

## PRACTICE NOTE SC Eq 7 – Family Provision

### Commencement

1. This Practice Note commences on 1 June 2009.

### Application

2. This Practice Note applies to all applications under the Family Provision Act 1982 or Chapter 3 of the Succession Act 2006.

### Definitions

3. In this Practice Note:

**CPA** means the *Civil Procedure Act 2005*

**Family provision application** means an application under the Family Provision Act 1982 or Chapter 3 of the Succession Act 2006

**Online hearing** means a hearing conducted pursuant to s 71 of the *Civil Procedure Act 2005* and Part 3.9 of the *Uniform Civil Procedure Rules 2005* and in accordance with Practice Note SC Gen 12

**UCPR** means the Uniform Civil Procedure Rules 2005.

### Plaintiff's documents

4. The plaintiff must serve the following documents with the Summons:  
An affidavit adapted from the form in Annexure 1 to this Practice Note  
Notice of eligible persons  
Draft consent orders for the first return date of the Summons that:
  - Set out a timetable for the future conduct of the proceedings including the service of affidavits and the disclosure of any documents
  - Refer the proceedings to mediation at the conclusion of that timetable.
5. If a limitation period is about to expire and proceedings are being commenced to preserve rights, the plaintiff must serve the following documents with the Summons:  
An affidavit setting out the reasons why the service of evidence should be deferred  
Draft consent orders for the first return date that set out a timetable for the future conduct of the proceedings.

### Defendant's affidavit

6. Unless the court orders otherwise, a defendant must serve an affidavit in reply on all active parties by no later than 4 weeks after being served with the Summons, the plaintiff's affidavit and the draft consent orders.
7. The defendant's affidavit must include:

Allegations of facts contradicting facts alleged in the plaintiff's affidavit

Details of:

- The nature and value of the assets and liabilities of the deceased at the date of death
- What is or is likely to be the nature and value of:
  - Any distributed estate
  - The net distributable estate
- What is the nature and value of any property which, in his or her opinion, is or may be the subject of any prescribed transaction or relevant property transaction
- The name and addresses of every person who, in the defendant's opinion, is holding property as trustee or otherwise which is or may be the subject of any prescribed transaction or relevant property transaction
- The names and addresses of every person who, in the defendant's opinion, is or may be:
  - An eligible person
  - An eligible person under a legal incapacity
  - A person beneficially entitled to the distributable estate
  - A person holding property as trustee or otherwise
- The name and addresses of every person to whom the defendant has given notice of the plaintiff's application. [SCR Schedule J requires the defendant to give all persons who are or may be eligible persons notice of the plaintiff's application.]

- Whether any commission is to be charged, and if so, the amount to be charged.

#### **Mediation**

8. Unless ordered otherwise, all proceedings involving Family provision applications must be mediated.
9. Unless ordered otherwise, the Usual Order for Mediation in Annexure 2 to this Practice Note will be made at the time the matter is referred to mediation.
10. If parties settle the proceedings before a court appointed mediator and provided the settlement does not require court approval, the mediator will enter the consent orders and vacate the next listing.

#### **Online hearings**

11. After the first directions hearing, if all parties are legally represented, the parties should expect that the Court will make consent orders for directions by online hearings in accordance with Annexure 3.
12. If the parties have consent orders prior to the first directions hearing, legal practitioners may request that the first directions hearing be conducted by an online hearing by sending an email to [onlinecourt\\_supremecourt@agd.nsw.gov.au](mailto:onlinecourt_supremecourt@agd.nsw.gov.au) not less than 7 days before the date of the first directions hearing.

#### **First directions hearing**

13. The proceedings will be listed before a registrar on Tuesday at 2pm at least 7 days after the Summons is filed.
14. Before the first directions hearing, parties must discuss the draft consent orders served by the plaintiff and attempt to agree those orders.
15. At the first directions hearing, the Registrar:
  - May give directions as to the service of any further affidavits;
  - Will generally refer the proceedings to mediation either to the court annexed mediation service provided by Registrars of the Court or, if the parties consent, to a private mediator;
  - Will make the Usual Order for Mediation in Annexure 2 to this Practice Note in matters referred to mediation;
  - Will list the proceedings for directions on the Tuesday after the mediation date.
16. If parties wish to have the matter referred to a private mediator, they must advise the Registrar of the time of the mediation and the name of the mediator at the first directions hearing.

#### **Applications for interim provision / expedition**

17. Any application for interim provision or expedition must be by a notice of motion filed as soon as the circumstances warranting such an application are known.

#### **Proof of certain matters**

18. Unless the court orders otherwise, or notice is given that strict proof is necessary, parties may give evidence as follows:
  - A kerbside appraisal by a real estate agent of any property;
  - Internet or other media advertisements of the asking price of real estate;
  - The plaintiff's or beneficiary's best estimate of costs or expenses of items the plaintiff or beneficiary wishes to acquire;
  - The plaintiff's or beneficiary's best estimate of costs or expenses of any renovation or refurbishment of property the plaintiff or beneficiary wishes to incur;
  - A description by the plaintiff or beneficiary of any medical condition of which it is alleged the plaintiff or beneficiary is suffering.
19. Practice Note SC Eq 5 – Expert evidence in the Equity Division applies with any necessary adaptations, if expert evidence is to be called.

#### **Consent Orders finalising proceedings**

20. Consent Orders finalising proceedings must include provisions that the parties agree that:
  - The application was made within time
  - The plaintiff is an eligible person
  - The plaintiff has served a notice identifying all other eligible persons on the administrator at the time of serving the summons
  - The administrator has filed a copy of the affidavit required by SCR Schedule J

The administrator has served notices of the plaintiff's claim on any person who, in the administrator's opinion, may be an eligible person  
The administrator has filed a notice of appearance.

21. Consent orders requiring the approval of an associate judge will be referred to the duty associate judge on a Friday.

#### **Listing for hearing**

22. If the proceedings fail to settle at mediation, the Registrar will set the proceedings down for hearing and make the Usual Order for Hearing in Annexure 4 to this Practice Note.

#### **Costs**

23. If any affidavits include irrelevant material, the court may order that the party responsible for that affidavit pay:  
His/her own costs of preparing the affidavit and any time spent dealing with the affidavit in court  
The indemnity costs of other parties to the proceedings in responding to the affidavit.
24. 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 value of the estate is less than \$500,000.

J J Spigelman AC  
Chief Justice of New South Wales  
14 May 2009

#### **Related Information**

Practice Note SC Eq 7 was issued on 14 May 2009 and commenced on 1 June 2009.

See also:

Practice Note SC Gen 1 Supreme Court – Application of Practice Notes

Practice Note SC Gen 6 Supreme Court - Mediation

Practice Note SC Gen 10 Supreme Court – Single Expert Witnesses

*Civil Procedure Act 2005*

*Uniform Civil Procedure Rules 2005*

## **ANNEXURE 1**

Plaintiff's Affidavit used in Family Provision matters

## **ANNEXURE 2**

### **USUAL ORDER FOR MEDIATION**

1. The executor or administrator of the deceased estate must file and serve an updated affidavit listing the estate's assets and an up to date valuation of those assets by no later than 6 working days prior to the mediation.
2. All other parties must file and serve a statement listing the parties' assets and up to date valuation of those assets by no later than 6 working days prior to the mediation.
3. Not less than 3 working days prior to the mediation, the plaintiff is to deliver a bundle of documents to the Mediator containing:
  - 3.1 copies of all affidavits served in the proceedings;
  - 3.2 copies of any other documents relied on by the plaintiff;
  - 3.3 the statement containing up to date valuations of the plaintiff's assets;
  - 3.4 the statement as to the plaintiff's estimated costs to the date of mediation.
4. Not less than 3 working days prior to the mediation the defendant is to deliver a bundle of documents to the Mediator containing:
  - 4.1 copies of any documents that will be relied upon by the defendant other than affidavits that have already been served on the plaintiff;
  - 4.2 a statement as to the defendant's estimated costs to the conclusion of the mediation, including the mediation costs, and the estimated costs of the proceedings, if the matter is not resolved at mediation; and
  - 4.3 a statement as to the current value of the estate.

## **ANNEXURE 3**

### **ORDERS FOR ONLINE HEARINGS**

1. Unless the court otherwise orders, any applications for consent orders are to be conducted in the absence of the public pursuant to s.71 of the Civil Procedure Act 2005 and UCPR 3.9.
2. Unless the court otherwise orders, such applications are to be conducted by electronic communication sent and received by means of the ECM system pursuant to s.14I of the Electronic Transactions Act 2000 and UCPR 3.9.
3. If not already registered, the legal representatives for all parties must apply for registration of themselves as users of the ECM system in accordance with UCPR 3.3 within 14 days.
4. Each legal representative must email [onlinecourt\\_supremecourt@agd.nsw.gov.au](mailto:onlinecourt_supremecourt@agd.nsw.gov.au) and
  - a. Advise that he or she is registered as a user of the ECM system
  - b. Give details of the name and number of the case in which he or she is appearing

- c. Request that he or she be added as a participant in the OnLine Court.
5. When mentioning a matter by consent, a legal practitioner must indicate on whose behalf he or she is mentioning the matter.

#### **ANNEXURE 4**

##### **USUAL ORDER FOR HEARING**

1. Any offer of compromise must be served not less than 4 weeks before the hearing date.
2. Not less than 4 weeks before the hearing date, the solicitor for each party must file and serve on the client and all other active parties, an affidavit setting out:
  - 2.1 details of the client's anticipated costs from the commencement to the conclusion of the proceedings;
  - 2.2 any details of alleged complexity for the justification of any aspects of the costs referred to in 2.1;
3. The parties are to agree by not less than 4 weeks before the hearing a chronology of relevant events, identifying those events that are not agreed by the description "N/A" (an agreed chronology).
4. By no later than 3 weeks before the hearing date the parties are to file with the Court an agreed chronology and an indexed Court Book with all affidavits to be relied upon at trial.
5. The parties are to file and serve not less than 2 weeks before the hearing date a short outline of submissions of no more than three pages dealing with all relevant claims. Those submissions should have attached thereto the proposed orders sought by that party.