

THE NEW FAMILY PROVISION REGIME

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Chapter 3 of the *Succession Act* 2006, NSW provides that eligible person may apply for provision or further provision from a deceased's person's estate. Around 600 to 800 applications are filed in the NSW Supreme Court each year.

The NSW Supreme Court has recently appointed Justice Hallen as the Family Provision List Judge, and revised Family Provision procedure with the intention of streamlining the process and reducing costs.

New Family Provision Practice Note

The Supreme Court issued revised Family Provision Practice Note Eq 7 effective 1 March 2013. There is a new standard form Plaintiff's affidavit in Annexure One. The affidavit includes sub-headings that compel the applicant to confine their evidence to address the factors in section 60 Succession Act. If the 12 month application deadline is approaching, the Plaintiff may commence proceedings without a supporting affidavit, but the affidavit must be filed by the first directions date (which should be within 28 days of filing). The Plaintiff will no longer need to annex tax returns to the affidavit, but the executor/defendant may request inspection of categories of the Plaintiff's financial documents which may include tax returns, bank statements, insurance policies and superannuation statements.

The executor/defendant must file (and not merely serve) the executor's affidavit setting out the assets and liabilities of the estate, notional estate and eligible persons, and affidavit of service of eligible persons. The executor/defendant is initially confined to one affidavit to traverse the Plaintiff's affidavit and one affidavit (which may be on information and belief) listing the other beneficiaries' financial circumstances. If the executor/defendant puts a beneficiary's financial circumstances in issue the beneficiary will be required to provide a verified schedule of financial circumstances, or the plaintiff may request inspection of categories of the beneficiary's financial circumstances. If the matter does not settle at mediation, each party may apply to file further affidavits.

Both the plaintiff and the executor/defendant must also provide an affidavit estimating the party's costs on a party/party basis to mediation. Justice Hallen has indicated in seminars to the profession that a reasonable range is \$20,000 to \$25,000. If the matter does not settle at mediation, the plaintiff and executor must file updated costs affidavit - the plaintiff's costs affidavit must include costs on an ordinary basis and on an indemnity basis and identify any uplift. The practice note includes an express comment in the practice note that a party's costs may be capped for estates less than \$500,000, and the resources of the estate and the court should not be used in a manner that is out of proportion to the size of the estate and the provision that may be made. The practice note echoes the court's recent comments about costs including Pembroke J's comments in *Ireland v Retallack; Estate of Gordon* [2011] NSWSC 846 that an estate should not be treated as a "milch cow", and Hallen J's warning in *Mikan v Velcic* (No 2) 2011 NSWSC 505 that parties should not assume that family provision litigation can be pursued safe in the belief that costs will be paid out of the estate.

Family Provision Directions List

The Family Provision directions list is directly case managed by Justice Hallen, and has been moved from Tuesday afternoon to Fridays with staggered listing times. Justice Hallen first lists matters that require court approval, such as settlements involving applicants who are minors or under a disability or where the interest of a minor beneficiary is disturbed; or there is a family provision release under section 95 Succession Act. Justice Hallen requires the papers and the proposed orders (preferably in word format) to be provided to his Associate before midday Wednesday, so that Justice Hallen has an opportunity to review the papers in chambers and the

approvals can be dealt with expeditiously. Next, recently filed matters are listed, and then older matters are listed. Motions are listed at the end of the list, not before 12 midday.

Justice Hallen has prepared draft orders for the first, second and third directions hearing. Copies of the draft orders are available on the bar table. The Practice Note provides that practitioners should communicate with a view to having consent orders at the directions hearings. Justice Hallen has stressed that the draft orders are draft only, and the parties may amend the orders to suit their matter. However, the parties may need to explain why they are deleting standard orders.

The draft orders for the first directions hearing provides a timetable for filing the required affidavits and inspection of each party's financial documents, a date for the mediation and the next return date (usually 2 weeks after mediation). If there are a number of matters involving the same estate, the orders should also provide that the matters should be heard together and evidence in one will be evidence in the other.

Mediation

The Succession Act requires mediation before hearing, and around 70% - 80% of matters settle at mediation or shortly thereafter. In some ways, a family provision practice is an ADR practice. It is intended that the mediation date will be within 3 to 4 months of the first directions date. There is a mediation calendar on the bar table during the Friday list with available dates for court-annexed mediation at 9.30am and 2pm. First come, first served to select a suitable date. The range of available dates is also published at the bottom in the Friday court list published online late Thursday afternoon. If the parties intend to have a private mediation, the parties must advise the court of the mediator's name and the date of the mediation at the first directions hearing.

Justice Hallen has indicated in seminars to the profession that in small estates of less than \$200,000, he may not refer the matter to mediation but instead suggest an informal settlement conference.

If the matter settles, the consent orders should include an order how the burden of the provision should be borne between the beneficiaries, orders about the plaintiff and the defendant's costs, as well as noting the agreement of the parties that the plaintiff was an eligible person, the application was commenced within time, the Schedule J affidavit has been filed and eligible persons have been served notice.

If the matter does not settle at mediation, the matter will be relisted where the court may make orders in accordance with the draft orders for the second directions hearing and fix a timetable for further affidavits and a further listing date, or make orders in accordance with the draft orders for the third directions hearing and list the matter for hearing.

Probate/Family Provision, Equitable Estoppel/Family Provision Claims

A plaintiff's claim may be a contested probate claim with a default family provision claim. In such cases, the plaintiff should file a statement of claim relating to the probate claim and the family provision claim (rather than the family provision summons), and the matter will be listed in the Probate List rather than the Family Provision List. Similarly, a plaintiff may have an equitable estoppel claim with a default family provision claim. Again, the plaintiff should file a statement of claim and the matter will be listed in the General Equity list.