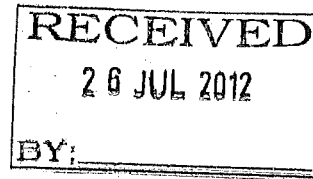


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25 July 2012

Victorian Law Reform Commission
GPO Box 4637
MELBOURNE VIC 3001

Submission No. 2

Dear Sir/Madam,

Re: Call for submissions into Part IV Claims under Administration and Probate Act

Part IV Claim Experience

Recently, we acted for an executor defending a Part IV claim in the County Court of Victoria. The claim was financed by a firm of solicitors acting on a 'no win, no fee' basis. An Originating Motion was served in early January 2012 seeking an order for the plaintiffs' proper maintenance and support claiming adequate maintenance and proper support had not been made for the plaintiffs. No other particulars of the claim were given. A proper basis certification was also provided under s. 42 of the Civil Procedure Act 2012. In mid January 2012, the plaintiffs' lawyers advised the matter had been listed before administrative mention on 9 March 2012. Despite having no details of the plaintiffs' claim the executor was asked to consent to orders for the conduct of the proceedings. We therefore asked for the plaintiffs to provide taxation returns, Centrelink documentation, and a statement of the plaintiffs' assets and liabilities and current financial circumstances. After the exchange of further correspondence we agreed to the plaintiffs' proposed minutes of consent orders providing the plaintiffs provide an affidavit of discovery 10 days prior to trial. The plaintiffs' lawyers responded by saying:

- The estate had no immediate right for discovery orders in Part IV claims;
- Financial issues would be addressed in the plaintiffs supporting affidavits;
- The modest size of the estate did not justify "unnecessary" legal costs preparing such affidavits when the information would be deposed to in the plaintiffs' affidavits.

As an agreement could not be reached on the Consent Orders, the matter was listed for a Directions Hearing. The plaintiffs refused to provide copies of any financial document to the estate nor any list of the documents in their possession prior to the service of the plaintiffs' affidavits.

Section 91(4)(h) of the Administration and Probate Act requires the Court to have regard to the financial resources and any capacity and financial needs of the applicants in a Part IV claim. Costs could have been minimised if the plaintiffs had provided full and proper disclosure at an early date in the proceedings. The Overarching Obligations also require the disclosure of existing documents, critical to resolution of a dispute. These obligations also require reasonable endeavours made by the parties to resolve the dispute, narrow the issues, ensure costs are reasonable and proportionate and minimise delay.

The plaintiffs briefed counsel to appear at the Directions Hearing and sought an order that the estate pay for costs of the hearing. In support of the application the plaintiffs' lawyers filed a five and a half page affidavit and 22 exhibits of the correspondence that had passed between respective solicitors to resolve the dispute.

At the Directions Hearing the presiding judge was critical of the plaintiffs' lengthy affidavit and the issue of disclosure of documents being raised before the plaintiffs had filed their affidavit material. The Court's major concern was the depletion of the estate by procedural disputation. Orders were made for the filing of material by all parties and a case conference date fixed. Costs of the day were reserved.

The plaintiffs filed and served affidavit material on 20 April 2012. This was the first time any details of the plaintiffs' claim was available to the defendant. The affidavits had very little documentation substantiating the claims of financial need. No documents containing information about superannuation were filed, nor tax returns, Centrelink records and telephone records (the plaintiffs claimed that they were in regular contact with the deceased prior to his death, which was disputed). No financial information of the partners of the plaintiffs' and other persons with whom they were living was disclosed.

Counsel was briefed to appear at the case conference for both parties. The plaintiffs' lawyers advised that their costs were at that stage \$25,000. Counsel for the estate advised that because of the size of the estate (approximately \$200,000), the claim should be settled. He was strongly of the view that no application should be made to the Court for further disclosure, again because of the size of the estate, and the likelihood that the estate would be held liable for the costs of all parties in any event. The executor therefore agreed to negotiate a settlement of the claim. Negotiations proceeded on the basis that \$25,000 first had to be paid to the plaintiffs' lawyers and on the self-serving, uncontradicted statements in the plaintiffs' affidavits which were not supported by documentation which could have easily been produced.

In his Will, the deceased expressly intended to benefit the children of his second wife. Both he and his second wife were not present to explain his intentions. His decision to exclude the children of his first marriage has been ignored. The executor was unable to implement the testator's intentions or to test the plaintiffs' claims of poverty which the executor believed was solely the plaintiffs' responsibility.

We are enclosing a practice note in respect of procedure followed in NSW in Family Provision Claims. The draft form of affidavit requires the plaintiff to make proper disclosure of their assets and liabilities, superannuation and their spousal or

partner's assets. This is a considerable improvement on the procedure followed currently in the County Court of Victoria, based on our recent experience.

Would you please consider our recent experience settling a Part IV claim in the County Court when conducting your enquiry into Part IV claims.

Yours sincerely,



~~Geoffrey Grantham and Harrison Wall~~
Instructing Solicitor and Law Clerk
GEOFFREY GRANTHAM & ASSOCIATES

Practice Note No. SC Eq 7

Family Provision

Date:

15/05/2009

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 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

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.141 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 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.

FORM OF AFFIDAVIT FOR USE IN FAMILY PROVISION CLAIMS

AFFIDAVIT OF [NAME] [DATE]

COURT DETAILS

Court

#Division

#List

Registry

Case number

TITLE OF PROCEEDINGS

[First] plaintiff [name]

#Second plaintiff #Number of
plaintiffs (if more than two)

[First] defendant [name]

#Second defendant #Number of
defendants (if more than two)

Additional information Family provision

FILING DETAILS

Filed for [name] Plaintiff

#Filed in relation to [eg plaintiff's claim, (number) cross-claim]
[include only if form to be eFiled]

#Legal representative [solicitor on record] [firm]

#Legal representative reference [reference number]

Contact name and telephone [name] [telephone]

[on separate page]

AFFIDAVIT

Name

Address

Occupation

Date

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] as the "deceased" in this affidavit.
- 4 The deceased:
 - Was born on [date] and died on [date] at [number] years
 - #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 was the deceased's #wife/#husband when #he/#she died.
#I was living in a domestic relationship with the deceased at the time #he/#she died as follows: [Briefly describe the basis of the domestic relationship]
#I am a child of the deceased.
#The deceased and [name] were in a domestic relationship and I am a child of that relationship as follows: [Briefly describe the basis of the domestic relationship]
#I am a former #wife/#husband of the deceased.
#I am the deceased's grandchild and was wholly or partly dependent on the deceased as follows:
#I was a member of a household of which the deceased was a member from [date] to [date] and was wholly or partly dependent on the deceased as follows:

Relationship with deceased

- 7 I have annexed a copy of the deceased's family tree, which is marked "A". It shows the names and ages (if known) of the deceased, the deceased's children and the deceased's other dependents.
- 8 [If relevant, include evidence to address the factors set out in s.9(3) of the Family Provision Act 1982 or s.60(2) of the Succession Act 2006]

Education and employment history

- 9 My education details are as follows:
- 10 My employment history is as follows:

Present circumstances

- 11 I am [number] years.
- 12 I #own/#am paying off/#rent my home at [address].
- 13 #I live by myself.
- #I live with the following people:

Name of person	Relationship to plaintiff	Is the person dependent on the plaintiff? Yes/no	Age (if under 18 years)

- 14 #I give financial assistance to the following people who do not live with me:

Name of person	Relationship to plaintiff	Age (if under 18 years)

- 15 My health is [describe the plaintiff's health].
- 16 I received the following gifts or other benefits from the deceased:

Date of gift/benefit	Amount of gift/value of benefit	Description

[Adapt as necessary to show any joint financial transactions with the plaintiff's spouse/partner.]

- 17 I have annexed a summary of my assets and liabilities (including superannuation and joint assets), which is marked "B".

18 I have annexed a summary of my monthly expenditure excluding credit card payments, which is marked "C".

19 I have annexed a copy of my income tax returns and notices of assessment for the last 3 years, which is marked "D".

20 I have provided access to the other parties to my bank statements and credit card statements for the last 3 years.

21 I purchased or sold the following real estate in the last 5 years:

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

22 I purchased or sold the following shares in public companies in the last 5 years:

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

23 I made the following gifts of amounts \$1,000 or more in the last 5 years:

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

24 I sold the following property for \$1,000 or more in the last 5 years:

Sale date	Sale price	Value of property	Description

25 I have the following interests in the following companies or trusts:

26 I have annexed a diagram that shows my ownership and control of the companies and trusts referred to in the previous paragraph and their underlying assets, which is marked "E".

27 #I have annexed a summary of my spouse/partner's assets (including superannuation and joint assets), liabilities and last 3 years' of income, which is marked "F".

#My spouse/partner has made an affidavit detailing his/her assets (including superannuation and joint assets), liabilities and last 3 years' of income. A copy of this affidavit will be served with this affidavit.

Claim on the deceased's estate #and notional estate

28 #I seek to have the following property designated as notional estate:

29 In the future, I will need [List the plaintiff's future needs. If the plaintiff will need accommodation, include details of the present cost of supplying that accommodation and evidence of those costs eg. Real estate agent advertisements].

#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: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.