



## SUPREME COURT PRACTICE NOTE SC EQ 07

### Supreme Court Equity Division – Succession & Probate Lists

#### Commencement

1. This Practice Note was issued on 16 June 2023 and commences on 1 July 2023. It replaces Practice Note SC EQ 07 issued on 12 February 2013.

#### Application

2. The list previously known as the Family Provision List will henceforth be designated the Succession & Probate List (the **List**) and will be managed by a Succession & Probate List Judge (**List Judge**).
3. This Practice Note applies to all applications under the Family Provision Act 1982 (NSW), Chapter 3 of the *Succession Act 2006* (NSW) (**family provision applications**) and to contentious probate proceedings or probate proceedings required to be dealt with by a judge (**probate proceedings**) commenced by the filing of a Summons or a Statement of Claim (including proceedings which combine probate proceedings with a family provision application).
4. The case management procedures to be applied in the List are for the just, quick, and cheap disposal of proceedings. This Practice Note is intended to streamline and clarify existing procedures in the List.
5. The Court expects that the resources of an estate and of the Court will not be used in a manner that is out of proportion to the size of the estate or any provision that may be made.

#### Case Management

6. The List will be managed on Fridays. Motions will be listed at 9.15am and called through for the purpose of ascertaining the length of the hearing and allocating a time for hearing on that or some other day. All matters for directions will be listed for live hearings commencing at 9.45am. The times for the commencement of the motions and directions hearings may change, and practitioners should always check the daily court lists as published prior to attendance at Court on a Friday.

7. Ordinarily, two judges will sit on Fridays. So far as is practicable, one judge will deal with family provision applications, whether or not combined with probate proceedings, and the other will deal with probate proceedings.
8. Where the proceedings combine a family provision application with probate proceedings, directions will be tailored, so far as is practicable, to avoid duplication and limit costs.
9. Any applications for substituted service, security for costs, setting aside Subpoenas or Notices to Produce may only be brought by Notice of Motion with the leave of the Registrar in Equity. If leave is granted, the Registrar in Equity will hear the application on a date allocated by the Registrar.
10. Any urgent application must be made by arrangement with the List Judge's Associate to obtain a suitable time for the hearing of the application.
11. The Court expects that:
  - 11.1 each party not appearing in person shall be represented at any hearing in the List before a judge by a legal practitioner familiar with the subject matter of the proceedings and with instructions sufficient to enable all appropriate orders and directions to be made; and
  - 11.2 legal practitioners will, prior to any directions hearing, have communicated between themselves with a view to reaching agreement on Short Minutes recording the directions to be made in accordance with this Practice Note.

## Definition

12. In this Practice Note, **administrator** includes executor and a person appointed to represent the estate for the purposes of the litigation.

## Family Provision Applications

13. The Summons commencing a family provision application must state the date of death of the deceased.
14. The Summons will be made returnable before a Judge no later than the first Friday after 28 days of the date of its filing (the first directions hearing).
15. The plaintiff must file and serve the following documents, with the Summons:
  - 15.1 an affidavit by the plaintiff adapted from the form which is Annexure 1;
  - 15.2 a notice of eligible persons, including the name and, if known, the address of any person who is, or who may be, an eligible person. A copy of the notice must be attached to the Summons or to the plaintiff's affidavit; and

- 15.3 an affidavit by the plaintiff (or their legal representative) estimating the plaintiff's costs and disbursements, calculated on an ordinary basis up to and including the completion of a mediation.
16. If the prescribed period for making a family provision application is about to expire and the proceedings are being commenced to preserve rights, the plaintiff must file and serve the two affidavits and the notice referred to in the immediately preceding paragraph, no later than 5 working days before the first directions hearing (or at such other time as the Court may order).
17. At the first directions hearing, the Court will give directions for the purpose of making information available at the earliest practicable date so that parties may make a realistic assessment of their respective cases. The Court will also give directions to encourage the early resolution of the proceedings, which may include referring the matter to mediation. Parties are expected to confer for the purpose of providing to the Court a timetable for the preparation of the matter.
18. At the first directions hearing, the Court may make directions, including for the service by the administrator of an affidavit providing for all or some of the following:
  - 18.1 the full name and date of birth of the deceased;
  - 18.2 copy of the deceased's Will and the probate or letters of administration, if granted (if a copy is not already annexed to the plaintiff's affidavit) or a statement that the deceased is alleged to have died intestate;
  - 18.3 a description of the nature and value of the assets and liabilities of the deceased at the date of death (a copy of the inventory of property attached to the probate or letters of administration will suffice for the property of the deceased at the date of death, unless other assets have been discovered);
  - 18.4 what is, or is likely to be, the nature, and an estimate of the value, of:
    - (a) the assets and liabilities of the deceased at the date of the affidavit;
    - (b) any property of the deceased that has been distributed at any time after the death of the deceased and the date of the distribution of that property; and
    - (c) the gross distributable estate (excluding the costs of the proceedings).
  - 18.5 a description of the nature, and an estimate of the value of any property which, in the administrator's opinion, is, or may be, the subject of any prescribed transaction or relevant property transaction;

- 18.6 the name and address of every person who, in the administrator's opinion, is holding property as trustee, or otherwise which is, or may be, the subject of any prescribed transaction or relevant property transaction;
- 18.7 any testamentary and other expenses, or other liabilities of the estate that have been paid out of the estate of the deceased, including the amount, if any, paid for, or on account of, the administrator's costs of the proceedings;
- 18.8 whether any commission is to be sought by the administrator, and if so, an estimate of the amount proposed to be sought;
- 18.9 the name and address of every person who, in the administrator's opinion, is, or may be:
  - (a) an eligible person;
  - (b) an eligible person under a legal incapacity;
  - (c) a person beneficially entitled to the distributable estate;
  - (d) a person holding property as trustee or otherwise;
- 18.10 the name and address of every person to whom notice of the plaintiff's application has been given, including any person who is, or who may be, an eligible person, as well as any person beneficially entitled to the distributable estate and any person holding property as trustee or otherwise, and the method by which such notice has been given (e.g. personal service, by post etc);
- 18.11 a reply to the plaintiff's Annexure 1 affidavit, which may include allegations of fact contradicting facts alleged in the plaintiff's Annexure 1 affidavit or any other matters of fact to be relied upon by the administrator;
- 18.12 the identity (if necessary, on information and belief) of each beneficiary who is raising, or is likely to raise, his, her, or its, financial, material, or other, circumstances as a competing claimant, and each beneficiary who is not raising, or is not likely to raise, those circumstances; and
- 18.13 an estimate of the administrator's costs and disbursements, calculated on an indemnity basis, up to, and including, the completion of a mediation.

## **Probate Proceedings**

19. At the first directions hearing, parties should expect that the Court will give directions for the filing and service, by parties, of a disclosure statement (which

the Court may order must be verified), disclosing (so far as has not previously been disclosed and so far as is known) all or some of the following:

- 19.1 the full name, date of birth and date of death of the deceased;
- 19.2 whether any family provision application has been made in respect of the estate and if so, by whom;
- 19.3 whether it is alleged that the deceased died intestate;
- 19.4 each testamentary instrument of the deceased (including any informal will or statutory will) and the whereabouts of the original of each such instrument and the name and address of the solicitor, if any, who prepared it;
- 19.5 each testamentary instrument of the deceased being propounded in the proceedings, and the party propounding it;
- 19.6 whether there is a dispute as to the validity of any testamentary instrument, and if so, the grounds of challenge;
- 19.7 the identity of anyone who may have an interest in the outcome of any application for a grant of probate or administration;
- 19.8 a description of the nature and value of the assets and liabilities of the deceased at the date of death (a copy of the inventory of property attached to the probate or letters of administration will suffice for the property of the deceased at the date of death, unless other assets have been discovered);
- 19.9 what is, or is likely to be, the nature, and an estimate of the value, of:
  - (a) the assets and liabilities of the deceased;
  - (b) any property of the deceased that has been distributed at any time after the death of the deceased and the date of the distribution of that property; and
  - (c) the gross distributable estate.
- 19.10 any caveat lodged in respect of the estate;
- 19.11 a description, and an estimate of the value of, all property in the estate;
- 19.12 whether there has been publication of a notice of intention to apply for a grant of probate or administration and if so, by whom, and when;

- 19.13 whether there has previously been a grant of probate or administration in respect of the estate and if so, identifying each such grant and any application that has been made for its revocation;
  - 19.14 whether a special administrator of the estate of the deceased has been appointed and, if so, providing the name of the administrator, the date of appointment and the proceedings in which the appointment was made;
  - 19.15 whether the deceased was, at the time of death, a “protected person” or a “person under guardianship” within the meaning of s 38 of the NSW *Trustee and Guardian Act 2009* (NSW), at any time within the last 5 years of life, or at any time any identified testamentary instrument was executed;
  - 19.16 details of any proceedings in which a financial management order or guardianship order affecting the deceased was made;
  - 19.17 whether the deceased executed an enduring power of attorney or guardianship appointment and, if so, details of any such instrument; and
  - 19.18 the identity of any hospital at which the deceased was a patient during the last year of life or within 12 months of execution of a testamentary instrument.
20. The Court may give directions for the return of subpoenas for the production of documents, notices for the production of documents to the Court, or applications under the Uniform Civil Procedure Rules 2005 (NSW) (UCPR) r 33.13, directed to bringing within the control of the Court (with or without liberty to apply for access to any documents produced to the Court):
- 20.1 known testamentary instruments of the deceased;
  - 20.2 the file of any solicitor or other person known to have prepared, or supervised the execution of, a testamentary instrument of the deceased;
  - 20.3 clinical records of a treating doctor of the deceased (not medical, hospital or nursing home records generally);
  - 20.4 any orders, and supporting reasons for decision, of the Civil and Administrative Tribunal of New South Wales (**NCAT**) relating to the welfare of the deceased (not the whole NCAT file).
21. The Court may give consideration to whether orders should be made for provision to the Court, and service on all parties, of an affidavit, or affidavits, deposing to the circumstances in which a testamentary instrument was prepared or executed.

## Consent Orders

22. The List closes at 12 noon on Thursday. Any application for the making of Consent Orders (including where if they are made, the matter is to be removed from the List), or orders to add a matter to the List or otherwise remove a matter from the List must be made prior to 12 noon on Thursday. Such applications are to be made by email to the List Judge's Associate.
23. If the List Judge makes orders in chambers which have the effect of removing the matter from the list or adjourning it, the parties will be advised.
24. Where parties reach a consent position after the deadline, it is preferable to notify the List Judge of this, even if the matter remains in the List.
25. In family provision applications (including such applications which are combined with probate proceedings), Consent Orders finalising proceedings must state whether:
  - 25.1 the application was made within time;
  - 25.2 the plaintiff is an eligible person;
  - 25.3 the plaintiff has served a notice identifying all other eligible persons on the administrator at the time of serving the Summons;
  - 25.4 the administrator has filed the administrator's affidavit and the affidavit of service of the notice of the plaintiff's claim on any person who is, or who may be an eligible person, as well as upon any person beneficially entitled to the distributable estate, and any person holding property of the estate, as trustee or otherwise; and
  - 25.5 the administrator has filed an Appearance.
26. Unless otherwise ordered, Consent Orders requiring approval of a compromise or release, or an order extending time for the making of an application, will be listed on a Friday only after all affidavits to be relied upon, as well as the pro forma document for approval of releases (whether inter vivos or involving the estate) have been completed and delivered to the List Judge.

## Subpoenas and Notices to Produce

27. Subpoenas in matters in the List must not be issued without leave of a judge. Notices to Produce, other than under UCPR r 21.10(1)(a), must not be served without leave of a judge. Once leave is given, case management of the Subpoena or Notice to Produce will be dealt with by the Registrar, who may in appropriate cases, refer it to a judge.

## **Mediation**

28. Unless otherwise ordered, all proceedings involving a family provision application will be referred to mediation at the earliest practicable time.
29. Contested proceedings in which the essential validity of a testamentary instrument is in dispute will ordinarily be referred to mediation before directions are given for a final hearing.
30. Unless otherwise ordered (which may occur if all parties consent), mediations will be Court annexed.
31. If the matter settles at a Court annexed mediation and the orders proposed do not require Court approval or an order extending time for the making of the family provision application, the Registrar may make the necessary orders and vacate the next directions hearing.
32. If the matter does not settle, there will be a timetable to prepare the matter for final hearing, which may include provision for the filing and service of a costs affidavit and an updating affidavit by any party or beneficiary.
33. The plaintiff's final affidavit as to costs and disbursements should identify the costs and disbursements calculated on an indemnity basis and those costs and disbursements calculated on an ordinary basis and the amount, if any, already paid on account of costs and disbursements. If there is any uplift factor included in the calculation of the plaintiff's costs, or any agreement that provides for such an uplift factor, the quantum thereof and the terms of any such fee agreement should be identified.
34. The administrator's affidavit as to costs and disbursements should identify the costs and disbursements calculated on an indemnity basis and the amount, if any, already paid out of the estate, or otherwise, on account of costs and disbursements.

## **Proof of certain matters**

35. Unless the court orders otherwise, or reasonable notice is given that strict proof is necessary, parties may give evidence as follows:
  - 35.1 a kerbside appraisal by a real estate agent of any real property;
  - 35.2 an estimate of the value, or a monetary amount, for the non-monetary assets of the estate other than real estate;
  - 35.3 internet, or other media, advertisements of the asking price of real estate;
  - 35.4 the plaintiff's, or beneficiary's best estimate of costs or expenses of items the plaintiff or the beneficiary wishes to acquire;



- 35.5 the plaintiff's, or the beneficiary's, best estimate of costs or expenses of any renovation or refurbishment of property the plaintiff or the beneficiary wishes to incur;
- 35.6 a description by the plaintiff, or by the beneficiary, of any physical, intellectual, or mental, disability, from which it is alleged the plaintiff, or the beneficiary, or any dependant of the plaintiff or beneficiary, is suffering, together with a copy of any medical, or other, report, in support of the condition alleged.

### **Expert Evidence**

36. Practice Note SC Eq 5 – *Expert Evidence in the Equity Division* applies with any necessary adaptations, if expert evidence is necessary to assist the Court.

### **Costs**

37. Orders may be made capping the costs that may be recovered by a party in circumstances including, but not limited to, cases in which the net distributable value of the estate (excluding costs of the proceedings) is less than \$500,000.

### **Regional Practitioners**

38. Applications to appear in the Friday List remotely by practitioners not in Greater Sydney should be directed by email to the List Judge's Associate, not later than 12 noon on Thursday.

### **The Hon. A S Bell**

Chief Justice of New South Wales  
16 June 2023

### **Related information**

See also:

Supreme Court Practice Note SC Eq 5 - Expert Evidence in the Equity Division  
Chapter 3 of the *Succession Act 2006*  
*Family Provision Act 1982*

### **Amendment history**

16 June 2023: This Practice Note replaces the previous version of SC Eq 7 that was issued on 12 February 2013.

12 February 2013: the Practice Note issued on 20 December 2012 is replaced following a minor correction to paragraph 14 of Annexure 1; the words "in accordance with the Practice Note applicable to my application" were removed.

20 December 2012: the Practice Note issued on 14 May 2009 is replaced.  
14 May 2009: Practice Note SC Eq 7 is issued with a commencement date of 1 June 2009.

## ANNEXURE 1

I [#say on oath #affirm]:

1. I am the plaintiff.
2. I believe that the contents of this affidavit are true.

### Deceased's information

3. I have referred to [name of the deceased] as “the deceased” in this affidavit.
4. The deceased:
  - (a) Was born on **[date]** and died on [date] aged [number] years
  - (b) #Left a will dated **[date]** /Did not leave a will.
5. #Probate/#letters of administration of the deceased's estate was granted to [name/s] on [date].  
#The Court has not granted probate or letters of administration in relation to the deceased's estate.

### Eligibility to make a Claim

6. I am (**insert as appropriate**):
  - (a) a person who was the wife or husband of the deceased person at the time of the deceased person's death,
  - (b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,
  - (c) a child of the deceased person,
  - (d) a former wife or husband of the deceased person,
  - (e) a person:
    - (i) who was, at any particular time, wholly or partly dependent on the deceased person, and

- (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a member of the household of which the deceased person was a member,
- (f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

**Any family or other relationship between the plaintiff and the deceased person, including the nature and duration of the relationship**

7. Insert details

**The nature and extent of any obligations or responsibilities owed by the deceased person to the plaintiff**

8. Insert details

**The nature and extent of the deceased person's estate (including any property that is, or could be, designated as notional estate of the deceased person) and of any liabilities or charges to which the estate is subject, as in existence when the application is being considered**

9. Annexed hereto and marked "###" is a true copy of the Probate, the deceased's will and the inventory of property attached to the Probate document.

or

9. The deceased died intestate. Annexed hereto and marked "###" is a true copy of the letters of administration and the inventory of property. The persons entitled on intestacy are:

Insert details

**The financial resources (including earning capacity) and financial needs, both present and future, of the plaintiff**

10. Annexed hereto and marked "###" is a summary of my assets and liabilities (including superannuation).

11. Annexed hereto and marked “###” is a summary of assets that I hold with another person.
12. My current gross monthly income is \$###. My current net monthly income is \$###.
13. Annexed hereto and marked “###” is a summary of my (or my family’s) monthly expenditure.
14. I shall produce documents sought by the administrator.
15. I purchased or sold the following real estate in the last 3 years:

<b>Purchase/sale date</b>	<b>Purchase or sale</b>	<b>Property details</b>	<b>Purchase price/sale price</b>

16. I purchased or sold the following shares in public companies in the last 3 years:

<b>Purchase/sale date</b>	<b>Purchase or sale</b>	<b>Share details</b>	<b>Purchase price/sale price</b>

17. I made the following gifts of amounts \$1,000 or more in the last 3 years:

<b>Date of gift</b>	<b>Amount of gift</b>	<b>Person or organisation to whom gift was given</b>

18. I sold the following property for \$1,000 or more in the last 3 years:

Sale date	Sale price	Value of property	Description

19. I have the following interests in the following companies or trusts:

Insert details

20. Annexed hereto and marked “###” is a diagram that shows my ownership and control of the companies and trusts referred to in the previous paragraph and their underlying assets.

21. Insert details of needs both present and likely future needs of the plaintiff

**If the plaintiff is cohabiting with another person-the financial circumstances of the other person**

22. Insert details

**The age of the plaintiff when the application is being considered**

23. I believe I was born on (insert date of birth) and am currently aged ### years.

**Any physical, intellectual or mental disability of the plaintiff that is in existence when the application is being considered or that may reasonably be anticipated**

24. Insert details

25. Annexed hereto and marked “###” is a true copy of a report dated ### from my general medical practitioner which discloses my current state of health.

**Any contribution (whether financial or otherwise) by the plaintiff to the acquisition, conservation and improvement of the estate of the deceased person or to the welfare of the deceased person or the deceased person's family, whether made before or after the deceased person's death, for which adequate consideration (not including any pension or other benefit) was not received, by the plaintiff**

26. Insert details

**Any provision made for the plaintiff by the deceased person, either during the deceased person's lifetime or made from the deceased person's estate**

27. Insert details

**Any evidence of the testamentary intentions of the deceased person, including evidence of statements made by the deceased person**

28. Insert details

**Whether the plaintiff was being maintained, either wholly or partly, by the deceased person before the deceased person's death and the extent to, and the basis on, which the deceased person did so**

29. Insert details

**Whether any other person is liable to support the plaintiff**

30. Insert details

**The character and conduct of the plaintiff before and after the date of the death of the deceased person**

31. Insert details

**The conduct of any other person before and after the date of the death of the deceased person**

32. Insert details

**Any relevant Aboriginal or Torres Strait Islander customary law**

33. Insert details if appropriate

#SWORN #AFFIRMED at	
Signature of deponent	
Signature of witness	
Name of witness	
Address of witness	
Capacity of witness	[#Justice of the peace #Solicitor #Barrister #Commissioner for affidavits #Notary public]

**Note:**

- (a) Please ensure that the affidavit is sworn or affirmed. The deponent and witness must sign each page of the affidavit.
- (b) Each page of the affidavit, including annexures, should be consecutively paginated on the top right hand corner of each page.