intestate estate. If the defendant does satisfy that qualification, she is entitled to the whole of the intestate estate up to the prescribed amount of $350,000, and one-half of the balance of the estate with the other half going to the deceased's son. The defendant's entitlement in those circumstances would constitute the vast bulk of the estate.

[21] If the deceased was domiciled in Western Australia at the time of his death, the distribution of the estate is governed by s 14 of the *Administration Act 1903* (WA). So far as is relevant for these purposes, s 15 of that Act also provides that a *de facto* partner will only qualify where "the de facto partner and the intestate lived as de facto partners for a period of at least 2 years immediately before the death of the intestate". The question whether a *de facto* relationship existed is to be determined by reference to the provisions of s 13A of the *Interpretation Act 1984* (WA).

[22] If the defendant does not satisfy that qualification and the added requirement of partnership for at least two years prior to death, the deceased's son is entitled to the whole of the intestate estate. If the defendant does satisfy that qualification, she is entitled to the whole of the intestate estate up to the prescribed amount of $50,000, and one-

third of the balance of the estate with the other two-thirds going to the deceased's son. The defendant's entitlement in those circumstances would constitute less than half of the estate.

[23] Against that background, the plaintiff contends that the evidence discloses that the deceased never formed an intention to make his home indefinitely in the Northern Territory and that his domicile remained Western Australia, with the consequence that even if the defendant was in the requisite *de facto* relationship with the deceased her entitlement is governed by the laws of Western Australia.

[24] The Northern Territory has enacted the uniform *Domicile Act 1987* (NT). There is no dispute that the deceased's domicile of origin was Jersey, and that he acquired Western Australia as his domicile of dependence when he migrated there with his parents at the age of three. That domicile was retained unless, after he attained the age of 18 years[12], he acquired a domicile of choice by combination of residence in the new domicile and intention to remain there. In order to do so, the deceased must have physically commenced living in the new domicile for a period (not necessarily of lengthy duration)[13], and have intended to make his home indefinitely in that place.[14]

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12 *Domicile Act*, s 7.

13 *Brabender v Brabender* [1949] VLR 69.

14 *Domicile Act*, s 9.

[25] The evidence in relation to those matters derives principally from the defendant's affidavit made on 19 December 2018. The defendant deposes relevantly:

(a) The deceased moved from Perth to Darwin to live with the defendant in her unit between October 2012 and January 2013. The deceased worked in Darwin during that period between October and December 2012. He continued to maintain rented premises in Perth.

(b) The deceased returned to Perth in January 2013 and resumed living in the unit there.

(c) In December 2013 the deceased rented a house owned by the defendant's uncle in Stirling, a suburb of Perth. The intention at that time was for the defendant to move to Perth to live with the deceased, and she commenced moving her belongings to Perth at or about that time. Ultimately, the defendant did not make the move to Perth.

(d) The deceased lived at the Stirling property between December 2013 and October 2015. He paid the rent on that property with occasional assistance from the defendant.

(e) In or about April 2015 the deceased told the defendant he wanted to live and work in Darwin "for a minimum of 24 months" in order "to save money and get ahead financially".

(f) The deceased commenced applying for jobs in Darwin in August 2015. He secured a job in September 2015 and moved to Darwin on 26 September 2015. He resided with the defendant's family there. The deceased maintained the lease on the property in Stirling.

(g) The deceased worked in Darwin between September 2015 and May 2016, and returned to Perth on a number of occasions during that period to see his son and other family.

(h) In January 2016 the deceased gave up the lease on the property in Stirling and moved his belongings into storage in Perth. The deceased paid the rent on the storage units, with occasional assistance from the defendant.

(i) In May 2016 the deceased secured employment in Sydney and moved there. The defendant says that at that time the mutual intention was that "either I would move with him to Sydney, or that Paul would return to Darwin after 24 months, or otherwise as soon as possible".

(j) From May 2016 until his death in August 2017, the deceased lived and worked in Sydney and visited Darwin for short periods in March and July 2017.

[26] It is clear that the deceased did not intend to make the Northern Territory his home when he first moved there in October 2012. It would also seem difficult to conclude on the basis of the evidence

adduced by the defendant for the purpose of the summary judgment application that when the deceased moved to Darwin in September 2015 he intended to make his home indefinitely in that place. The only expression of intention disclosed in the evidence was to live and work in Darwin "for a minimum of 24 months". The deceased left his personal belongings in Perth. It is perhaps significant in this enquiry that, as will be seen later in these reasons, the deceased also left his motor vehicle and motorcycle in Perth. It seems likely that the deceased clearly foresaw and reasonably anticipated that he would return to Perth in the event that his employment in the Northern Territory ended. The deceased was accustomed to move in search of employment and no doubt intended to continue that pattern even after his move to Darwin in September 2015, and did in fact do so.

[27] While the Writ seeks a declaration that the deceased was domiciled in Western Australia at the date of his death, the application for summary judgment does not. However, the plaintiff contended by submission in the application for summary judgment that the defendant has failed to prove an intention on the part of the defendant to make the Northern Territory his domicile of choice.

[28] The question of domicile remains in dispute. It cannot be said that there is no real question to be tried on that matter, or no dispute as to facts sufficient to deprive the defendant of the opportunity to have the matter determined at trial. Having said that, the issues which do fall

for determination in the application for summary judgment must be considered on the basis that even if she was the *de facto* of the deceased in the relevant sense, it is by no means clear that the defendant is entitled to the bulk of the estate. As the evidence presently stands, there is the real prospect of a finding that entitlement to the intestate estate is governed by the law of Western Australia rather than the Northern Territory.

Property within jurisdiction

[29] Section 14(1) of the *Administration and Probate Act* provides that the Supreme Court has jurisdiction to make a grant of the administration of the estate of any deceased person leaving real or personal property within the Territory. In addition, the Court shall have jurisdiction to grant administration of the estate of a deceased person who did not leave property within the Territory if satisfied that the grant "is necessary".[15]

[30] It falls first to consider whether the deceased left real or personal property in the Territory. The requirement that there be property in the jurisdiction derives from the role of the personal representative to get the estate in, both for the purpose of distribution and so that it is available to satisfy any debts of the estate and to provide a proper defendant in the jurisdiction to any action brought for that purpose.[16]

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15 *Administration and Probate Act*, s 14(2).

16 *Re Aylmore* [1971] VR 375.

It is on that basis that the plaintiff contends that "property" only includes property which has some value and is capable of classification as part of the deceased's estate.[17]

[31] While it is true to say that one meaning of the term "estate" is the net worth of a deceased taking into account all valuable items under his or her name, all property of a deceased vests in the personal representative regardless of value. The real and personal estate of the deceased is an asset in the hands of the personal representative for the payment of liabilities, but that is not to say that only property capable of realisation for value forms part of the estate. Some property may have no realisable value or have sentimental value only.

[32] By way of illustration, "personal chattels" are defined in s 61 of the *Administration and Probate Act* to include "the articles of household or personal use or adornment, plated articles, china, glassware, pictures, prints, linen, jewellery, clothing, books, musical instruments or apparatus, scientific instruments or apparatus, wines, liquors, consumable stores and domestic animals of the intestate". That is consistent with definitions in other jurisdictions, which include articles

17 In making that submission, the plaintiff also draws attention to the requirement in r 88.27 of the *Supreme Court Rules* that an applicant for a grant of probate must file an affidavit of assets and liabilities stating the value or estimated value of each item of property. It is submitted that because s 6(5) of the *Administration and Probate Act* provides that words used in that Act have the same meaning as defined in Chapter 3 of the *Supreme Court Rules*, the ambit of the term "property" must be restricted to property with value. Neither the *Administration and Probate Act* nor the *Supreme Court Rules* defines "property" for this purpose.

of household or personal use regardless of monetary value.[18] These are all items properly taken into account in determining whether or not a deceased has left property within the jurisdiction. The fact that personal items may have little or no commercial value does not deny their characterisation as "property", although there may be circumstances in which a court will decline to make a grant of administration where the property existing in the jurisdiction is so small as to be practically negligible.[19]

[33] Rule 88.24 of the *Supreme Court Rules* provides that an application for administration shall be supported by, *inter alia*, an affidavit in accordance with Form 88K establishing whether the deceased died leaving a spouse, *de facto* partner or issue; stating that the deceased left an estate in the Territory, and the value of that estate, distinguishing real and personal estate and giving a short statement of what the estate consists; setting out the relationship of the applicant to the deceased; furnishing the names and ages of the persons entitled in the distribution of the estate and their relationship to the deceased; furnishing details of the applicant's knowledge of claims against the estate; and stating the character in which the person making the application claims to be entitled to a grant.

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18 *Administration and Probate Act 1929* (ACT), s 49A; *Succession Act 1981 (*Qld), s 34A; *Administration and Probate Act 1919* (SA), s 72B; *Administration and Probate Act 1953* (Tas), s 3; *Administration and Probate Act 1958* (Vic), s 5. Particular provision is made in s 67 of the *Administration and Probate Act* for the entitlement to such chattels which are not effectively disposed of by way of will.

19 See *Goods of Wilson* [1929] St R Qd 59.

[34] As footnoted above, r 88.27 of the *Supreme Court Rules* provides that an applicant for a grant of administration shall file an affidavit of assets and liabilities in accordance with Form 88T stating the value or estimated value of each item of property and the amount or estimated amount of each liability. The purpose of this requirement is the identification of the assets that form the deceased's estate preparatory to the discharge of the administrator's duty to bring those assets under his or her control, and ultimately to complete the disposition of the estate in accordance with the rules of intestacy.

[35] In the defendant's affidavit as applicant for the grant of representation made on 17 October 2017, she identified herself as the *de facto* partner and "senior next of kin" of the deceased. She also identified as next of kin the deceased's mother, father, sister and son, aged 16 years. No mention is made of any entitlement or asserted entitlement on the part of the son in the distribution of the estate.

[36] At paragraph [9] of the affidavit the defendant deposed that "[t]he deceased left an estate within the said Territory". At paragraph 11 of the affidavit the defendant deposed that the deceased left an estate within the Territory, New South Wales and Western Australia with an estimated value of $157,530.69 comprised of a motor vehicle, a motorcycle, two pushbikes, money in bank and superannuation and death benefits. The deceased's liabilities are estimated at $127,315.45,

being moneys owed to financial institutions and the Australian Taxation Office.

[37] In the Affidavit of Assets and Liabilities made on 17 October 2017 the defendant annexed an inventory said to comprise a true statement of "all the assets and liabilities of the deceased of which at the date of promising this affidavit I am aware". Thirteen assets are identified in that inventory, being the motor vehicle and the motorcycle, two bicycles, money in bank and on hand, salary and leave entitlements owing, tax credits, and superannuation and death benefits estimated in the value of $128,000. Ten liabilities were identified, the principal one of which was $78,315.45 said to be owing to the Australian Taxation Office. The inventory also identified property owned jointly by the deceased and the defendant, described only as "Household Furniture, Good/Chattels (owned by Karen Louise Arkell & Paul McArdle)".

[38] The issue of property within the jurisdiction was first raised between the parties by letter from the plaintiff's solicitors to the defendant dated 18 September 2017. That letter requested that the defendant provide a list of the deceased's assets and liabilities both in the State of Western Australia and outside that State. That request was repeated in further correspondence dated 28 September 2017. That correspondence also gave notice that the deceased's son intended to bring an application for a grant of letters of administration in the court of appropriate jurisdiction.

[39] The defendant replied by email dated 3 October 2017. That reply drew attention to an earlier letter from the plaintiff's solicitors in which they said they would address the administration of the estate after the funeral had taken place. The defendant said she had been "saddened and consumed" by the death of the deceased and the funeral arrangements, and that she was affronted by the requests in circumstances where the memorial service in Western Australia had not yet taken place.

[40] Within two weeks from the date of that email the defendant had filed an application for the grant of administration, supported by an Affidavit of Death which had been made on 27 September 2017.[20] Letters of administration were issued on 23 October 2017.

[41] By further correspondence dated 12 January 2018, the plaintiff's solicitors, having been made aware that a grant of representation had been made to the defendant, notified the plaintiff's intention to apply for a revocation of the grant, including on the basis that the assets identified in the statement of assets and liabilities were not in the Northern Territory such that the Territory court had no jurisdiction to make a grant. The letter went on to state, relevantly:

> Our client instructs us that none of the assets of the deceased at the time of death were in the Northern Territory. If you contend

20 The significance of the matters put in the defendant's email dated 3 October 2017 is discussed further below in the context of the plaintiff's complaint concerning the defendant's conduct in the application for grant.

> we are wrong, please identify those assets that you say gave the Supreme Court of the Northern Territory jurisdiction to make a grant.

[42] That request was repeated in subsequent correspondence dated 30 January 2018, in which the plaintiff's solicitors requested the defendant's "advice as to what specific assets and liabilities were located in the Northern Territory as at the date of the deceased's death". Following receipt of that correspondence the defendant instructed solicitors in the matter, who replied by letter dated 13 February 2018. That letter contained the assertion that the deceased "had personal property in the Northern Territory", but with no detail beyond a bald reference to the Affidavit of Assets and Liabilities.

[43] By reply dated 1 March 2018, the plaintiff's solicitors again sought details of what property the deceased had left in the Northern Territory, noting their instructions that the deceased's vehicles and furniture were stored in Western Australia. They received no response, and by further letter dated 1 August 2018 the plaintiff's solicitors advised that they had instructions to issue a writ seeking revocation of the grant of administration and that the persistent failure to identify what assets were in the Northern Territory led them to the inference that there were no such assets.

[44] The defendant's solicitors replied to that correspondence by letter dated 28 August 2018. That letter addressed a range of matters raised

by the plaintiff's solicitors in the letter dated 1 August 2018, and contained the following references to the issue of property within the Territory:

> In the circumstances it is not necessary [*sic*] that the Deceased did not have any assets (which is denied) in the Northern Territory.
>
> …
>
> Both our Client and the Deceased had the use of and owned property together including household chattels. They hired together a storage unit in Western Australia which they were both responsible for and which contained jointly owned chattels.
>
> Your reference to assets in the Northern Territory is a moot point given that our Client was a de facto of the Deceased at the time of his death and that gives rise to jurisdiction in the Northern Territory as referred above. That said however, our Client instructs the Deceased had assets in the Northern Territory and New South Wales. As previously advised any assets owned by the Deceased in Western Australia were jointly owned with our Client.

[45] By reply dated 29 August 2018, the plaintiff's solicitors requested the defendant to identify the assets of the deceased in the Territory, and to provide documentary evidence in support of the assertion that the defendant was involved in the hire of a storage unit in Western Australia which contained jointly owned chattels. In a response dated 14 September 2018, the defendant's solicitors identified the assets to include "clothing, shoes, the Deceased's important correspondence including mail from the Australian Tax Office, his end of year financial tax returns and personal papers". In the course of this application, the plaintiff drew attention to the fact that no mention was made of this

property in the Affidavit of Assets and Liabilities, and that none of the property identified had value.

[46] Turning then to the direct evidence in relation to that matter, the defendant's affidavit made on 19 December 2018 discloses the following relevant matters:

(a) the defendant and the deceased had various household furniture and items placed in storage in Western Australia in January 2016, including a motor vehicle (Holden Commodore), a motorcycle (Suzuki GSX1300), a bicycle (BMX), and a bike frame, rims and parts;

(b) when the deceased secured employment and relocated to Sydney in or about May 2016, he took with him "clothes and some cherished possessions and one of his pushbikes", and left in the Darwin residence he shared with the defendant "all of his personal papers, some clothes and shoes and one of his bikes"; and

(c) the deceased's residential address was registered with various government agencies and financial institutions as the residence in Winnellie at which the deceased had formerly resided with the defendant. The only document of that type annexed to the affidavit which predates the deceased's death is a Medical Assessment of Fitness to Drive dated 8 April 2016.

[47] As already noted above, the Affidavit of Assets and Liabilities listed the deceased's assets to include two bicycles. The submission made by the plaintiff in relation to that evidence is that the inventory of the deceased's property which was placed into storage in Perth in January 2016 includes two bicycles, and the deceased took a bicycle from Darwin to Perth in May 2016. It is said to follow that the assertion that the deceased left a bicycle in Darwin contradicts that evidence, is not otherwise substantiated, and should be rejected.

[48] The affidavit made by the defendant on 20 December 2018 relevantly provides that the assets of the estate not yet converted to cash are held in storage in Perth or at the Winnellie residence. The property held at the Winnellie residence is not particularised in that affidavit.

[49] As already stated, a defendant is required to condescend into particulars and deal specifically with the facts relied upon by the plaintiff in support of an application for summary judgment. The defendant's affidavit material should state clearly and concisely what facts are relied on as supporting the defence. The defendant's affidavits conspicuously fail to do so in relation to the personal property which the deceased is said to have left in Darwin. It may be noted in this respect that the defendant's affidavit made on 19 December 2018 contains a detailed listing of the goods and chattels in Koala Storage in Western Australia, but no such inventory in relation to the deceased's goods and chattels said to be in Darwin.

[50] So far as that disputed issue of fact is concerned, I am not satisfied that the deceased left any "property" within the meaning of s 14 of the *Administration and Probate Act* within the Territory at the time of his death. The correspondence from the defendant, and subsequently from her solicitors, was evasive in relation to this issue. The defendant has not taken the opportunity in the course of this application to list the property asserted with any precision. The affidavit material in relation to the bicycles is uncertain and inconsistent. If any property was left in the jurisdiction, it was of negligible value.

[51] However, even if the Court was positively satisfied that the deceased did not leave "property" within the Territory, that finding of fact would not be determinative of the question of whether the Court had jurisdiction to make the grant of administration, or of the question whether the grant of administration should now be revoked for want of jurisdiction on an application for summary judgment.

[52] Section 14(2) of the *Administration and Probate Act* also provides that the Court shall have jurisdiction to grant administration of the estate of a deceased person who did not leave property within the Territory if satisfied that the grant "is necessary". It is not apparent that the grant of administration in this case was predicated on any finding of necessity by the Registrar. The defendant contends that even if the Registrar gave no consideration to the question of necessity, in determining whether or not to revoke a grant of administration for want

of jurisdiction, the Court may for that purpose consider whether the grant was "necessary" in the relevant sense.

[53] The defendant submits, in effect, that the term "necessary" in this context takes its flavour from the power under s 33 of the *Administration and Probate Act* for the Court to appoint an administrator of the estate of a person who dies intestate "if it thinks it necessary or convenient". On that submission, the term "necessary" is broad in scope and confers a discretion, the exercise of which must be directed to the due and proper administration of the estate and the interests of the beneficiaries. The defendant submits that because she is the *de facto* partner entitled to the greater share of the estate under the intestacy rules, and because she was resident in this jurisdiction, it was "necessary" to make the grant in this jurisdiction.[21]

[54] Only Queensland, the Australian Capital Territory and the Northern Territory make provision for a grant of probate or administration where there is no property of the estate within the jurisdiction.[22] Under each of those provisions the court must be satisfied that a grant of

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21 The defendant points to the fact that there was a query from the Registrar of Probate in relation to the fact that the defendant and the deceased were living separately at the time of his death; and that the response from the defendant's then solicitor dated 23 October 2017 provided a proper basis for the Registrar to find that the defendant was the deceased's *de facto* partner, and that the efficient administration of the estate militated in favour of a grant of administration to her.

22 *Probate and Administration Act 1898* (NSW), s 40; *Administration and Probate Act 1958* (Vic), s 6; *Administration and Probate Act 1919* (SA), s 5; *Administration Act 1903* (WA), s 6; *Supreme Court Civil Procedure Act 1935* (Tas), s 5(5), as cited in Ken Mackie's, *Principles of Australian Succession Law* (LexisNexis Butterworths, 3rd ed, 2017) at [13.2].

representation is necessary.[23] There would not appear to be any authority dealing specifically with the operation of those provisions. The Supreme Court of Queensland had a similar jurisdiction prior to the enactment of the *Succession Act 1981* (Qld). The *Manual of Queensland Succession Law* contains the following statement concerning the scope of that jurisdiction:[24]

> Although a very broad jurisdiction is conferred upon the Supreme Court of Queensland to grant and revoke probate and letters of administration, issues of comity arise where the deceased died domiciled in another State, particularly if he or she left no estate in Queensland. Then the court will refuse to make a grant unless there is a good reason for it do so, such as, for instance, that the estate has a right of action, pursuable in Queensland which may have the effect of generating an asset, in the form of a judgment, within the jurisdiction [*Re Hall* [1923] QWN 40, *Goods of Wilson* [1929] St R Qd 59, *Re Bowes* [1963] QWN 35, *Kerr v Palfrey* [1970] VR 825].

[55] The Queensland cases cited in that passage disclose a number of principles. First, where there are no assets within the jurisdiction a grant of probate or administration will only be made on proof of a sufficient reason.[25] Secondly, sufficient reason may include that the applicant executor or administrator is domiciled in the jurisdiction, and is familiar with the estate of the deceased and his or her affairs so that instructions can more readily be given to solicitors in that

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23 *Succession Act 1981* (Qld), s 6(2); *Administration and Probate Act 1929* (ACT), s 9; *Administration and Probate Act* (NT), s 14, as cited in Ken Mackie's, *Principles of Australian Succession Law* (LexisNexis Butterworths, 3rd ed, 2017) at [13.2].

24 WA Lee, *Manual of Queensland Succession Law* (The Law Book Company Ltd, 3rd ed, 1991) at [830].

25 *Re Hall* [1923] QWN 40. In that case, title to real property could not be transferred in accordance with the provisions of the Will unless probate of the Will was granted in Queensland.

jurisdiction.[26] Thirdly, a grant will not be made where to do so would provide the applicant no benefit or assistance in the administration of the estate, or for the sole purpose of prosecuting claims to property in another jurisdiction.[27]

[56] In England, s 2 of the *Administration of Justice Act* 1932 vested the relevant court with power to make a grant of probate notwithstanding that the deceased person left no estate in the jurisdiction. Although that section did not condition the exercise of the jurisdiction on satisfaction that a grant was "necessary", the English courts approached the matter on the basis that good and sufficient reason was required before it would be exercised. Those reasons might include, by way of example, the necessity for a grant in order to bring overseas property to the estate.[28] Conversely, and notwithstanding the conferral of jurisdiction by s 2 of the *Administration of Justice Act*, it was considered contrary to principle to make a grant of representation in the estate of a person domiciled in some other country who died leaving no assets within the jurisdiction.[29]

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26 *Re Bowes* [1963] QWN 35.

27 *Goods of Wilson* [1929] St R Qd 59.

28 *In the Estate of Wayland* [1951] 2 All ER 1041, the High Court made a grant of probate of a Belgian will even though it disposed only of property in Belgium. The court considered it necessary to grant probate in respect of the Belgian will in England as the practical effect of not doing so would be that the executors would have to abandon the Belgian property.

29 In *Aldrich v Attorney-General* [1968] P 281 at 295, the court stated that it would be contrary to principle to make a grant of representation in the estate of a person domiciled in some other country who died leaving no assets in England. That such a grant might provide the deceased's father opportunity to make application for a declaration of legitimacy and an entitlement as next of kin did not displace that principle.

[57] The grant of letters of administration involves the determination of three issues. The first is the question whether there is property in the jurisdiction, and, if not, whether some circumstance exists which would displace the ordinary principle that no grant should be made where the deceased leaves no assets within the jurisdiction. The second determination to be made is whether the size and composition of the estate are such that it is "necessary and convenient" to appoint an administrator under s 33 of the *Administration and Probate Act*.[30] If it is considered necessary and convenient to appoint an administrator, the third issue is who should be appointed for that purpose.

[58] Those three issues do not fall for determination in linear progression in the context of an application for the grant of letters of administration. That is because the considerations which inform those determinations are not mutually exclusive. This Court is vested with broad powers to grant administration of an estate to the individual who is considered fit to assume the responsibilities of administrator.[31] While these powers are given under statute, prior to the enactment of such legislation, courts generally followed the rule that the grant should follow the

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30 The conferral of that discretion draws attention to the provision in s 110A of the *Administration and Probate Act* for the administration of small estates by professional personal representative without any grant of representation.

31 *Administration and Probate Act 1969* (NT), ss 14, 33.

interest.[32] That principle is also applied in the exercise of the statutory powers.

[59] This means that the administration will ordinarily be granted to the individual most interested in the efficient administration of the estate. So far as is relevant for these purposes, s 22 of the *Administration and Probate Act* provides that the Court may grant administration of the estate of an intestate person to the spouse or *de facto* partner of the deceased person or one or more of the next of kin, including conjointly. Those considerations will also bear on the determination of whether a grant of representation is "necessary" where there is no property of the estate within the jurisdiction.

[60] If the defendant was the *de facto* partner of the deceased in the relevant sense, she clearly has a substantial interest in the efficient administration of the estate. That is so regardless whether it is the intestacy rules of the Northern Territory or Western Australia which have application. As I have already recognised, and as the plaintiff concedes, the issue whether the defendant was the *de facto* partner of the deceased is not ripe for determination on a summary basis. The evidence received for the purpose of the summary judgment application discloses that the defendant was familiar with the estate of the deceased. The defendant was resident in the Northern Territory and for

32 *In the Goods of Gill* (1828) 1 Hagg 342.

that reason more readily able to give instructions to solicitors in this jurisdiction. The estate's principal asset is comprised by the proceeds of life insurance and superannuation paid to the estate on her application, and is deposited in an account at a bank branch within this jurisdiction.[33]

[61] For those reasons, it cannot be said that there is no real question to be tried on the issue of whether the grant of representation to the defendant was necessary in the circumstances as they then presented. In any event, the question whether the grant was then necessary has been subsumed and overtaken by events transpiring since it was made. Any relief granted in the application for summary judgment must properly take those events into account. I turn then to the plaintiff's contention that the grant of administration should be revoked on the basis of the defendant's conduct, including the asserted irregularity of the grant.

Revocation on the basis of irregularity and conduct

[62] Section 26 of the *Administration and Probate Act* provides that at any time after administration of the estate has been granted the Court may, upon the application of a person who is interested in the estate, revoke the administration. The Court's jurisdiction to revoke a grant of

33 While that payment post-dated the grant of administration, it cannot be ignored in the determination of whether the grant of administration should now be revoked for want of jurisdiction.

administration is conferred "in the broadest of terms".[34] That statutory jurisdiction reflects the inherent jurisdiction and its exercise will be guided by the same considerations.[35]

[63] This is not a matter in which there has been some fundamental error in the grant. A failure to condescend into detail about the circumstances of the *de facto* relationship would not constitute an error of that sort, and, as already noticed, the defendant's then solicitor provided extensive detail of those matters to the Registrar by the letter dated 23 October 2017. The same may be said of the deposition concerning the value of the estate and the failure to make any deposition concerning the domicile of the deceased. So far as there is subsequent evidence supporting a suggestion that there was no property within the jurisdiction, that would not warrant revocation on a summary basis for the reasons already given.

[64] The exercise of the jurisdiction in this case must be informed by "the due and proper administration of the estate and the interests of the parties beneficially entitled thereto".[36] The New South Wales Court of Appeal observed in *Bates v Messner* that:[37]

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34 *Baldwin v Greenland* [2007] 1 Qd R 117.

35 See generally Dal Pont & Mackie, *Law of Succession*, (Lexis-Nexis Butterworths, 2nd ed, 2017), [11.94]-[11.97].

36 *In the Goods of Loveday* [1900] P 154 at 156.

37 *Bates v Messner* (1967) 67 SR (NSW) 187 at 191-2 per Asprey JA.

> [T]the essential basis of the exercise of the court's inherent jurisdiction to revoke a grant of probate is that emphasised by Jeune P [*In the Goods of Loveday* [1900] P 154], namely, that the real object which the court must always keep in view is the due and proper administration of the estate in the interests of the parties beneficially entitled thereto on the part of the person to whom and by whose oath as to the faithful performance of his duties the court has been induced to entrust the office of executor. The terms used in some of the previously decided cases with relation to the circumstances which have given rise to the exercise of the jurisdiction of revocation, such as 'abortive', 'inefficient', 'useless' or 'ineffectual', are simply descriptive of a situation in which the court has been persuaded to the view that its grant, which was predicated on the oath of the executor named in the will that 'he will pay all the just debts and legacies of the said deceased so far as the estate of the said deceased will extend and the law shall bind him, and that he will otherwise well and faithfully administer the said estate according to law; and that he will render a just and true account of his administration' has been circumvented by a breach of that oath which is in effect an undertaking to the court making the grant. I shall make no attempt to define all circumstances which may attract the exercise of the court's jurisdiction, but where circumstances clearly appear to have arisen after a grant of probate which impel the court to the firm conclusion that the due and proper administration of an estate has either been put in jeopardy or has been prevented either by reason of acts or omissions on the part of the executor or by virtue of matters personal to him, for example, mental infirmity, ill health, or by virtue of the proof of other matters which establish that the executor is not a fit and proper person to carry out the duties which he has sworn to the court that he will perform, the court may exercise its inherent jurisdiction to revoke the grant.

[65] Those principles were later affirmed by the New South Wales Court of Appeal in *Mavrideros v Mack*, which said the test was:[38]

> … whether the due and proper administration of an estate had either been put in jeopardy or had been prevented either by reason of acts or omissions on the part of the executor or by virtue of matters personal to him, for example, mental infirmity, ill health,

38 *Mavrideros v Mack* (1998) 45 NSWLR 80; [1998] NSWCA 286 per Sheller JA (Priestley and Beazley JJA agreeing) at 108. Those principles were more recently endorsed in *Riccardi v Riccardi* [2013] NSWSC 1655 at [7]:

> or by virtue of the proof of other matters which establish that the executor was not a fit and proper person to carry out the duties he had sworn to perform.

[66] As that later case established, it is not necessary for the Court to be satisfied that the grant has been effectively rendered useless. Where the threat to the due and proper administration of the estate arises out of deliberate default by the administrator, the case for revocation is clear. *Lubis v Walters*[39] from this Court was such a case. In that matter, Angel J revoked the grant of administration to a person who, in paying to himself the cash assets of the estate in ignorance of his statutory duties and without reference to the interests of creditors or others, committed "a serious dereliction of duty" demonstrating unfitness for office. Even where the defaults are sought to be explained on the basis of a misunderstanding of the relevant duties, the extent of the misunderstanding or default may operate to cast doubt on the administrator's fitness to act. The nature and quality of the defendant's conduct are to be assessed in light of those principles.

[67] On 1 September 2017, the plaintiff's solicitors put the defendant on notice that the deceased's son claimed the sole beneficial entitlement to the deceased's estate and had responsibility for applying for a grant of letters of administration. On 18 September 2017, the plaintiff's solicitors put the defendant on notice concerning the significance of the location of the deceased's assets to the grant of administration. On 28

39 *Lubis v Walters* [2009] NTSC 23.

September 2017, the plaintiff's solicitors put the defendant on notice that the deceased's son intended to bring an application for a grant of letters of administration in the court of appropriate jurisdiction.

[68] As already described, by correspondence dated 3 October 2017 the defendant avoided any engagement on those issues by reference to her emotional distress and the fact that the memorial service in Western Australia had not yet taken place. That response was disingenuous given that by that time the defendant had already instructed a solicitor[40] and made an Affidavit of Death[41] in obvious anticipation of an application for the grant of letters of administration. The defendant filed that application two weeks after her response. The defendant did not give the plaintiff specific notice of that application, and the only available inference is that she was seeking to cloak her intentions in that respect. Letters of administration were issued on 23 October 2017. The plaintiff's solicitors were made aware of the grant by January 2018, and notified an intention to apply for a revocation of the grant.

[69] As I have already described, the defendant's affidavit as applicant for the grant of representation was made on 17 October 2017. That affidavit identified the deceased's son, then aged 16 years, as one of the next of kin. She also deposed that the deceased had left an estate in

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40 The defendant's affidavit made on 20 December 2018 discloses that she first took advice from a solicitor in relation to the matter on 30 August 2017 and continued those instructions to 30 January 2018. Thereafter she engaged new solicitors.

41 The Affidavit of Death was made on 27 September 2017.

the Northern Territory, New South Wales and Western Australia with an estimated value of $157,530.69 with liabilities estimated at $127,315.45. In the Affidavit of Assets and Liabilities made on that same date, the defendant did not identify which, if any, of those assets were situate in the Northern Territory. The estimated net value of the estate was said to be $25,215.24 (allowing for a contingency sum for unknown creditors of $5,000).

[70] The plaintiff contends that the defendant misled the probate office by failing to inform the Court that none of the assets were situate in the Northern Territory; by deposing falsely that the deceased had an estate within the Northern Territory; by failing to inform the court that the assets listed in the affidavit were situate in Western Australia (except for cash on hand and employment entitlements owing, which were situate in New South Wales); and by failing to depose to facts relevant to the ascertainment of the deceased's domicile. I am unable to conclude for the purposes of this application that the defendant intended to mislead the Court in those respects. The failure to be more specific in relation to the nature and proportion of the deceased's estate in the Territory is more readily attributable to laxity or misunderstanding, and there was no obligation on the defendant as applicant to make any deposition as to domicile in the circumstances.[42]

42 As already footnoted, r 88.11 of the *Supreme Court Rules* provides that where it appears in a proceeding for a grant that the deceased was domiciled out of the Territory the Court may require evidence of the

[71] The plaintiff next contends that the defendant failed to disclose to the Court the true value of the estate in order to ground a deposition in the Affidavit of Assets and Liabilities that because the value of the estate was less than $350,000 she was the "Person Entitled" to it. It is said that failure was compounded by the defendant's deposition in the Affidavit of Applicant made on 17 October 2017 that, "I am not aware of any claims against the estate other than those set out in the affidavit of assets and liabilities filed in this proceeding".

[72] While it is correct to say that at the time that deposition was made the defendant was clearly and recently on notice that the deceased's son asserted a beneficial entitlement to the estate, that deposition was made in accordance with the requirement in r 88.24(1)(b)(x) to furnish details of the applicant's knowledge of claims against the estate. The reference to "claims" in that context is directed to claims by creditors and the like, rather than to the persons entitled or said to be entitled in the distribution of the estate. In that latter respect, the defendant deposed in the same affidavit to the ages and relationships of the deceased's surviving next of kin, including the deceased's son. However, it is true to say that the affidavit did not identify the deceased's son as a person claiming entitlement in the distribution of the estate, and the affidavit material made no reference to the challenge

domicile of the deceased. There is no anterior obligation on an applicant. The plaintiff contends that had the Court known the facts in relation to domicile it would not have granted letters of administration to the defendant. That might be considered unlikely given the depositions concerning the defendant's *de facto* status and the estimated value of the estate at the time the application was made.

to her status as the deceased's *de facto* partner. At the very least, the affidavit provided a paucity of information in relation to those matters.

[73] Returning then to the defendant's estimate of the size of the estate, the plaintiff says the value of the deceased's superannuation and death benefit entitlement was readily ascertainable prior to the time the Affidavit of Assets and Liabilities was made. This is apparent from the fact that the plaintiff's solicitors wrote to BT Superannuation on 3 October 2017 seeking details of the superannuation and death cover. BT Superannuation replied by email dated 4 October 2017 advising that the current value of the superannuation account was $116,619.82 and that insurance cover of $300,000 would be credited to that account if the claim was accepted and paid by the insurer in accordance with the terms of the policy. It is apparent from the Affidavit of Assets and Liabilities that the defendant was aware that the deceased's superannuation and death cover were with BT Superannuation.

[74] In the Affidavit of Assets and Liabilities the defendant gives estimates of $100,000 in respect of the death benefit and $20,000 in respect of the superannuation. The plaintiff contends that those estimates were critical in calculating the estimated net value of the estate to be in the order of $25,000 in order for the defendant to assert that she was the only person entitled to it.

[75] The plaintiff also draws attention to the fact that s 143 of the *Superannuation Act 1922* (Cth) protects superannuation entitlements from being applied or made available for the payment of estate debts. Similarly, ss 204 and 205 of the *Life Insurance Act 1995* (Cth) protect life insurance policies from being applied or made available to pay the debts of a deceased estate. On that basis the plaintiff says that properly advised, and had she made due enquiry, the defendant must have known that the value of the estate was worth well in excess of $350,000.

[76] The defendant seeks to explain how she derived those estimates and her enquiries of BT Superannuation at paragraphs [35] to [40] of her affidavit made on 25 January 2019.

[77] By email dated 31 August 2017, presumably in response to a telephone query from the defendant, BT Financial Group advised the defendant that to begin the settlement processes for the investment they required certain materials, including the client's Investor Number and a certified copy of the death certificate. That email advised further that until a certified copy of the death certificate was received account specific information such as balances could not be provided. By reply email dated 1 September 2017 the defendant provided the Investor Number, name, date of birth, date of death, account address and address for future correspondence.

[78] By email dated 25 September 2017, BT Financial Group advised the defendant that they still required a certified copy of the death certificate, a certified copy of the deceased's proof of age and a copy of the Coroner's final report. By reply email dated 30 September 2017, the defendant advised that she was meeting with a Darwin representative of BT Financial Group on 2 October 2017 in order to lodge certified copies of the death certificate and the deceased's proof of age. That correspondence also noted that the Coroner's final report was still pending, and that the defendant had made application to this Court for a grant of administration, and that she intended establishing a bank account in the name of the estate of the Late Paul McArdle for administration purposes.

[79] By further email dated 3 October 2017, the defendant advised BT Financial Group that post-mortem reports might take several months to be finalised and that the police brief of evidence was not expected to be filed before mid-November 2017. The Coroner could only determine whether further enquiries were necessary upon a review of those materials. The defendant asked for the claims to be processed on the basis of the Coroner's preliminary findings. By reply email dated 4 October 2017, BT Financial Group advised that the insurer required the final Coroner's report in order to determine the application of various exclusions on the policy. That included a need to investigate the deceased's medical history. The Case Manager requested a copy of the

police brief of evidence on the basis that it might be sufficient to meet the insurer's needs.

[80] By email dated 3 January 2018, the defendant attached a copy of the police brief of evidence from the coronial proceedings and noted that the insurer had been provided with certified copies of the documents requested, including the death certificate, a death claim form, a payment of benefit form and the Letters of Administration issued by this Court. That email then requested "specific details regarding the Superannuation Investment amount (including any Death Benefit amount)" for the deceased.

[81] By email dated 4 January 2018, BT Financial Group advised that a copy of the Police Report had been forwarded to the insurer, which would advise whether further information was required. That email also advised that the current value of the superannuation account was $121,059.41, and that the insurance cover was in the amount of $300,000 if the claim was accepted and paid by the insurer. That email also noted that the Letters of Administration stated that the value of the deceased's estate within the jurisdiction was promised not to exceed the sum of $157,530.69. BT Financial Group queried why that amount was included in the Letters of Administration in circumstances where the total benefit would exceed that amount in the event the insurer accepted the claim.

[82] By email dated 17 January 2018 the defendant advised that at the date of the application for administration the investment details and death cover had not been disclosed to her by the BT Financial Group, and sought that information as a matter of priority so that the estimated value of the estate could be revised.

[83] A number of observations may be made in that respect. First, the defendant was advised by the BT Financial Group on 31 August 2017 that account specific information could be provided once a certified copy of the death certificate was received. The requests for other materials made by the BT Financial Group, then and subsequently, related to the finalisation of the settlement process and the question of whether the insurance claim would be accepted. Secondly, the death certificate issued on 19 September 2017 and was in possession of the defendant at some time prior to 27 September 2017 when it was annexed to the Affidavit of Death. Thirdly, when the plaintiff's solicitors wrote to BT Superannuation on 3 October 2017 seeking details of the superannuation and death cover they provided a copy of the death certificate and were advised of the current value of the superannuation account and the insurance cover the following day. At all times after 27 September 2017 at the latest, it was open to the defendant to do the same thing. Fourthly, the Affidavit of Assets and Liabilities was not made until 17 October 2017, some three weeks after the defendant came into possession of the death certificate.

[84] At paragraph [35] of her affidavit made on 25 January 2019 the defendant deposes that "[a]t the time I signed the Affidavit of Asset and Liabilities I had tried to obtain information from BT Life regarding the amount in BT Life". That assertion must be seen in light of the situation as I have described it in the immediately preceding paragraph. At paragraph [36] of her affidavit the defendant deposes that BT Life "would not release any information regarding the amount of BT Life until such time as they had a certified copy of the Death Certificate, certified copy of the member's proof of age and the Coroner's Findings or Report". In the following paragraph the defendant deposes that she "made every effort to have [BT Life] disclose to me the amount of the payout". Those assertions are incorrect. At paragraphs 38 to 40 of her affidavit the defendant says that she derived the estimated values contained in the Affidavit of Assets and Liabilities utilising the online insurance estimator on the BT Life website using her best estimates as to the length of the deceased's contributory service.

[85] As a result of those various failings and misunderstandings on the part of the defendant, the estimates contained in the Affidavit of Assets and Liabilities grossly understate the actual entitlements. Again, however, I am unable to conclude for the purposes of this application that the defendant intended to mislead the Court in those respects. I think it more likely that the defendant misread the reply by the BT Financial Group to her communication on 31 August 2017, and as a result failed

to make further enquiry after the death certificate had been provided. However, the defendant's failure to make due and informed enquiry about the superannuation and death cover prior to making the Affidavit of Assets and Liabilities is, at the least, indicative of a degree of laxity in relation to her obligations as an applicant for the grant of administration.

[86] The issues concerning the defendant's conduct do not end there.

[87] Section 54 of the *Administration and Probate Act* provides that the real and personal estate of the deceased shall be assets in the hands of the administrator for the payment of duties, fees and debts in the ordinary course of administration. Section 55 of the Act also provides that the real and personal property of the deceased are assets for the payment of funeral, testamentary and administrative expenses, and the debts and liabilities of the deceased. However, in accordance with general law provisions, and as s 62 of the *Administration and Probate Act* makes explicit, the administrator holds the intestate estate on trust for the persons entitled to it. Section 96 of the *Administration and Probate Act* provides that where the administrator has given notice to send in claims against the estate, the administrator may at the expiration of the time specified in the notice distribute the assets of the estate among the persons entitled. That right is expressly subject to regard to the claims of which the administrator has notice.

[88] Following BT Financial Group's query concerning the estimate of the superannuation and insurance benefit in the Affidavit of Assets and Liabilities, the defendant made a further affidavit on 5 February 2018 and filed it in the probate proceedings. At paragraphs [18] to [20] of that affidavit the defendant deposed:

> I have communicated with the Creditors of the deceased. All creditor accounts have been closed and finalised by me. I have communicated with institutions and utilities such as Banks, Medicare, Telstra, Australian Taxation Office (ATO) and Superannuation companies for finalisation and settlement of the deceased's affairs with them.
>
> I have made arrangements to settle all accounts from the proceeds of the deceased's Estate.
>
> I have also corresponded with the solicitors for the Mother of the deceased's son on 31 October 2017, to advise her the deceased, PAUL MCARDLE would have wanted his Estate divided fairly between me and his son JAKE MCARDLE. I also said that once all the bills were paid, I would write to the solicitor about JAKE MCARDLE's inheritance.

[89] As will be seen, no such communication was subsequently made by the defendant. At paragraphs [21] to [29] of that same affidavit, the defendant went into an explanation concerning the understatement of the superannuation and insurance benefit, and advised that she was in the process of preparing an "updated Affidavit of Assets and Liabilities". It would not appear that any further affidavit was filed.

[90] As already described above, on 12 January 2018 the plaintiff's solicitors put the defendant on notice of the plaintiff's intention to apply for a revocation of the grant of administration. The basis for that

application was said to include that the defendant was not the deceased's *de facto* partner in the relevant sense. By letter dated 13 February 2018, the defendant's solicitors asserted her status as the *de facto* partner and expressed doubt that BT Super would pay any funds to the estate. The basis for that assertion is not apparent. That correspondence went on to state that in the unlikely event any such payment was made, the monies would be distributed in accordance with the Northern Territory intestacy rules.

[91] The defendant had initially opened a bank account with the People's Choice Credit Union in the name of the estate on 29 August 2017. In or about May 2018, the defendant opened a further bank account in the name of the estate at the Westpac bank. She says she did so because she understood BT Life to be connected to Westpac. The account was clearly opened in anticipation that the superannuation and insurance proceeds would be paid into that account. On 18 July 2018, BT Financial Group advised the defendant's solicitors that the deceased's superannuation benefits would be paid to the Westpac account in the name of the estate. On 8 August 2018, BT Financial Group advised the defendant's solicitors that the total benefit amount was $424,112.33, including insurance cover of $300,000, and that the amount had been fully withdrawn and transferred to the nominated bank account. The statement for the Westpac account shows that amount was credited to the account on 30 July 2018.

[92] Coincidentally, by letter dated 31 July 2018 the plaintiff's solicitors sought a response to their earlier query whether the defendant's solicitors had instructions to accept service of process seeking the revocation of the grant of administration. Having received no response by the deadline advised in that letter, the plaintiff's solicitors provided the defendant with a pre-suit letter dated 1 August 2018 in accordance with Practice Direction No 6 of 2009. That letter advised that the plaintiff would be seeking a revocation of the grant on the bases, *inter alia*, that the defendant was not the *de facto* partner of the deceased in the relevant sense, that the defendant was not a beneficiary of the deceased's estate, and that the Western Australian intestacy rules applied to the distribution of the estate by reason of the deceased's domicile.

[93] The defendant did not reply to that letter until 28 August 2018 through the agency of her solicitors. That reply denied the assertions in the correspondence from the plaintiff's solicitors. It also made a number of positive assertions which warrant mention. The first assertion was that the defendant would continue to administer the estate in accordance with her obligations under the *Administration and Probate Act*. The second assertion was that the deceased's son had no "further entitlement" other than under the Northern Territory intestacy rules, with which the defendant "fully intends to comply".

[94] By letter dated 29 August 2018, the plaintiff's solicitors provided the defendant's solicitors with a draft writ and statement of claim in order to identify the facts upon which the plaintiff would rely. The defendant's solicitors disputed those facts by letter dated 14 September 2018. Further correspondence was then exchanged.

[95] While that correspondence was in train, the defendant made the following payments and disbursements from the Westpac account in the name of the estate:

(a) a payment to herself in the amount of $187,000 on 24 August 2018;

(b) a payment to her solicitors, Withnalls Lawyers, in the amount of $12,818.41 on 24 August 2018;

(c) a payment to herself in the amount of $200,000 on 4 September 2018;

(d) payments to Withnalls Lawyers in the amounts of $5,000 and $167.27 on 21 September 2018;

(e) a payment to a Tim Mills in the amount of $1,500 on 21 September 2018, recorded to be in repayment of a Withnalls Lawyers account;

(f) a payment to Withnalls Lawyers in the amount of $11,536.69 on 28 September 2018;

(g) payments to Withnalls Lawyers in the amounts of $4,256.34, $2,191.89 and $619.98 on 8 October 2018;

(h) a payment to herself in the amount of $9,000 on 9 October 2018;

(i) a payment to Withnalls Lawyers in the amount of $5,000 on 22 October 2018; and

(j) payments to Withnalls Lawyers in the amounts of $27,000, $5,197.50 and $4,063.29 on 15 November 2018.

[96] During that period the defendant made payments to herself in the amount of $396,000 in circumstances where she was clearly on notice concerning a challenge to her entitlement as a beneficiary, or, if a beneficiary, the extent of that entitlement. The defendant repaid into the Westpac account $50,000 in two instalments in September 2018 and a further $50,000 in two instalments in October 2018. As is discussed further below, the reasons for those repayments are unclear.

[97] During that same period, the defendant paid in excess of $75,000 from the estate in respect of professional fees charged by Withnalls Lawyers. The vast bulk of those fees were charged in respect of the challenge to her entitlement as a beneficiary and her status as personal representative, rather than in procuring any benefit to the common property represented by the estate.

[98] The payment of $27,000 made on 15 November 2018 would appear to be on trust for anticipated work which had not at that stage been undertaken by those solicitors. As will be seen, that payment was

made on the day the interlocutory application first came before this Court.

[99] The payments to Withnalls Lawyers in the amounts of $4,256.34, $2,191.89 and $619.98 made from the estate account on 8 October 2018 were in respect of debt recovery services provided by the firm to a company owned by the defendant's brother. In her affidavit made on 20 December 2018, the defendant deposes that those monies were "paid in error" and would be repaid to the estate account. There is no attempt made by the defendant or her solicitors to describe the nature of that "error". It may be noted in that respect that the accounts were addressed to the company rather than to the defendant, and were clearly marked to be in relation to debt recovery services for that company rather than in relation to the estate of the deceased.

[100] The Writ was filed on 11 October 2018. The defendant's solicitors wrote to the plaintiff's solicitors by letter dated 2 November 2018. Leaving aside introductory matters, the letter commenced, "We advise that the Estate was distributed some six months ago". A number of observations may be made about that representation. First, it was not reflective of the pattern of payments made from the estate account between August and October 2018. Secondly, and even assuming the Northern Territory intestacy rules had application, it necessarily constituted a concession that the estate had been distributed in a

manner that deprived the deceased's son of his beneficial entitlement.[43] Thirdly, that representation blithely ignored communications between the solicitors over the preceding three months concerning a challenge to the defendant's entitlement, which included an express representation by the defendant's solicitors that she would "continue to administer the Estate in accordance with her obligations under the *Administration and Probate Act*".

[101] The representation concerning distribution no doubt led to the filing of the interlocutory summons on 8 November 2018, by which the plaintiff sought an order that the defendant pay all moneys forming part of the estate into court. When the interlocutory application came before the Court on 15 November 2018, the defendant consented to an order that she repay the moneys she had paid to herself out of the assets of the estate within two days, and that she account pursuant to s 89 of the *Administration and Probate Act* for all moneys received and paid out by her as administrator of the estate within seven days. On the day the application came on for hearing the defendant made the last three payments to Withnalls Lawyers in the total amount of approximately $36,000. In compliance with the consent order, the defendant paid all she had remaining of the estate funds into an interest-bearing account. That amount was $287,893.75.

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43 On the defendant's estimation, the net value of the estate is in the order of $370,000. Even if it was accepted that the Northern Territory intestacy rules have application, the deceased's son would have had some beneficial entitlement.

[102] The defendant seeks to explain the reasons for the payments she made to herself out of the Westpac account in the name of the estate in her affidavit made on 25 January 2019. At paragraph [19] of that affidavit she deposes:

> After receiving correspondence for over a year from [the plaintiff's solicitors] which made me feel worn down I feared that the Westpac Account might be frozen and I would not have funds to pay Estate expenses I therefore transferred the sum of $187,000 on 24 August 2018 and on 4 September 2018 $200,000 to the ANZ Account which I will discuss later in this affidavit.

[103] The reference to "Estate expenses" in that paragraph must primarily be a reference to fees which might be charged in the future by her solicitors in defence of her claim to a beneficial entitlement. So much is apparent from the fact that in the affidavit the defendant made on 5 February 2018 in the probate proceedings she deposed that all creditor accounts had been closed and finalised. That explanation is also at odds with the representation made by her solicitors in November 2018 that the estate had been distributed.

[104] At paragraphs [26] to [33] of her affidavit made on 25 January 2019 the defendant deposes that the amounts of $187,000 and $200,000 taken from the account in the name of the estate in August and September 2018 respectively were transferred into her personal ANZ account which she had held for some 20 years. She deposes further that upon advice from her solicitors she transferred $100,000 back into the estate account in four separate payments over the course of

September and October 2018. There is no explication of the substance of that advice or the reason for the repayment. The defendant says that the funds, once transferred to her ANZ account, were used only to pay estate costs and debts and "were not used inappropriately". It is not clear to what costs and debts that reference is made.

[105] That attempt at justification notwithstanding, in paying to herself the bulk of the cash assets of the estate in breach of her duties as personal representative, and without regard to the existing challenge to her beneficial entitlement, the defendant committed a serious dereliction of duty which demonstrated her unfitness for the office of personal representative. It is also of note that the defendant did not repay those monies until the plaintiff made interlocutory application for a remedy to the situation. Even if it is accepted that the defendant misunderstood her relevant duties, or was poorly advised, the extent and fundamental nature of the default in this case leads to the same conclusion of unfitness. That is particularly so in circumstances where the payment she made to herself, leaving aside any contest concerning her *de facto* status, well exceeded her beneficial entitlement if the Western Australian intestacy rules were found to have application.

[106] This conclusion is not based upon the premature determination of any contested issue of fact. It is based on the defendant's own admissions and depositions. That conclusion is reinforced by two further matters. The first relates to the payments made to Withnalls Lawyers directly

from the funds of the estate, and the second relates to the manner in which the defendant has sought to account for the monies paid out of the estate.

[107] I turn first to the payments made in respect of legal expenses. The defendant submits that the proceedings were directed not only to her beneficial entitlement, but also to the proper jurisdiction for the grant of letters of administration and which substantive intestacy rules would apply. So characterised, "she was sued as an incident of her administration of the estate". The submission follows that in the face of that challenge the defendant was entitled to seek legal representation for and on behalf of the estate as personal representative, that she could not have obtained legal representation to defend that challenge without paying legal representatives for that purpose, and she was therefore entitled to use estate funds in securing that representation.

[108] That submission fails to recognise that the whole purpose and substance of the challenge was to the defendant's beneficial entitlement, or the extent of that entitlement, and the mechanisms properly open to a personal representative to seek the Court's authorisation for the defence of proceedings on behalf of the estate. It also wholly fails to recognise the conflict between the defendant's duty and interest to which the plaintiff's claim gave rise.

[109] The entitlement to an indemnity for expenses and liabilities properly incurred in the course of the administration of an estate recognises that a personal representative is personally liable for those expenses and liabilities. The application of the common property represented by an estate to those expenses and liabilities is subject to curial oversight. A personal representative is not to be deprived of expenses incurred in the administration of the estate, including legal costs, if they were incurred acting reasonably in defence of a claim related to the estate. However, if the administrator is found to have acted unreasonably, those costs are not properly allowed out of the estate. If those expenses have already been taken from the estate prior to the consideration of that matter by the Court, the beneficiaries may have no practical or fruitful recourse for the recovery of those monies.[44]

[110] Rule 54.02 of the *Supreme Court Rules* provides a mechanism by which a proceeding may be brought for the determination of a question arising in the administration of an estate.[45] For the reasons described in the preceding paragraph, one of the most common purposes for which personal representatives seek the Court's advice or direction under that mechanism is for a determination of whether proceedings should be initiated or defended on behalf of the estate, with the

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44 That will necessarily be the case in these circumstances if the defendant is found not to be the *de facto* partner of the deceased in the relevant sense.

45 That mechanism confers jurisdiction to provide advice or directions to personal representatives without need for the commencement of an administration action.

obvious expense and liability which might be incurred as a result. As the courts have observed, in cases of doubt the proper course is for the personal representative to seek the Court's direction as to whether or not an action should be brought.[46] The same principle applies to the defence of an action, failing which the personal representative will not be protected from any claim by a beneficiary arising from the course undertaken.

[111] The reason for that approach is founded in the personal representative's duty to protect and preserve the estate for beneficiaries as much as to protect the personal representative from personal liability. Where there is any doubt, an application for directions is the position prudently and properly adopted in the case of substantial disputes involving a debt or action in contract or tort by or against a third party with no beneficial interest in the estate. That principle applies *a fortiori* where the question involves a hostile dispute between a personal representative and beneficiaries, and with even greater force where the personal representative is also a beneficiary so as to give rise to some conflict between the duty as administrator and the interest as a beneficiary.[47] In fact, the existence of such a conflict may bear upon the administrator's suitability to continue in office.

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46 *Re Atkinson (deceased)* [1971] VR 612 at 615; *Re Beddoe* (1893) 1 Ch 547 at 558, 562.

47 In those circumstances the application for advice or direction will not be entertained on an *ex parte* basis as all parties with an interest should have notice and opportunity to make submissions to the court: see *Harrison v Mills* [1976] 1 NSWLR 42 at 45; *Hartigan Nominees Pty Ltd v Rydge* (1992) 29 NSWLR 405 at 440.

[112] In *Monty Financial Services Ltd and Anor v Delmo*[48], the Supreme Court of Victoria considered an application for the removal of an executor on the basis that he was unfit to act by reason of conflict of interest. The executor was a beneficiary in equal shares of the residue of the testator's estate, and also claimed to be a creditor of the estate in respect of certain extensions and improvements made to the testator's residence prior to her death. The asserted unfitness was based on the proposition that the defendant would be faced with and obliged to resolve a conflict of duty and personal interest concerning the debt he claimed was owed to him by the estate, and that this resolution could adversely affect the interests of the other residuary beneficiary. The Court's conclusion on the critical issue was that unfitness to act comprehends a situation in which an executor has a conflict of duty and interest in carrying out his executorial duties.[49]

[113] In the course of his reasons, Ashley J conducted an extensive review of the authorities dealing with the meaning and scope of unfitness in this context, and the history of the relevant legislative provision. The Court dealt first with an earlier and restrictive construction of "unfitness" as follows.

> That done, the few cases which have directly raised the interpretation of s 34(1)(c) all involved misconduct or neglect of duty by the executor in the period between grant of probate and

48 *Monty Financial Services Ltd and Anor v Delmo* [1996] 1 VR 65.

49 *Monty Financial Services Ltd and Anor v Delmo* [1996] 1 VR 65 at 82.

> application for removal. The misconduct or neglect was constituted by matters such as unwarranted delay in administration of the estate, failure to communicate with beneficiaries, failure to account, and unreasonable delay in paying beneficiaries their entitlement. *Turner* apart, the authorities are consistent in holding that unfitness is demonstrated by the presence of such a factor. I find it impossible to accept that serious dereliction of duty as an executor does not make that person unfit to hold the office. It cannot matter whether the dereliction is born of intent, of carelessness, or of incompetence. In each case the actual or potential deleterious effect upon the estate and the beneficiaries is the same. In consequence, in my respectful opinion, the restrictive construction advanced in *Turner* must be rejected; although (subject to any statutory provisions to contrary effect) the matters falling within that narrow construction would also constitute unfitness.[50]

[114] The Court then went on to consider, by way of analogy, the principles applying to the removal of trustees. Reference was made to authority from the Privy Council and the High Court to the effect that the question of removal was to be guided by the welfare of the beneficiaries, the security of the trust property, and the faithful and sound exercise of the powers of the office.[51] That determination is largely discretionary. On the basis of those authorities, and there being no relevant distinction between trustees and personal representatives for this purpose, Ashley J concluded that a trustee (and so a personal representative), could be removed where a conflict of interest and duty

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50 *Monty Financial Services Ltd and Anor v Delmo* [1996] 1 VR 65 at 73.

51 *Monty Financial Services Ltd and Anor v Delmo* [1996] 1 VR 65 at 78-79, citing *Letterstedt v Broers* (1884) 9 App Cas 371 at 385-387; *Miller v Cameron* (1936) 54 CLR 572 at 575, 579 and 580-581. Reference was also made to *Passingham v Sherborn* (1846) 9 Beav 424, and *Hunter v Hunter* [1937] NZLR 794; [1938] NZLR 520.

arose, at least where that conflict is capable of testing the capacity of the administrator to act correctly.

[115] The Court then went on to consider a line of authority dealing with disputes between claimants to the administration of an intestate estate. Those authorities established that a grant may be refused where the prospective administrator has some familial or other conflict, or where the prospective administrator has an indirect interest in legal proceedings commenced on behalf of the estate, and it is the risk or undesirable suspicion that the interests of the estate might not prevail which is determinative in the decision. The same principles have application, with greater strength, where the interest is an immediate beneficial interest in the estate rather than an interest one step removed.[52]

[116] The review undertaken in *Monty Financial Services Ltd and Anor v Delmo* also considered the decision in *Dare v Darcy; Darcy v Dare* (unreported, Teague J, 10 November 1993). That matter involved the estate of a deceased who died leaving a *de facto* wife and adult son. Their respective entitlements under the will could vary considerably depending on the approach taken by the executor to transactions undertaken by the deceased in his lifetime. The *de facto* partner did not make application for a grant of probate on advice concerning the

52 *Monty Financial Services Ltd and Anor v Delmo* [1996] 1 VR 65 at 80-81, citing Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*, 17th ed, at 351; *Budd v Silver* (1813) 2 Phill 115; *In the goods of Mary Carr* (1867) LRP and D 291.

position of conflict in which she was thereby placed. She consented to a grant of probate to the son, but only on condition that he make application to the court for directions concerning the administration. He did not do so, and the *de facto* partner subsequently brought an application for his removal. In determining that application, Teague J made the following observations:

> Because of the actual and potential conflicts of interest which confronted him, [the executor] should not have applied for probate, but should, like [the *de facto* partner], have declined to apply. Given the terms of the will, the state of the deceased's affairs and the nature of his relationship with [the *de facto* partner], he ought to have appreciated that he could not properly act as executor and pursue his own best interests.
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> …
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> [The executor] chose to ignore any suggestion that he ought not to become and remain executor despite the conflicts of interest that had to result. His position of conflict was highlighted by the action of [the *de facto* partner] in not applying for probate because of her position of conflict.

[117] This is not to say that a person with a beneficial entitlement is precluded from making application for a grant of letters of administration. Section 22 of the *Administration and Probate Act* contemplates expressly that the Court may and ordinarily should grant administration to the spouse or *de facto* partner or one of the next of kin, which are all classes likely to have a beneficial entitlement under the intestacy rules. It is only to say that circumstances may arise, either before or following the grant of administration, which create a conflict of duty and interest. Those circumstances include where the

conflict necessarily requires a decision by the personal representative whether to accept or reject his or her own assertions concerning a matter relevant to entitlement. That conflict may be such as to require an application for directions from the Court, and action taken by the administrator in the face of that conflict may be such as to warrant removal.

[118] The material circumstances presenting in this case following the grant were as follows. In January 2018, the defendant was put on notice of the plaintiff's intention to apply for a revocation of the grant of administration on the basis that she was not the deceased's *de facto* partner in the relevant sense. In July 2018, the defendant was paid the total benefit amount of $424,112.33. In August 2018, the defendant received formal pre-suit correspondence asserting that the defendant was not the *de facto* partner of the deceased in the relevant sense, that the defendant was not a beneficiary of the deceased's estate, and that the Western Australian intestacy rules applied to the distribution of the estate by reason of the deceased's domicile.

[119] After that time, the defendant made the payments from the funds of the estate to herself and to her solicitors which I have previously described. At the time those payments were made, it should have been clear to the defendant that there was a conflict between her duty as administrator and her interest as a potential beneficiary. Continuing in the role of administrator in the face of the challenge which had clearly

been notified would require her to determine the validity of her own assertions concerning the existence of a *de facto* relationship and the deceased's domicile.

[120] The question of payments by personal representatives to solicitors acting on their behalf in removal or administration proceedings was considered by the Supreme Court of Victoria in *Skaftouros v Dimos*.[53] That case involved administration proceedings to remove an executor. One of the complaints made in relation to the executor's conduct was that he had appropriated $45,440 of the estate's money to pay his own legal expenses in defending the proceeding. The Court made the following findings in that respect (citations omitted):[54]

> The plaintiffs submitted that the defendant had no right prior to the determination of the case to reimburse himself from the estate for counsel's fees and other expenses incurred in his defence of this proceeding. The plaintiffs referred to *Yunghanns v Candoora No. 19 Pty Ltd (No. 2)* and, in the context of corporate oppression proceedings, to cases where directors sought to defend their conduct using the funds of the company.
>
> It was submitted on behalf of the defendant that he was entitled to reimburse himself or pay these fees and expenses by reason of s 36(2) of the *Trustee Act 1958*.
>
> Senior counsel for the defendant cited *National Trustees Executors and Agency Company of Australasia Ltd v Barnes* as authority for the proposition that costs incurred in proceedings by executors in defending their conduct were, within the meaning of the relevant section of the *Trustee Act*, "incurred in or about the execution of the trusts or powers". Although the decision supports that proposition (at least if those costs were properly incurred) I do not think that it directly or indirectly supports the further

53 *Skaftouros v Dimos* [2002] VSC 198.

54 *Skaftouros v Dimos* [2002] VSC 198 at [206]-[212].

> proposition that executors are entitled as of right to take such costs from the estate in anticipation of success in the proceeding or in anticipation of obtaining such an order in the proceeding, even if unsuccessful. Although the High Court allowed the executor's appeal, I do not think that the Court acceded to the submission put on the executor's behalf that the executor was entitled to his costs and it was "not a matter of discretion for the court".
>
> The position as to administration proceedings is set out in the leading English text as follows:
>
> > " … the court will itself decide at the conclusion of [administration] proceedings whether the representative is to get his costs out of the estate. If he has acted reasonably the representative is not to be deprived of his costs out of the estate."
>
> In my opinion a proceeding pursuant to statute seeking removal of an executor stands in a similar position to an administration proceeding: it is for the Court to decide at the conclusion of the proceeding (or other appropriate time) whether the executor is to get his costs out of the estate.
>
> In my opinion it was improper for the defendant to take his costs from the funds of the estate before this proceeding was concluded and any appropriate orders as to costs were made in his favour.
>
> Further, the relative speed with which the defendant's costs were paid or reimbursed out of the estate might significantly be contrasted with his lengthy delays in the payment of other parties' costs and of the pecuniary legacies and with his failure to pay a relatively small amount to put Unit 2, Whitby Street in a lettable condition.

[121] The decision to remove the executor was subsequently affirmed by the Victorian Court of Appeal. The leading judgment was delivered by Dodds-Streeton AJA (Winneke P and Batt JA concurring), who said in that respect (citations omitted):[55]

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55 *Dimos v Skaftouros* (2004) 9 VR 584 at [164]-[165]. The Court of Appeal also endorsed the analysis by Ashley J in *Monty Financial Services Ltd and Anor v Delmo* [1996] 1 VR 65, which had previously also been endorsed in *Fysh v Coote* [2000] VSCA 150.

> The appellant contended that the trial judge was not entitled to take into account that Mr Dimos took his costs out of the estate, contending that he had an indemnity pursuant to the principles of *National Trustees Executors & Agency Company of Australasia Ltd v Barnes* to which he could resort without waiting until the removal application was determined.
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> In *National Trustees Executors and Agency Company of Australasia Ltd v Barnes* the High Court recognised the principle that a trustee is entitled to be indemnified out of the trust estate for all proper costs, charges and expenses incident to the execution of the trust, which could include the defence of a suit to remove the trustee. In Barnes, the trustees, having successfully defended such a suit, were "clearly entitled" to their costs. While Williams J. (with whom Rich, A.C.J. agreed) stated that even a trustee who failed in litigation might be indemnified for his costs, he acknowledged that the governing question was whether the costs were properly incurred. In my view, *Barnes* is not authority for the proposition that Dimos was entitled to take his costs in circumstances where, as the learned trial judge found, his resistance to removal was unjustified. The indemnity depends on the conclusion that the costs were properly incurred in the administration of the estate.

[122] Similar observations may be made about the circumstances presenting in this case. At the very least, having regard to the clear conflict which presented and the relatively large sum of money subsequently appropriated by the defendant for legal expenses, she should have made application to the court for directions in relation to the defence of the proceedings and an authorisation to expend estate monies for that purpose before proceeding to transfer more than $75,000 of trust money to her solicitors. Again, that conclusion is not based upon the premature determination of any contested issue of fact. It is based on the patent conflict which manifests in this case, and on the defendant's own admissions and depositions.

[123] The defendant's present assertion that she could not afford to pay for legal representation to defend that challenge without using estate funds could have been addressed in the context of that application. One further consequence of that application would have been to bring her conflict of interest to the Court's attention. For the reasons I have described, that conflict raises real issues concerning the defendant's resistance to removal.

[124] It is no answer to that finding that the defendant was acting on legal advice. The Court is not privy to that advice or what it contained, and the solicitors were not represented in the proceedings. Indeed, they continue to act for the defendant in defending the application for summary judgment, and in the proceedings generally. However, I note in this respect that the defendant's written submissions in relation to the use of estate funds for legal expenses state that her solicitors "strongly urged [her] to defend the claims made against the estate". It is not apparent whether they also urged her to pay their fees out of the funds of the estate without seeking the Court's authorisation, or had knowledge concerning the source of the funds, and that question remains open.

[125] I turn then to the manner in which the defendant has sought to account for the monies paid out of the estate. Given the conclusions I have reached in relation to the other matters, little needs to be said about this matter at this particular stage. When the interlocutory application

first came before the Court on 15 November 2018 the defendant consented to an order requiring her to provide an account pursuant to s 89 of the *Administration and Probate Act* for all moneys received and paid out by her as administrator of the estate within seven days. No adequate accounts were filed.

[126] The defendant appears to have conceded that was the case, as she consented to a further order in relation to filing accounts relating to the administration of the estate when the application came back before the court on 29 November 2018. That further accounting was also inadequate for the reasons generally set out at Annexure JB3 to the affidavit of James Barrett made on 11 January 2019.

The appropriate course

[127] By both the Writ and the interlocutory application the plaintiff seeks orders that the grant of letters of administration to the defendant be revoked. There are two courses open to the Court in these circumstances. The first course is to revoke the grant of administration pursuant to s 26 of the *Administration and Probate Act*, either with or without making a further grant. The second course is to discharge or remove the administrator and to vest the estate in a new administrator pursuant to s 41 of the *Administration and Probate Act*.

[128] The first course is the only one available where there has been some fundamental error in the grant. That is not the case here for reasons I

have already described. Both courses are open where the administration of the estate has been put in jeopardy by reason of acts or omissions on the part of the administrator or by virtue of matters personal to the administrator. As the cases I have cited demonstrate, the same test of "unfitness" has application to both courses.

[129] In the present case I consider that the interests of the proper administration of the estate and the beneficiaries commend the second course. That will save the expense of any further application for the grant of letters of administration, whether in this jurisdiction or in Western Australia. While the deceased's son has expressed the desire to make such an application, I consider that the grant of letters of administration to the deceased's son would also be inappropriate. It would place the son in the potential position of having to make some determination concerning the deceased's domicile and the validity of the defendant's claim in circumstances where those determinations will bear fundamentally upon his beneficial entitlement. I also appreciate that the conduct of the administration and administration proceedings in the Northern Territory is less convenient for the plaintiff, but that is where the balance of conveniences lies.

[130] The appointment of the Public Trustee for the Northern Territory as administrator *pedente lite* will permit the questions of the deceased's domicile and the defendant's *de facto* status to be determined, in the context of this proceeding if necessary.

Disposition

[131] I make the following orders:

1. In the grant of letters of administration of the estate of Paul McArdle (deceased) made in common form on 24 October 2017, Karen Louise Arkell is removed as administrator pursuant to s 41 of the *Administration and Probate Act*.
2. Karen Louise Arkell shall within two days of the authentication of these orders deposit in the Registry of this Court the original letters of administration granted to her.
3. The Public Trustee for the Northern Territory is appointed as administrator *pedente lite* of the estate of Paul McArdle (deceased).
4. From this date all property in the estate of Paul McArdle (deceased) vests in the Public Trustee for the Northern Territory.
5. Karen Louise Arkell shall within two days of the authentication of these orders transfer control of the interest-bearing trust account in the name of the estate of Paul McArdle (deceased) to the Public Trustee for the Northern Territory, taking such steps as the Public Trustee requires for that purpose.
6. Karen Louise Arkell shall within two days of the authentication of these orders deliver to the Public Trustee for the Northern Territory all assets of the estate within the Northern Territory of Australia not yet converted to cash, and advise the Public Trustee

of the location of all assets of the estate outside the Northern Territory of Australia not yet converted to cash.

7. Karen Louise Arkell shall within two days of the authentication of these orders deliver to the Public Trustee for the Northern Territory all accounts and other documents in her possession relating to the administration of the estate.

8. The costs of this application are reserved.

[132] I will hear the parties and the Public Trustee in relation to any further and consequential orders.
