

FAMILY PROVISION - PRACTICE AND PROCEDURE

ESSENTIAL ASPECTS

ALL YOU WANTED TO KNOW ABOUT FAMILY PROVISION AND WERE TOO FRIGHTENED TO ASK

Introduction

1. All family provision matters are case managed in the Family Provision List by Hallen J. This paper seeks to deal with the essential aspects of practice and procedure in that list.

Institution of Proceedings

2. Practice Note no. SC Eq 7 governs the procedure employed in the List. Proceedings are instituted by way of Summons. The plaintiff must file and serve an Affidavit adapted from the form in Annexure 1 to the Practice Note. The plaintiff must also file and serve a Notice of Eligible Persons and an Affidavit setting out an estimate of the plaintiff's costs and disbursements calculated on an indemnity basis, up to and including a mediation.

Plaintiff's Affidavit – Matters for Attention

3. Family provision cases are about dollars and cents. Most affidavits are strong on family history and light on financial circumstances or identifying and quantifying the cost of proper and adequate provision.
4. Greg Smith of counsel has prepared a checklist setting out a client's financial circumstances – see Annexure A.

5. It is important to identify at an early stage the components of an order for provision. If accommodation is a component it is important to arrange for the client to inspect appropriate properties and to obtain information such as domain searches or other documentation setting out the cost of the relevant accommodation. The material should include transactional costs such as stamp duty and legal costs. If a motor vehicle or whitegoods are required it is important to annex internet material showing their costs.

The Defendant

6. If you are acting for a defendant as soon as you receive the Summons you should commence to prepare the administrator's affidavit (Annexure B), the Affidavit of Service of Notices (Annexure C), remember to serve all beneficiaries as well as eligible persons, an Affidavit setting out the financial and material circumstances of any beneficiary who wishes to raise their circumstances as a competing claim on the estate (Annexure D). Only one affidavit is to be served so if more than one beneficiary circumstances are relevant, the deponent should set out the beneficiary's circumstances on information and belief. The fact that the beneficiary is not making a separate claim for provision or is not an eligible person is irrelevant. The purpose of the affidavit is to lay the foundation for the relevant beneficiary to assert that they need the bequest received under the Will and that any order for provision in favour of the plaintiff should be reduced or refused to reflect this. Also prepare an affidavit estimating the administrator's costs, calculated on the indemnity basis, up to and including a mediation.
7. Hallen J expects these affidavits to be filed and served prior to the first return date. They can be prepared without reference to the plaintiff's evidence. In many (if not most cases) an affidavit in reply is not necessary before a mediation. If it is, it can be prepared after receipt of the plaintiff's affidavit. The circumstances in which an

affidavit in reply is useful before mediation include where the status of the plaintiff is disputed or whether conduct of the plaintiff (including any estrangement from the deceased) is in issue.

8. Serve a notice to produce upon the plaintiff for acquiring production of the plaintiff's and the plaintiff's partner's financial records. Greg Smith's precedents are annexed and marked D and E.

Alternative Dispute Resolution

9. Either at the first or second return date Hallen J will refer the matter to alternative dispute resolution. The alternatives are:
 - (a) A judicial settlement conference: These are usually matters where the estate is under \$500,000.00. The conference can either be at 9:30 before Hallen J or, alternatively, the parties and their legal representatives commence negotiations in chambers and if unsuccessful by a given time appear before the Judge;
 - (b) Court appointed mediation before a Registrar: these usually occur in cases where the estate is less than \$1 million; and
 - (c) Private mediations: This usually occurs where the estate exceeds \$1 million. Hallen J will usually order that the Mediator's fees and the costs of venue hire be, in the first instance and subject to further order, be paid out of the estate.

Settlement

10. If the matter is settled at mediation orders need to be drafted that dispose of the proceedings. If the mediation is Court annexed the Registrar may be able to make the orders. If not or in cases where there is a private mediation, consent orders, affidavits and a completed settlement checklist (Annexure F) is delivered to Hallen J's associates.

11. A soft copy of the orders should also be emailed to the Associate. The Judge will indicate via email from his Associate the orders he is prepared to make. Each party must confirm the appropriateness of and consent to the orders by email. The orders are then entered into Justice Link and the matter is then concluded.
12. The administrator's solicitor should take out the orders. They should then be lodged with the probate or letters of administration so as the orders can be included in the grant.

Orders

13. Attention needs to be given to the appropriate form of order.

Where no Grant has been made in the Estate

14. In these circumstances it may be necessary to have the Court make a grant pursuant to s.91 of the Succession Act, 2006 and/or an order pursuant to UCPR Rule 7.10.

Lump Sum Provision

15. The most common form of order for provision is a lump sum of money. The relevant form of order is set out in Annexure G. Attention needs to be given to the question of whether and from what time interest is to be paid. Consideration should also be given as to who will bear the burden of paying the provision.

Crisp Order

16. A Crisp order takes its name from a form of order made by Holland J in Crisp v Burns Philp Trustee Co Ltd. In essence it is a portable right of residence whereby the plaintiff is entitled to ask executors to sell the relevant accommodation and obtain alternative accommodation for them including the right to reside in aged care accommodation – see Annexure H.

Clifford v Mayr [2010] NSWCA 6 or “Reverse Crisp” Orders

17. These orders usually grant the plaintiff a fee simple interest in the property but subject to a charge – See Annexure I.

Loans

18. There is a movement to order that the plaintiff receive a loan from the estate (appropriately secured) which can be used for accommodation or other purposes. This may be an alternative to a Crisp order – see Annexure J.

Curren v Harvey (2012) NSWSC 276

19. These are orders conditional on the plaintiff not being incarcerated for a period of time and/or for funds for specified purposes beneficial to the plaintiff - see Annexure K.

Releases

20. If a release of right is to be given it must be supported by an affidavit which deals with the matters in s.95 Succession Act, 2006.

Disclaimer

21. The precedents which are annexed are a general guide only. It must be considered and, if necessary, adapted to the particular circumstances of a case.

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8 October 2021