



SUPREME COURT PRACTICE NOTE SC EQ 07

Supreme Court Equity Division – Probate and Family Provision List

Commencement

1. This Practice Note was issued on 13 June 2024 and commences on 17 June 2024. It replaces Practice Note SC EQ 07 issued on 16 June 2023.

Application

2. The list previously known as the Succession and Probate List will henceforth be designated the Probate and Family Provision List (the **List**) and will be managed by a Probate and Family Provision List Judge (the **List Judge**), with the assistance of the Registrar in Probate.
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). The provisions of this Practice Note should be read with the procedural requirements for (a) family provision claims under all applicable family provision legislation as provided for in the Supreme Court Rules 1970 (NSW) pt 12 r 1A and Schedule J and (b) probate claims as provided for in the Supreme Court Rules 1970 (NSW) Pt 78.
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. The Court requires practitioners to ensure that all eligible persons and affected parties are notified and in cases of any genuine doubt as to whether a person is eligible or affected by the claims in the proceedings to raise the issue with the Registrar in Probate or List Judge at the earliest opportunity.
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.

Definitions

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

Case Management

7. Probate proceedings (including those combined with a family provision application) will be managed by the Registrar in Probate in a List on Tuesdays commencing at 9.00am.
8. Family provision applications will be managed by the Registrar in Probate in a List on Thursdays commencing at 9.00am.
9. A judge will ordinarily be available on both days, to whom the Registrar may refer matters. As well, a judge will ordinarily be available for the Registrar to refer matters to be dealt with on Fridays.
10. 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.
11. Unless the Registrar in Probate is unavailable, all urgent applications must, in the first instance, be referred to the Registrar in Probate who may refer it to the List Judge or another judge. Where the Registrar in Probate is unavailable and the matter is genuinely urgent, the Duty Judge may be approached.
12. The Court expects that:
 - 12.1 each party not appearing in person shall be represented at any hearing in the List 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
 - 12.2 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.

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 the Registrar in Probate no later than the first Thursday 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 (adapted from the form which is Annexure 2) 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 or filed contemporaneously with the Summons; and
 - 15.3 an affidavit estimating the plaintiff's costs and disbursements, calculated on an indemnity basis up to and including the completion of a mediation. 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. If a legal practitioner is on the record, the affidavit is to be made by the practitioner.
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 Registrar in Probate 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 Registrar in Probate 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 Registrar in Probate a timetable for the preparation of the matter.
18. At the first directions hearing, the Registrar in Probate may make directions, including for the filing and/or 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 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) 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; or
 - (d) a person holding property as trustee or otherwise;
- 18.10 compliance with Supreme Court Rules 1970 (NSW) Schedule J – Succession Act, including the name and address of every person to whom notice of the plaintiff's application has been given (in the form required by Supreme Court Rules 1970 (NSW) Schedule J – Succession Act cl 4(3) – as reproduced in Annexure 2), 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 with a summary of such 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 Registrar in Probate will give directions for the filing and service by the parties of a disclosure statement (which the Registrar in Probate 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 their 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 their life or within 12 months of execution of a testamentary instrument.
20. The Registrar in Probate 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); and
 - 20.4 any orders, and supporting reasons for decision, of the New South Wales Civil and Administrative Tribunal (**NCAT**) relating to the welfare of the deceased (not the whole NCAT file).
21. The Registrar in Probate 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 for Tuesdays will close at 12 noon on the preceding Friday. The List for Thursdays will close at 12 noon on the preceding Tuesday. The deadline will be appropriately adjusted for any intervening public holidays. 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 the closing of the relevant List and must be made by email to the Registrar in Probate.
23. If the Registrar in Probate 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 Registrar in Probate by email 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. On filing of consent orders in family provision applications, a completed settlement checklist must be included with the consent orders in the form as published on the Supreme Court website.
27. Where a family provision application is combined with probate proceedings, the requirements of paragraph 19 apply.
28. Where consent orders require approval of a compromise or release, or an order extending time for the making of an application, the Registrar in Probate will notify the parties of the next listing after consulting with the List Judge.
29. 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; and
 - (b) two copies of the order.

Subpoenas and Notices to Produce

30. Subpoenas in matters in the List must not be issued without leave of the Registrar in Probate. Notices to produce, other than under UCPR r 21.10(1)(a), must not be served without leave of the Registrar in Probate. The Registrar in Probate may dispense with any requirement for the filing of a motion for leave to issue a subpoena or serve a notice to produce.

Mediation

31. Unless otherwise ordered, all proceedings involving a family provision application will be referred to mediation at the earliest practicable time.
32. 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.
33. Unless otherwise ordered (or otherwise by consent), mediations will be Court-annexed with a presumption that they are listed with a half day estimate unless there are factors warranting a longer estimate. It is expected that the parties will be personally present absent exceptional circumstances. Where private mediation is sought by a represented party, the party is to be advised that Court-annexed mediation, without any cost of the mediator or the venue, is available.
34. 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 conducting the mediation may make the necessary orders and vacate the next directions hearing.

35. 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. Irrespective of whether provision is made for an updating affidavit, practitioners are reminded of the obligation on an applicant to place the relevant facts before the Court.
36. 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. If a legal practitioner is on the record, the affidavit is to be made by the practitioner.
37. 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

38. Unless the Court orders otherwise, or reasonable notice is given that strict proof is necessary, parties may give evidence as follows:
 - 38.1 a kerbside appraisal by a real estate agent of any real property;
 - 38.2 an estimate of the value, or a monetary amount, for the non-monetary assets of the estate other than real estate;
 - 38.3 internet, or other media, advertisements of the asking price of real estate;
 - 38.4 the plaintiff's or beneficiary's best estimate of costs or expenses of items the plaintiff or the beneficiary wishes to acquire;
 - 38.5 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;
 - 38.6 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

39. Practice Note SC Eq 05 – Expert Evidence in the Equity Division applies with any necessary adaptations, if expert evidence is necessary to assist the Court.

Costs

40. 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 \$1,000,000.
41. In probate matters, no presumption with respect to the making of an order for costs arises by reason only of the fact that the testator was the cause of the litigation or because the circumstances led reasonably to an investigation concerning the testator's Will.

Regional Practitioners

42. Applications to appear in the Tuesday and Thursday lists remotely by practitioners not in Greater Sydney should be directed by email to the Registrar in Probate, not later than 12 noon on the preceding Friday for Tuesdays, and 12 noon on the preceding Tuesday for Thursdays.

The Hon. A S Bell

Chief Justice of New South Wales
13 June 2024

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

13 June 2024: This Practice Note replaces the previous version of SC Eq 7 that was issued on 16 June 2023.

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. Annexed hereto and marked “###” is a family tree diagram which shows the relationships between the deceased and persons who are or may be eligible persons within the meaning of s 57 of the *Succession Act 2006* (NSW).
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:

| 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.

ANNEXURE 2

Forms (adapting UCPR Form 1)

Notice of Eligible Persons

NOTICE OF ELIGIBLE PERSONS

To the Administrator

The plaintiff notifies you that, in [his/her] opinion, the persons named below are or may be eligible persons pursuant to s 57 of the *Succession Act 2006* (NSW)

[Name(s) – address (if known)]

The plaintiff notifies you that, in [his/her] opinion, of the persons named above, the following persons are or may be persons under legal incapacity

[Name(s)]

Notice of Claim Form – Succession Act Claims

NOTICE OF CLAIM

The plaintiff has applied to the Court under the *Succession Act 2006* for a family provision order in respect of the estate of (*name*) deceased who died on (*date*).

If you are entitled to, and wish to apply for, an order for provision for you out of that estate, you must apply within a period prescribed by the *Succession Act 2006* or allowed by the Court. If you do not, before the Court deals with the plaintiff's application, apply for an order for provision for you out of that estate, the Court may deal with the plaintiff's application without regard to any possible application by you.

Dated—

(*signature*)

Solicitor for the administrator

(*Address for service*)

(*or as the case may be*)