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**UNIFORM CIVIL PROCEDURE RULES:
SUBMISSION ON PROBATE AND
ADMINISTRATION**

Miscellaneous Paper
MP 30

Queensland Law Reform Commission
February 1998

The short citation for this Miscellaneous Paper is Q.L.R.C. M.P. 30
Published by the Queensland Law Reform Commission, February 1998
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ISBN: n/a

Printed by: Queensland Law Reform Commission

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Queensland Law Reform Commission

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6 February 1998

The Executive Director
Policy and Legislation Division
Department of Justice
18th Floor, State Law Building
50 Ann Street
BRISBANE Q 4000

Dear Sir,

Uniform Civil Procedure Rules - Consultation Draft Supplement - Probate and Administration & Costs

Thank you for your invitation to comment on the proposals in the Draft Supplement. The Commission does not have a current reference which would cover issues relating to costs so our comments have been restricted to probate and administration.

The Queensland Law Reform Commission has an interest in the draft probate rules from its work on the Uniform Succession Laws Project and, in particular, the current stage of that project - the Administration of Estates. It is anticipated that the National Committee for Uniform Succession Laws will be able to present its final report to the Standing Committee of Attorneys General on the Administration of Estates by the end of 1998. A number of issues which are covered in the current Queensland Probate and Administration Rules and the draft probate rules, will be covered by the National Committee's review of the administration of estates.

The Commission has discussed the draft probate rules and offers the following comments and suggestions for your consideration:

1. Automatic recognition of interstate grants of probate

The draft rules do not provide for the automatic recognition of interstate grants of probate. All interstate grants need to be resealed in Queensland before they are effective in this jurisdiction.

Although the possibility of automatic recognition has been discussed over a number of years it is yet to be seriously addressed at a national level. The National Committee for Uniform Succession Laws will be making recommendations relating to the automatic recognition of interstate grants of probate in its report to the Standing Committee of Attorneys General on the Administration of Estates later in 1998.

Suggestion: That this matter be deferred until the National Committee for Uniform Succession Laws has made recommendations on automatic recognition to the Standing Committee of Attorneys General.

2. Draft rule 7(1)(b) states, in part:

[An affidavit in support of an application for probate or letters of administration with the will must] ... identify the applicant as being the executor named in the will

Wills made by solicitors often refer to the executors of the will by reference to a position rather than a name - for example, as two of the firm's partners to be designated by the senior partner of the firm. The executors are not actually identified in the will. This has the practical advantage that there will rarely be a shortage of executors.

Suggestion: That draft rule 7(1)(b) include after the words "executor named in" and before the words "the will", the words "or designated by", as currently appear in RSC O71 r11(1).

3. Draft rule 7(1)(c) states:

if a certificate of the testator's death is issued under the *Registration of Births, Deaths and Marriages Act 1962* - have attached to it a certified copy of the certificate.

This provision is too limited. It only refers to certificates issued pursuant to the Queensland legislation. It should refer to the relevant legislation in other Australian jurisdictions. Section 6(2) of the *Succession Act 1981* (Qld) contemplates that a grant may be made in circumstances where the deceased does not die in Queensland:

The court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that the deceased person left no estate in Queensland or elsewhere or that the person to whom the grant is made is not a resident or domiciled in Queensland. [emphasis added]

Suggestion: That draft rule 7(1)(c) not be limited to certificates issued under Queensland legislation. The Commission notes that RSC O71 r11(3) is not limited to a death certificate that issues under the Queensland Act.

4. Draft rule 13(b) reads:

if a certificate of the deceased's death is issued under the *Registration of Births, Deaths and Marriages Act 1962* - have attached to it a certified copy of the certificate.

Again, this provision is too limited. It should not matter in which jurisdiction the certificate of death was issued.

Suggestion: That draft rule 13(b) not be limited to certificates issued under Queensland legislation.

5. End of Part 4

There is no equivalent in this Part to the current Order 71 rule 34 which reads:

Limited and Special Administration

In the case of limited or special administration, the grant shall set forth the circumstances under which the special or limited grant is made.

If an order is limited (for example, if a person is appointed administrator until a minor otherwise entitled to a grant becomes of age), it is an advantage to administrators and others to have the circumstances of the limitation set forth. If there are limitations, these should be stated in the grant.

Suggestion: That the draft rules include a provision along the lines of the current Order 71 rule 34.

6. Draft rule 24(4) reads:

The caveat takes effect on the date of the filing and remains in force for 6 months.

There is no reference to a **renewal** of a caveat as under the current Order 71 rule 52 which reads:

A caveat shall remain in force for 6 months only, but may be renewed from time to time.

Suggestion: That draft rule 24(4) refer to the possibility of renewal of the caveat.

7. Draft rule 25 reads, in part:

- (1) Unless the court otherwise orders, nothing may be done on an application to which a caveat relates, whether filed before or after the filing of the caveat, until at least 8 days after service of the notice under subrule (2) on the caveator.
- (2) The registrar must give to the person subject to the caveat, notice in the approved form of the filing of the caveat.
- (3) The notice must set a day by which the person may file a notice of intention to defend.
- (4) The registrar must also give to the caveator a copy of the notice. [emphasis added]

The current drafting is confusing. It seems that the reference in draft rule 25(2) to "the person subject to the caveat" should in fact be a reference to "the caveator". (see O71 r55).

Suggestions:

25(2) should refer to the "caveator" instead of "the person subject to the caveat".

For clarity, 25(3) should refer to the "caveator" instead of "the person".

That, 25(4) refer to "the applicant" instead of " the caveator" because reference to "the caveator" appears to be wrong.

8. Part 8 Contentious Business

The draft rules in this Part appear to do away with the concept of an application for a grant in solemn form in non-contentious proceedings. The current O71 r80 does not restrict proof in solemn form to contested proceedings. In practice, even if a matter is not contested it may be prudent for an application to be made for a grant in solemn form. For example, in years to come a person who was a minor at the death of the deceased, may challenge the earlier distribution. A grant in solemn form would protect the executor in respect of the distribution made earlier.

Suggestion: That the rules provide that it be possible to apply for a grant in solemn form even if the application is not contested.

9. Draft rule 29 definition of "script".

The definition does not include tape recordings. A tape recording of drafting instructions for a will may be particularly relevant in these matters.

Suggestion: That the definition of "script" include tape recordings of instructions to prepare a will.

10. Draft rule 31(1) reads in part:

A party who files a notice of intention to defend in a contested proceeding in relation to all or part of a deceased's estate must file an affidavit -

This provision has overlooked the usual requirement that the plaintiff also file an affidavit of scripts although the possibility is hinted at in draft rule 31(4). The filing of affidavits of scripts by both parties has practical advantages which should not be dispensed with.

Suggestion: That draft rule 31(1) refer to a requirement that the plaintiff also file an affidavit of scripts.

11. Draft rule 31(1) and draft rule 7(1) inconsistency

Draft rule 31(1) requires an affidavit to be filed. Draft rule 7(1) only assumes that such a requirement exists.

Suggestion: That draft rule 7(1) refer to a requirement that a supporting affidavit be filed.

12. Draft rule 35 "Proof in solemn form"

The heading to this rule is inappropriate. To reflect the content of the rule it should be along the lines of "Proof in solemn form after grant in common form".

Suggestion: That the heading of the rule more accurately reflect the content of the rule.

The Commission would be pleased to provide any elaboration on the above suggestions at your convenience.

Yours sincerely



The Honourable Justice Paul de Jersey
Chairman

