

PRACTICE NOTE SC EQ 07 – FAMILY PROVISION

Commencement

1. This Practice Note was issued on 12 February 2013 and commences on 1 March 2013. It replaces the Practice Note issued on 20 December 2012.

Application

2. This Practice Note applies to all applications under the *Family Provision Act 1982* and/or Chapter 3 of the *Succession Act 2006* (family provision applications).

List Management

3. From 1 March 2013 all family provision applications will be managed by the Family Provision List Judge in the Family Provision List each Friday. Notices of Motion will be listed at 9.30 am. Directions will be listed from 10.00 am. Practitioners must check the published list for the allocated times.

Definition

4. In this Practice Note **administrator** includes executor and, where appropriate, the person appointed to represent the estate of the deceased for the purposes of the hearing.

Plaintiff's Documents

5. The Summons commencing the family provision application, which should identify the date of death of the deceased in respect of whose estate the application is being made, will be made returnable before the Family Provision List Judge no later than the first Friday after 28 days of the date of its filing (the first directions hearing).
6. The plaintiff must file and serve the following documents with the Summons:
 - (a) A copy of the affidavit of the plaintiff adapted from the form in Annexure 1 to this Practice Note.
 - (b) 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 is to be attached to the Summons or to the plaintiff's principal affidavit.
 - (c) A copy of an affidavit setting out an estimate of the plaintiff's costs and disbursements, calculated on the ordinary basis, up to, and including, the completion of a mediation.
7. If the prescribed period for making the 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 paragraph 6, no later than 5 working days before the first directions hearing or at such other time as the Court may order.

The first directions hearing

8. At the first directions hearing the Court will give directions for the purpose of making information available at the earliest practicable date so that all parties may make realistic assessment of their respective cases. The Court will also give directions to encourage the early resolution of the proceedings including by referring the

matter to mediation at a suitable time. The parties are expected to confer for the purpose of providing to the Court a timetable for the preparation of the matter for this purpose.

9. At the first directions hearing the Court may make directions including in relation to the service, by the administrator, of the following:

9.1 An administrator's affidavit which is to include:

- a. A 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);
- b. 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 so far as the property of the deceased at the date of death unless other assets have been discovered);
- c. What is, or is likely to be, the nature, and an estimate of the value, of:
 - (i) The assets and liabilities of the deceased at the date of swearing the affidavit;
 - (ii) 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;
 - (iii) The gross distributable estate (omitting the costs of the proceedings).
- d. 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;
- e. 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;
- f. 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.
- g. Whether any commission is to be sought by the administrator, and if so, an estimate of the amount proposed to be sought.
- h. The names and address of every person who, in the administrator's opinion, is, or who may be:
 - (i) An eligible person;
 - (ii) An eligible person under a legal incapacity;

(iii) A person beneficially entitled to the distributable estate;

(iv) A person holding property as trustee or otherwise;

- 9.2 An affidavit of service setting out 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);
- 9.3 One affidavit in reply to the plaintiff's affidavit in chief, which affidavit may include allegations of facts contradicting facts alleged in the plaintiff's affidavit in chief or any other matters of fact to be relied upon by the administrator;
- 9.4 An affidavit, if necessary on information and belief, which identifies 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;
- 9.5 An affidavit setting out an estimate of the administrator's costs and disbursements, calculated on the indemnity basis, up to, and including, the completion of a mediation.

Mediation

10. Unless ordered otherwise, all proceedings involving a family provision application will be referred to mediation.
11. If the parties settle the proceedings at a court annexed mediation, and if the orders proposed do not require court approval, or an order extending time for the making of the application, the registrar/mediator will make the orders and vacate the next directions hearing before the Family Provision List Judge.

Between first directions hearing and the mediation

12. If the matter is referred to court annexed mediation, the original of the administrator's affidavits are to be filed in the Registry no later than 7 days before the date of the Mediation with a covering letter confirming the date of the mediation.
13. If the matter is referred to private mediation, the original of the administrator's affidavits are to be filed in Court at the directions hearing following the mediation.
14. The administrator's legal representative is to advise the plaintiff's legal representative, in writing, of any beneficiary who is known to wish to attend the mediation, no later than 7 working days prior to the mediation.
15. If it is necessary to adjourn a mediation, the parties are expected to relist the matter before the Family Provision List Judge for the purpose of adjusting any timetable. Alternatively the parties may file Consent Orders adjusting the timetable with the List Judge's Associate for the making of Orders in Chambers.

Directions hearing following Mediation

16. If the parties settle the proceedings before a private mediator, the Court will make the necessary orders at the directions hearing following the mediation. If no approval of the court is required, or there is no order extending the

time for the making of the application, and if the original of the orders, signed by the parties or his, her or their, legal representative, the orders may be made, in Chambers, by the Family Provision List Judge, provided that those orders are received before noon on the day before the date of the directions hearing, in which event that date will be vacated.

17. If the matter has not settled, a timetable will be made for the preparation of the matter for final hearing. The timetable is to include provision for filing and service of a costs affidavit and any updating affidavit of any party or beneficiary:

17.1 The plaintiff's final affidavit as to costs and disbursements should identify the costs and disbursements calculated on the indemnity basis and those costs and disbursements calculated on the 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 in the costs affidavit.

17.2 The administrator's affidavit as to costs and disbursements should identify the costs and disbursements calculated on the indemnity basis and the amount, if any, already paid out of the estate, or otherwise, on account of costs and disbursements.

18. The Court may set the matter down for hearing at this directions hearing or bring the matter back for a further directions hearing at which time the matter will be set down for hearing. Directions will also be given for the filing and service of a list of the affidavits of the respective parties, an agreed chronology, a joint statement of assets and liabilities and a short outline of submissions.

Consent Orders

19. Consent Orders finalising proceedings are to include the following provisions:

- (a) The application was made within time;
- (b) The plaintiff is an eligible person;
- (c) The plaintiff has served a notice identifying all other eligible persons on the administrator at the time of serving the Summons;
- (d) 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;
- (e) The administrator has filed an Appearance.

20. Consent orders requiring approval of a compromise, or of approval of a release, or an order extending time for the making of an application, will be listed before the Family Provision List Judge 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 Family Provision List Judge.

Proof of certain matters

21. Unless the court orders otherwise, or reasonable notice is given that strict proof is necessary, parties may give evidence as follows:
- (a) A kerbside appraisal by a real estate agent of any real property.
 - (b) An estimate of the value, or a monetary amount, for the non-monetary assets of the estate other than real estate.
 - (c) Internet, or other media, advertisements of the asking price of real estate.
 - (d) The plaintiff's, or beneficiary's best estimate of costs or expenses of items the plaintiff or the beneficiary wishes to acquire.
 - (e) 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;
 - (f) 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

22. 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.

After the making of Orders

23. If a family provision order is made, whether by consent or otherwise, an administrator must, unless the Court otherwise orders, within 28 days after the order is recorded in the Court's computerised court record system, lodge in the Probate registry:
- (a) the probate, letters of administration or copy of election, or any reseal of probate granted in another jurisdiction, as the case may require, bearing a copy of the order; and
 - (b) a copy of the order.

Costs

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 net distributable value of the estate (excluding costs of the proceedings) is less than \$500,000.

General Matters

25. In all family provision applications the Court expects that:
- 25.1 Each party not appearing in person, shall be represented, at any hearing before the Family Provision List 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.

25.2 Legal practitioners will have communicated with a view to reaching agreement on Short Minutes recording the directions to be made in accordance with this Practice Note.

25.3 The resources of the estate and of the Court will not be used in a manner that is out of proportion to the size of the estate and the provision that may be made.

T F Bathurst
Chief Justice of New South Wales
12 February 2013

Related Information

Practice Note SC Eq 5 – Expert Evidence in the Equity Division

Chapter 3 of the *Succession Act 2006*

Family Provision Act 1982

Amendment history:

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:

(b) Was born on **[date]** and died on [date] aged [number] years

(c) #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,

8 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:

Purchase/sale date	Purchase or sale	Property details	Purchase price/ sale price

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

Purchase/sale date	Purchase or sale	Share details	Purchase price/ sale price

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

Date of gift	Amount of gift	Person or organisation to whom gift was given

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.

