



Précis Paper

Practice in the Family Provision List

This exercise concerning a Law List and its administration crosses state borders.

Discussion Includes

- What is the procedure in the Supreme Court Family Provision List?
- What Practice Note applies?
- What does the Court expect from practitioners?
- What documents need to be filed with the application?
- What happens at the first directions hearing?
- What scope is there for offers of compromise?

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Practice in the Family Provision List

1. In this edition of BenchTV, David Jay (Barrister) and Ian Benson (Solicitor) discuss legal practice in the Family Provision List in NSW. A claim under the family provision list refers to an application for an order for provision to be made out of an estate for a person's maintenance, education and advancement in life.
2. In mid-2015 Justice Hallen gave a tutorial to practitioners on practice in the Family Provision List in the Supreme Court entitled *Current Issues from the Perspective of the Bench*, which was a part of a series of 8 lectures entitled *Estate Administration Tutorial Series: Probate, Protective and Family Provision Jurisdictions* - a joint initiative of the Supreme Court of NSW, the NSW Bar Association, and the Law Society of NSW. Justice Hallen informed practitioners about how they can conduct a practice in the Family Provision List so that it is efficient, quick and cost effective including practical matters about list procedure, steps to take commencing proceedings, preparation of affidavits, costs and how to conclude proceedings efficiently. Justice Hallen emphasized the need to follow the *Supreme Court of NSW Practice Note SC Eq 7* (hereafter "Practice Note") in this area of practice since it is both detailed and prescriptive about the methods practitioners should apply when conducting proceedings in the Family Provision List. Mr Jay recently published the article 'Family Provision: Better practice in the family provision list' which collates and discusses Justice Hallen's findings.

Operation of the Family Provision List.

3. The Family Provision List was created in March 2013. There is a dedicated Family Provision List judge (Justice Hallen) and the list operates mostly on a Friday for most of the day where notices of motion and directions hearings are conducted. Practitioners are expected to come well-armed and informed about their cases and Justice Hallen takes an active involvement in ensuring that matters are both prepared and moving quickly.
4. The List exists because the Supreme Court has acknowledged that family provision applications are becoming much more prevalent. This might be due to the increasing value of real property in NSW, which increases the value of estates, and the increasing awareness of the ability to challenge a Will. Mr Jay has observed a strong expectation by children that they are entitled under a Will and they are willing to fight for it in court.
5. Proceedings under the Family Provision List ought to be commenced within 12 months of the date of death of the deceased. If proceedings are commenced more than 12 months after the date of death, there is a requirement for a reasonable explanation for the delay, for example that there had been an estrangement and the applicant was not made aware of the

death. The length of the delay and whether or not probate has been granted are weighed in the balance by the Court when considering whether the delay was reasonable.

6. There are several matters that the plaintiff should seek to determine, including:
 - a. If probate has been granted or whether letters of administration have been applied for;
 - b. What the assets of the estate are; and
 - c. If there are any other eligible claimants, and their personal/financial circumstances.
7. The purpose of a Family Provision claim is to determine if a claimant has been left without adequate provision for their maintenance and advancement in life. This information is important in determining whether or not an eligible claimant has a good claim.

Commencement of Proceedings

8. Proceedings are usually commenced by way of summons. The Practice Note specifies that the date of death of the deceased be specified in the summons. In a rare case, proceedings may commence by statement of claim when there is an additional complexity, such as a trust claim or undue influence claim, that also needs to be determined by the Court. A statement of claim is a more detailed document which sets out the elements of the claim including the particulars and facts, while a summons is just a statement of relief in the proceedings (e.g. further provision from the estate or notional estate).
9. The plaintiff must file and serve the following documents in support of a summons:
 - a. An affidavit in accordance with Annexure "A" of the Practice Note
 - b. A notice of eligible persons providing the name and address (if possible) of all other persons who may be eligible to claim. This is required so that other eligible persons can be notified allowing them to make a claim if they wish and so that all claims can be decided in the one hearing.
 - c. An estimate from the plaintiff's lawyers of the legal costs and disbursements up to and including mediation. This places the onus on practitioners to have costs at front of mind, even before proceedings have commenced.
10. Sometimes time only permits summons to be filed as the 12-month period after the death is about to expire. Justice Hallen said in his lecture that if the documents cannot be prepared in time, the summons should be issued before the 12-month period expires and the additional documents filed and served in readiness for the first return date (usually 4-5 weeks later). However, if the matter comes before the court without the documents being prepared,

Justice Hallen will expect a clear explanation as to why this is the case. Justice Hallen takes an active interest in all the matters on the List and will read the affidavit for each matter before the first return date, so that he can make observations about what needs to be done. If practitioners are relying on counsel or a town agent, there will also be an expectation that that representative will have a full knowledge of the case.

11. Annexure "A" of the Practice Note is unusual in that it is prescriptive about the contents of an affidavit, where in most other proceedings it is a matter for the plaintiff to put on matters that they think are relevant to their claim. This is because matters in the Family Provision List follow a fixed formula or methodology. The Annexure requires the following matters to be addressed in the affidavit:
 - a. Eligibility of claim, which is a function of the claimant's relationship with the deceased. Usually claimants are spouses or children, but it is also possible for claims to be run by grandchildren and people who had a close personal relationship with the deceased.
 - i. The nature of the relationship
 - ii. Whether or not there has been disentitling conduct
 - b. Detailed financial circumstances of the claimant including assets, liabilities, and superannuation of the plaintiff (and their partner).
 - c. Purchases and sales of property and shares in last 3 years
 - d. Health of the claimant, if relevant
 - e. Evidence of testamentary intention including previous testamentary intention
 - f. Currency of the Will
12. The courts take a very dim view of claimants who provide less than full and frank disclosure of their financial circumstances, and can easily infer that there has been a deliberate non-disclosure. Mr Jay suggests that practitioners conform as closely as possible to the Annexure.
13. Affidavits are no longer filed in the registry, instead Justice Hallen is assisted by the plaintiff's practitioners delivering them up to his Chambers prior to the first directions hearing. If original affidavits are delivered to him, he will mark them as filed in court and he will take the time to read through them in order to quicken the process in Court.

Standard Forms, Discovery and Timing

14. There are two standard forms:
 - a. A short form of directions for estates under \$500k
 - b. A longer form of directions which allows for discovery or exchange of documents

15. As discovery can be expensive to pursue, Mr Jay suggests practitioners use a notice to produce when there is genuinely a need for specific documents e.g. tax returns for the last three years.
16. At the directions hearing, there is an expectation that the matter will be set down for mediation within 3 months and if the mediation is not successful, there is an expectation that the matter will be fixed for hearing with 12 months.

Executors and Administrators

17. Assuming that the affidavits and other supporting documentation has been provided to the executor (or administrator), Justice Hallen said that the executor could consider preparing the formal affidavits in support of the defendant's case and having them on even before the first directions hearing (although it is not strictly required by the Practice Note). Clauses 9.1 and 9.2 of the Practice Note specify the documents that should be prepared, including an affidavit with a copy of the will, a statement of assets and liabilities which identifies property that might be the subject of a notional estate claim, any testamentary expenses (e.g. funeral expenses, costs of conducting property sales) and names and addresses of eligible persons and beneficiaries set out in an affidavit of service. In every case, the administrator will be expected to have those formal affidavits.
18. Justice Hallen takes the view that it is probably unnecessary for an executor to submit an affidavit in reply at an early stage (before mediation) as not doing so saves on costs and reduces the heat or animosity between parties in the case. However, it might be appropriate to consider an affidavit in reply at an early stage if there is a genuine contest about disentitling conduct (that is, conduct which clearly explains why the plaintiff was left out of the will).

Costs

19. If a plaintiff's estimate of costs and disbursements up to and including mediation are more than \$25k they are expected by Justice Hallen to explain why. This is because costs in excess of \$25k can significantly reduce the value of the estate. Justice Hallen noted that there is an expectation on practitioners to contain the costs, otherwise the case will be taken out of their hands.
20. In the Family Provision List, offers of compromise tend not to be used greatly. The usual order is that if the plaintiff is successful, the costs should come out of the estate on an indemnity basis. However, Justice Hallen expressed that there is no reason why offers of compromise should not be encouraged, particularly during the mediation stage when both parties have a good idea about each other's arguments. Mr Jay's personal preference is for

offers of compromise if time permits rather than a Calderbank offer because there is a presumption in favour of indemnity costs under an offer of compromise.

21. Clause 24 of the Practice Note specifically allows the Court to cap costs (particularly where the value of the net distributable estate is under \$500,000) but this power is not commonly used as it requires a separate analysis of the court which itself consumes costs.
22. There are various practical ways for practitioners to avoid unnecessary costs including:
 - a. Staying close to the formula of the Practice Note
 - b. Making use of the fact that the Practice Note permits matters to be dealt with without the requirement of strict proof (e.g. estimates of assets in the estate)
 - c. Unless disentitling conduct is a genuine issue, avoiding long passages about past perceived grievances since they do not add much to the case and increase the length of the trial. It is important to stick to the real issues of the case.
23. Justice Young in *Estate of Joan Esme Little and the Succession Act 2006* [2015] NSWSC 1913 criticises affidavits with irrelevant information and notes the requirements of practitioners at [23]:

Before leaving the witnesses, I must say something about the way in which Susanne and Leonie's affidavits were prepared. In particular, Susanne's is the worst example. Susanne goes back to her childhood and we even have a story of how she was carried on by the school bus and so missed a day of school for which she received a belting from her father. It is almost impossible to see how that incident could have the slightest bearing on what I have to decide in this case. It may well be that it was therapeutic for Susanne (and for corresponding details, Leonie) to get out of her system something that had been troubling her for years, but that is no reason why the Court should be burdened with excess semi-irrelevant details. That is one of the reasons why the costs in this relatively small estate are over \$250,000. It is to be hoped that solicitors acting for plaintiffs will employ their professional skills when these affidavits are prepared, not just to put in affidavit form the client statement but only to put forward such details as are really relevant to the decision that has to be made.

24. Statistics show that most cases are settled prior to the hearing (60-80% at mediation and more prior to the hearing). Justice Hallen thus advises practitioners to only prepare for the mediation at the start in order to constrain costs, as chances are that the matter will not proceed to hearing.

Settlement

25. If the matter is settled, Justice Hallen recommends the following steps to be taken:
- a. Deliver original affidavits to his Honour
 - b. File affidavit of proof of service to eligible persons (personal service preferred over postal service)
 - c. Show evidence of grant of probate/administration
 - d. Deliver to his Honour the original signed consent orders as agreed between the parties
 - e. Consent orders must address matters required by s 65 of the *Succession Act* 2006 (NSW) which lists what needs to be specified in a family provision order
 - f. Evidence that other beneficiaries who received under the Will are aware of and consent to the settlement
 - g. Consent orders must satisfy the matters set out in Clause 19 of the Practice Note including that the application was made in time, the plaintiff is an eligible person, the notice of eligible persons has been served on the administrator and the administrator has attended the formal matters in the Practice Note.
 - h. Consent orders should specify whether the plaintiff's legacy is in lieu of or in addition to the bequest made in the Will. If there is a statement that a plaintiff should receive a certain percentage of the estate, the value of the estate should also be noted so that it is clear what the plaintiff will receive from the estate.
 - i. If the matter is settled within 12 months of the date of death then consent orders need to include a notation that all eligible persons have been notified and none of them propose to make a claim on the estate

Post Mediation if Not Settled

26. If a matter is not settled, the matter will go back to Court for further directions, parties will be expected to finalise any affidavits and practitioners also have to give an updated affidavit for costs and disbursements. The Practice Note also prescribes that if there is an uplift fee in the affidavit in costs and disbursements that should be specified as well. Parties will then need to wait for a hearing date. However, if the estate is not large, his Honour will sometimes call the parties and their legal representation in for a short informal conference in order to explain the costs and potential outcomes, to assist in the resolution of the matter without the cost of a formal hearing.

BIOGRAPHY

David Jay

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David Jay was admitted as a Solicitor in 1998 and called to the Bar in 2004. He has presented papers for the Law Society's CLP programs on environmental law and family provision claims. David is a member of the Francis Forbes Society for Australian Legal History. He was also a former tipstaff for Justice Peter Young. His primary practice is in commercial disputes, equity and tax law.

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Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law

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Estate Administration Tutorial Series: Probate, Protective and Family Provision Jurisdictions - a joint initiative of the Supreme Court of NSW, the NSW Bar Association, and the Law Society of NSW, including *Current Issues from the Perspective of the Bench* by Justice Hallen

Supreme Court of NSW Practice Note SC Eq 7