

ANNEXURE “B”
PROBATE LIST
STANDARD FORM OF ORDERS
(Version 1 – 28 January 2020)

This annexure to the Probate List Guidelines provides precedents, in standard form, of orders commonly made in probate proceedings. Orders might be made by reference to the numbered paragraphs of the annexure.

Precedent forms for orders commonly made by the Court in the Protective List can be found in the paper presented on 11 March 2017 by Lindsay J (the Probate and Protective List Judge) entitled “The Incapacitated Plaintiff and Personal Injury Compensation Proceedings” published in the “Judicial Speeches” section of the Court’s website.

(I) CASE MANAGEMENT OF DISCOVERY AND SUBPOENA PROCESSES

A. DISCLOSURE STATEMENTS

1. ORDER that each party to these proceedings file and serve, no later than _____, a Disclosure Statement substantially in the form or to the effect of Annexure "A" to the Probate List Guidelines published on the website of the Court.
2. RESERVE for further consideration whether orders should be made for a Disclosure Statement to be verified in whole or part.

B. SUBPOENAS AND NOTICES TO PRODUCE

3. ORDER, subject to further order, that no subpoenas for the production of documents be issued, no notices for the production of documents be served, and no requests under r 33.13 of the *Uniform Civil Procedure Rules 2005* NSW (UCPR) be made, without the leave of a judge.
4. ORDER, subject to further order, that no access to documents in the custody of the Court (produced to the Court on a subpoena, notice to produce, or available under UCPR r 33.13) be granted without the leave of a judge.
5. ORDER that the parties to these proceedings be at liberty to issue subpoenas for the production of documents, or to serve notices for the production of documents to the Court, or to make an application under UCPR r 33.13, returnable before a Registrar on _____ (or such other date as a judge or Registrar may allow), limited to:
 - a) production by a party to the proceedings, or a (named) solicitor or other person, of documents being or purporting to be:
 - i) a will or other testamentary instrument of the deceased;
 - ii) documents relating to the preparation or execution of a will or other testamentary instrument by or on behalf of the deceased;
or
 - iii) documents relating to fees charged for services provided in connection with the preparation or execution of a will or other testamentary instrument on behalf of the deceased person;

- b) production by a (named) medication practitioner of clinical records relating to treatment of the deceased; or
- c) production by the Registrar of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) of a copy of orders made, and reasons for decision in support of orders made, in relation to the person or property of the deceased.

C. DISCOVERY AFFIDAVITS

- 6. ORDER that (a named party, solicitor or other person), no later than _____, file (or file and serve) an affidavit, or affidavits, deposing (to the best of his or her knowledge, information and belief) to the circumstances in which (an identified will or other testamentary instrument) was prepared and executed.
- 7. Where the person named in Order 6 is not a party to the proceedings:
 - a) in the absence of an undertaking to the Court to the same effect, ORDER, subject to further order, that the reasonable costs of compliance with Order 6 (in a sum to be assessed by the Court, if not agreed with the person named in Order 6) be paid in the first instance by _____.
 - b) In the absence of agreement with the person named in Order 6 otherwise, ORDER that (a named party) pay into court, no later than _____, the sum of \$_____ as security for the costs of compliance with Order 6.
 - c) RESERVE to (the person named in Order 6) liberty to apply for Order 6 to be discharged or varied or for an order that money paid into court pursuant to Order 7(b) be paid out of court.

(II) NOTICE OF PROCEEDINGS IN PROCEEDINGS FOR A GRANT OF PROBATE OR ADMINISTRATION

- 8. ORDER that (a named person) file and serve on each person interested in the estate, no later than _____, notice of the proceedings in accordance with the Probate Rules (*Supreme Court Rules 1970 NSW, SCR Pt 78 rr 57 and 64*).
- 9. ORDER that (a named person) file, no later than _____, an affidavit which:

- a) complies with SCR Pt 78 r 59(b) (which requires proof of service of notices of proceedings or an explanation for non-service of a notice of proceedings); and
- b) conforms in substance with Prescribed Form 151 (entitled “Affidavit Confirming Service of Notice of Proceedings”).

(III) CASE MANAGEMENT OF PROBATE PLEADINGS

- 10. ORDER that these proceedings proceeding by way of pleadings.
- 11. ORDER that (a named party) file and serve a statement of claim no later than ____.
- 12. ORDER that, unless the Court otherwise orders, the validity of a testamentary instrument, being a will or codicil, is to be challenged on no ground other than an allegation of:
 - a) a want of due execution;
 - b) a want of testamentary capacity;
 - c) a want of knowledge and approval of the contents of the instrument (including any allegation of suspicious circumstances);
 - d) undue influence (in the sense of co-ercion);
 - e) fraud;
 - f) revocation by the deceased.

(IV) A SPECIAL GRANT OF ADMINISTRATION (AN INTERIM GRANT)

- 13. ORDER (up to and including a specified date, usually six months hence, ____ or earlier grant of probate or administration) that administration of the estate of ____ (who died on ____) be granted to ____ (“the Administrator”) limited to:
 - a) collection and preservation of all assets of the deceased;

- b) payment of liabilities of the deceased, or of the estate of the deceased, incurred in the ordinary course of business, including insurance premiums;
- c) establishment, and operation, in the ordinary course, of a bank account or accounts in the name of the estate of the deceased;
- d) keeping an account of all receipts and disbursements in administration of the estate of the deceased;
- e) with the prior written consent of all known beneficiaries of the estate of the deceased or the leave of the Court:
 - i. leasing (for a period of no more than six months) real estate comprising part of the estate of the deceased;
 - ii. bringing or defending any legal proceeding on behalf of the estate;
- f) appointment of an agent (including a solicitor, accountant or real estate agent) to do any business that the Administrator is unable to do, or that it is unreasonable to expect the Administrator to do, in person;
- g) doing all such other things as are incidental to the powers hereby conferred.

14. NOTE that nothing in Order 13 authorises the Administrator to make a distribution of the estate of the deceased, or any part thereof, without the leave of the Court.

15. RESERVE for further consideration the question whether the Administrator should represent the estate of the deceased in any proceedings brought under Chapter 3 of the *Succession Act 2006* (NSW) in relation to the deceased.

16. ORDER that any requirement for:

- h) publication of notice of intention to apply for this interim grant of administration;
- i) an administration bond and sureties; or
- j) further compliance with the Probate Rules,

be dispensed with.

17. ORDER, subject to further order, that the Administrator be authorised to retain out of the estate of the deceased remuneration that is just and reasonable

(not exceeding \$____ per hour or such other amount as may be approved by the Court) for performance of the office of administrator.

18. RESERVE to all persons interested in a due administration of the estate of the deceased (including the Administrator) liberty to apply as they may be advised.

(V) GENERAL GRANTS OF PROBATE OR ADMINISTRATION

A. A GENERAL GRANT OF PROBATE (TO AN EXECUTOR NAMED IN A WILL)

19. ORDER that the will dated ____ of ____ (who died on ____) be admitted to probate (expressly or by implication “in common form” or, if the Court is satisfied of the elements identified in *Estate Kouvakas; Lucas v Konakas* [2014] NSWSC 786 at [249], “in solemn form”).
20. ORDER that probate of the will of the deceased be granted to ____.
21. ORDER that the proceedings be referred to the Probate Register to complete the grant.
22. [If all interested persons agree] ORDER that any requirement for an administration bond or sureties be dispensed with.
23. [If all interested persons agree] ORDER that any requirement for further compliance with the Probate Rules (*Supreme Court Rules 1970 NSW, SCR Pt 78*) be dispensed with.

[**Note:** If all interested persons, for consideration, consent to a grant of probate or administration, a grant in solemn form is not necessary to bind them to the outcome of probate proceedings.]

B. A GENERAL GRANT OF ADMINISTRATION WITH THE WILL ANNEXED

24. ORDER that the will dated ____ of ____ (who died on ____) be admitted to probate (in common form or solemn form, as the case may be).
25. ORDER that letters of administration, with the will of the deceased annexed, be granted to ____.
26. Orders otherwise as in the case of a general grant of probate to an executor named in the will, set out above.

C. A GENERAL GRANT OF ADMINISTRATION IN RESPECT OF AN INTESTATE ESTATE

27. DECLARE that the purported will dated ____ of ____ (who died on ____) is not a valid testamentary instrument of the deceased.
28. DECLARE that the deceased died intestate.
29. ORDER that letters of administration of the intestate estate of the deceased be granted to ____.
30. ORDER that the proceedings be referred to the Probate Registrar to complete the grant.
31. [If all interested persons agree] ORDER that any requirement for an administration bond or sureties be dispensed with.
32. [If all interested persons agree] ORDER that any requirement for further compliance with the Probate Rules (*Supreme Court Rules 1970 NSW, SCR Pt 78*) be dispensed with.

(VI) REVOCATION OF A (GENERAL) GRANT OF PROBATE OR ADMINISTRATION

33. ORDER that the grant of probate (or administration, as the case may be) issued by the Court on ____ in respect of the estate of ____ (who died on ____) be revoked.
34. ORDER that ____ deliver up the (revoked) grant to the Probate Registry forthwith (if not earlier returned to the Registry).
35. ORDER that (the grantee of the revoked grant) by himself, his servants and agents be restrained from:
 - a) acting or purporting to act as a legal personal representative of the deceased; and
 - b) holding himself out as entitled to act as a legal personal representative of the deceased.
36. ORDER that ____ serve a copy of these orders on (the grantee of the revoked grant) no later than ____.

[**Note:** Upon revocation of a grant, orders are generally made for a fresh grant of probate or administration (as the case may be), with the proceedings referred to the Probate Registrar to complete the grant “forthwith”, intending that (subject to payment of any filing fees) further compliance with the Probate Rules be dispensed with.]

(VII) NOTATIONS AND ORDERS ON THE MAKING OF A STATUTORY WILL

37. NOTE the summons filed _____.

38. NOTE the draft will for (the incapable person) propounded by the plaintiff (and other drafts, if any).

39. NOTE the written submissions dated _____ signed by _____ on behalf of _____.

40. NOTE the following affidavits read in support of the summons:

a) affidavit of _____ sworn _____.

b) affidavit of _____ affirmed _____.

41. NOTE the following affidavits read by _____ in response to the summons:

c) affidavit of _____ sworn _____.

d) affidavit of _____ affirmed _____.

42. ORDER, pursuant to section 19 of the *Succession Act 2006* NSW, that the plaintiff be granted leave to make an application for an order under section 18 of the Act on behalf of (the incapable person).

43. ORDER, pursuant to section 18 of the *Succession Act*, that a will be authorised to be made on behalf of (the incapable person) in terms of the draft will that is Exhibit _____.

44. ORDER that the Registrar be authorised and directed to sign, and seal with the seal of the Court, pursuant to section 23 of the *Succession Act*, a will in the terms of the draft will that is Exhibit _____.

45. [Where the incapable person is a “protected person” within the meaning of the *NSW Trustee and Guardian Act 2009* NSW, s 38]:

e) NOTE that the NSW Trustee on _____ authorised the plaintiff to apply for a statutory will.

- f) ORDER, subject to further order, that the manager of the protected estate of (the incapable person), _____, provide to the Court, no later than six months after (the incapable person) attains the age of _____, or the death of (one or more identified significant persons in the life of the incapable person), whichever first occurs, a report as to whether (the incapable person's) will should be revised.
- g) NOTE that Order 45(b) is not intended, of itself, to require or prevent a further application for authorisation of a will, or codicil, for (the incapable person).
46. ORDER that the plaintiff's costs of these proceedings be paid out of the estate of (the incapable person) on the indemnity basis.
47. [Other orders for costs, if any, as appropriate to the particular case.]
48. RESERVE to the incapable person, and any other person with a sufficient interest, liberty to apply generally.
49. ORDER that these orders be entered forthwith.
50. NOTE that these orders have been made at _____am/pm on _____.

(VIII) INTERLOCUTORY COSTS ORDERS

51. [If the quantum of costs is agreed or evidence of quantum is adduced] ORDER that X pay Y's costs (of a specified application or hearing) in a specified sum of \$_____.
52. [If the quantum of costs is not agreed and no evidence of quantum is adduced] ORDER that X pay Y's costs (of a specified application or hearing) as agreed or assessed, with leave to proceed to an assessment forthwith.
53. ORDER that costs payable pursuant to (an order in the form of Order 51 or Order 52) be payable forthwith.
54. ORDER that the party ordered to pay costs (by an order in the form of Order 51 or Order 52) have no recourse to the estate of the deceased for payment or reimbursement of those costs.