

A GUIDE TO PRACTITIONERS
APPLICATIONS FOR APPROVAL OF COMPROMISES IN
TESTATORS FAMILY MAINTENANCE (TFM) CASES

Introduction

1. Civil proceedings are often settled by consent between parties who are of full age and mental capacity. However, where a minor,¹ or an adult person who is not capable of managing their own affairs in relation to the proceeding,² is a party to the proceeding or has an interest affected by the proceeding, any settlement must be subject to, and then approved by the Court in order to be valid.³ This is known as an approval of ‘compromise’ (or settlement).⁴ The Court’s approval is facultative.⁵
2. The term ‘person under disability’ in this guide refers to persons under a legal disability, and includes both minors and adults who lack capacity to manage their own affairs in relation to the proceeding.⁶
3. Applications for approval of a TFM compromise come in two main forms:
 - (a) where the person under disability is a party to the proceeding, that party should seek approval under r 15.08 of the *Rules*;
 - (b) where the person under disability is a beneficiary of the estate, the defendant should seek approval under r 54.02(2)(c)(i) of the *Rules*.
4. This guide deals with pre-trial applications for approval of a compromise in TFM matters that affect the interests of a person under disability. However,

¹ A person aged less than 18 years of age: see *Age of Majority Act 1977* (Vic).

² An adult person who is incapable by reason of injury, disease, senility, illness or physical and mental infirmity, of managing that person’s affairs in relation to the proceeding: *Supreme Court (General Civil Procedure) Rules 2015* (‘*Rules*’) r 15.01.

³ Rule 15.08(1) of the *Rules*.

⁴ There are other circumstances where the Court may be asked to exercise power to approve a compromise of a Part IV proceeding, including where not all beneficiaries agree to the compromise: See *Hodge v De Pasquale* [2014] VSC 413; *Morrison v Abbott* [2012] NSWSC 320 [72] – [89]; *Keep v Packham* [2012] NSWSC 782 [61]- [70].

⁵ *Fairhurst (bht NSW Trustee and Guardian) v Fairhurst* [2012] NSWSC 388 [38].

⁶ See the definition of person under a disability in r 15.01 of the *Rules*.

most of the principles are applicable to approvals made at trial.

Procedure

5. The moving party must, without copying in any other party to the proceeding, promptly email the Court's TFM inbox at TFM@supcourt.vic.gov.au⁷ to give notice of an intention to seek an approval of compromise and obtain a date for hearing, so that the summons can be issued within 30 days of entering into the compromise as required by the Rules.⁸ The following documents should be attached to the email:
 - (a) a draft summons;
 - (b) an affidavit in support made by the solicitor showing:
 - (i) the date of compromise;
 - (ii) the date of birth of the person under a disability;⁹ and
 - (iii) the agreement of the litigation guardian to the compromise;¹⁰
 - (c) exhibits to the affidavit, which must include:
 - (i) counsel's opinion (see detailed requirements below);¹¹
 - (ii) fully executed and dated terms of settlement; and
 - (iii) any current VCAT orders relating to the person under disability;
 - (d) a draft order approving the compromise¹² (which also deals with any procedural matters, such as the late appointment of a litigation

⁷ Paragraph 12.3 and 15.2 of the Practice Note SC CL 7 (TFM List Practice Note).

⁸ Rule 15.08(2) of the *Rules*.

⁹ Rule 15.08(4) of the *Rules*.

¹⁰ There is a suggestion in *Karvelas (by her next friend) v Chikirow* (1976) 11 ACTR 22, 23-24, that the agreement of the litigation guardian is not necessary in all cases. As a practical matter, any compromise will require the involvement of the litigation guardian, as it is that person who, on behalf of the person under a disability, must enter into the agreement constituting the compromise. This approach to the issue was adopted in *Re Birchall; Wilson v Birchall*, (1880) 16 Ch D 41 and *Naso v Cottrell* (1994) 11 WAR 475.

¹¹ For the purposes of this guide, references to 'counsel' should be taken to include reference to appropriately qualified Australian Legal Practitioners.

¹² See the appendix to this guide and the Supreme Court website. Draft orders should be in word format: Practice Note SC CL 7 (TFM List Practice Note) [12.3].

guardian, amendments to the title of the proceeding etc).

6. The moving party must produce the original Grant of Representation ('Grant') to the Court by delivering it to the TFM Associate (if the plaintiff is the applicant, this may require the defendant to co-operate).
7. Once the material in paragraphs 5 and 6 has been received, the moving party will be given instructions about how to file the material on RedCrest.
8. The moving party must *not* serve the affidavit in support on any other parties. This is prohibited by the *Rules*¹³ to preserve confidentiality if the approval is not granted.
9. Generally, applications for approval are decided by an Associate Judge (or by a Judicial Registrar on referral) on the papers without the need for a hearing, especially if the papers are sufficiently well prepared to permit fair and expeditious determination. Otherwise a hearing is conducted *ex parte* and in closed court, generally at 9:30 am on a TFM List Directions day, unless otherwise advised.
10. If made, an order granting the approval is sent to each party in the proceeding and to the Probate Registry with the original Grant. The Probate Registry will then annex the order to the original Grant and return it to the solicitors for the legal personal representative of the deceased estate.
11. Where there are multiple proceedings relating to the one estate, or multiple applications for approval in the one proceeding, it is the Court's preference that all applications for approval be returnable at the same time and be the subject of one Order, to be annexed to the Grant.

Counsel's opinion

12. When the matter comes before the Court, the terms of settlement are in final form. In determining whether to approve a compromise, the Court is concerned only with the best interests of the person under disability.¹⁴ The

¹³ Rule 15.08(2.1) of the *Rules*.

¹⁴ *Gillespie v Alperstein* [1964] VR 749; *Re Barbour's Settlement* [1974] 1 All ER 1188, 1191; *Karvelas*

Court has long been accustomed to rely heavily on the assistance of those advising the person under disability in deciding whether the compromise is beneficial to, and in the best interests of, that person. Counsel, solicitors and the litigation guardian have opportunities, which the Court lacks, for informed and extensive consideration of the proposed compromise having regard to the attitude of the other parties and the apparent strength and weakness of their respective claims. Expressing a view on whether the terms of a proposed compromise are in the interests of a person under a disability is a matter of great responsibility for all concerned. The opinion of counsel is required.

13. It is not the role of the Court to decide whether the outcome of the compromise is one that would have been made had the matter proceeded to trial. Rather, its role is to protect the person under a disability and to exercise its independent judgment on the question whether or not to approve the compromise.¹⁵
14. There is no prescribed list of the criteria by reference to which an application for the approval of a compromise ought to be determined. Approvals are made according to the particular facts of the case. Nevertheless, counsel's opinion in support of the application ought usually include, at least:
 - (a) a summary of all relevant facts, including the distribution under the Will or intestacy, the actual size of the estate and any personal details as are necessary to understand the claim and the proposed compromise;
 - (b) a brief analysis of the principles relating to TFM claims in the context of the case at hand;
 - (c) proposed future administration of the provision for the person under disability (see below);
 - (d) the details of the proposed compromise, including costs (see below); and

(by her next friend) v Chikirow (1976) 11 ACTR 22, 23; *Elliott (by his next friend) v Diener* (1978) 21 ACTR 21, 22; *Fisher v Marin* [2008] NSWSC 1357 [29], [35]; *Elderfield v Transport Accident Commission* [2010] VSC 116 [16]-[20]; *Stephens-Sidebottom v Victoria (Department of Education and Early Childhood Development)* [2011] FCA 893 [12]; *Rockman v IPR Nominees Pty Ltd (No 2)* [2018] VSC 270 [64].

¹⁵ *Fairhurst (bht NSW Trustee and Guardian) v Fairhurst* [2012] NSWSC 388 [37].

- (e) a well-reasoned explanation as to why the proposed compromise is said to be in the best interests of the person under disability, as compared to continuing the litigation in the hope of a better outcome.
15. The test for approval of a compromise under O 15 is whether acceptance of an offer is for the benefit of the person under disability. That requires more than mere assertion. It requires a comparison to be made between the proposed compromise and the likelihood of a better outcome at trial.¹⁶ This will require counsel for the plaintiff to address the question whether the prospect of getting a greater sum by rejecting the present offer is good enough to outweigh, significantly, the risk of not getting any more at trial.¹⁷ Thus the major consideration is the degree of the risk that going to trial would result in a less favourable result than that obtained by the compromise. Assessing the risk requires assessing the likely outcome of the claim and the costs of achieving that outcome, particularly to the estate of the deceased. Unsupported conclusions that the proposed compromise is ‘fair’, ‘satisfactory’ or ‘acceptable’ may not be sufficient.
16. The test for an approval under O 54 is similar but not identical. That is because the defendant has capacity to enter the compromise and is seeking the Court’s approval of this decision, rather than of the underlying compromise itself. Therefore, the approval will be granted if the Court is satisfied that the defendant’s decision to agree to the compromise was within power; there is no impropriety in the defendant’s decision; it was made in good faith; and the defendant gave fair consideration to the relevant issues.¹⁸ This difference does not change the expected content of counsel’s opinion. A fully reasoned opinion is required showing why the compromise is in the best interests of the person under disability, as compared to continuing the litigation in the hope of a better

¹⁶ *Karvelas (by her next friend) v Chikirow* (1976) 11 ACTR 22, 23. *Elliott (by his next friend) v Diener* (1978) 21 ACTR 21, 22; *Elderfield v Transport Accident Commission* [2010] VSC 116 [16]-[20]; *Fisher v Marin* [2008] NSWSC 1357 [29], [35]; *Rockman v IPR Nominees Pty Ltd (No 2)* [2018] VSC 270 [64].

¹⁷ *Ibid.* *Kowal v Langlands* [2008] WASC 27 [10].

¹⁸ *ExxonMobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd* (2010) 29 VR 356, 375; *Tritt v Hoskins* [2016] VSC 589 [15]; *Rockman v IPR Nominees Pty Ltd (No 2)* [2018] VSC 270 [46]-[47].

outcome.¹⁹

17. Occasionally, in O 54 approval applications, a defendant may have an interest in the proceeding contrary to the interests of a beneficiary who is under a disability, but the defendant's legal representatives consider that they can act and advise in the interests of all beneficiaries (this applies especially where the defendant clearly prefers the interests of the person under disability to their own).²⁰ However, even in such cases, once the matter is resolved in principle, it may be considered preferable that independent counsel be retained to advise on an application for approval exclusively for the beneficiaries under a disability.
18. Independent counsel should be experienced, fully instructed and acting solely in the interests of any persons under disability. There should not be any significant additional costs to substituting independent counsel for existing counsel to provide the advice on the approval application.
19. In rare cases, independent counsel advising after a claim has settled in principle, may recommend that a beneficiary under disability be joined as a defendant, a litigation guardian be appointed and separate solicitors retained at that time. Such course is unlikely to be warranted where independent counsel supports the proposed compromise.²¹ If independent counsel is to be appointed, ordinarily, counsel in the matter would consult each other and recommend independent counsel to the defendant's solicitors. If there is any difficulty in selecting independent counsel, the Court may be asked to nominate from a list of 3 or 4 names of experienced counsel who will accept a brief to provide independent advice on a proposed compromise at a cost

¹⁹ *Tritt v Hoskins & Anor* [2016] VSC 589 [16].

²⁰ On the other hand, where necessary, a beneficiary under disability may be joined as a defendant, with a litigation guardian and separate representation. This will generally happen earlier in the proceeding well before settlement, under the general principles applying to joining beneficiaries: see O 9. However, practitioners will recall that the Court will not normally allow two sets of costs to defendants where there is no conflict of interest between them.

²¹ Insufficient or unreliable instructions may cause independent counsel to recommend against a compromise, as the merits of the settlement remain unclear.

proportionate to the quantum of the beneficiaries' interest in the estate. Such nomination can be requested by joint email from existing counsel for the parties sent to TFM@supcourt.vic.gov.au.

20. The expectation with respect to counsel's opinion is based on the desirability of an independent view of the matter.

Future Administration of Assets to be held for Persons under Disability after An Approval

21. Counsel's opinion needs to deal with the proposed future administration of money or property to be held for the person under disability. There are three alternatives.
22. First, payments of money to persons under disability in any civil proceeding must be paid into Court and, unless otherwise ordered, paid out to an administrator or State Trustees.²² An order of this type takes effect as if it were an administration order made by VCAT under the *G&A Act*, including for minors.²³ This 'two step' process allows the Court to supervise compliance with the order.
23. All moneys paid into Court are held by the Senior Master.²⁴ The Senior Master is assisted by the Funds in Court office ('FIC'), an administrative division of the Court, which provides legal, investment, beneficiary service and administrative support to the Senior Master and the beneficiaries of the FIC.²⁵
24. In appropriate cases, the Court may exercise its discretion to order that money paid into Court be retained and administered by the Court, rather than paid out to an administrator.²⁶ Exceptional circumstances do not need to be shown to warrant making an order that funds remain in Court; however, the payment

²² Section 51A of the *Supreme Court Act 1986* ('*SC Act*') for minors and s 66 of the *Guardianship and Administration Act 1985* (Vic) ('*G&A Act*') for adult persons under disability.

²³ See section 66(8) of the *G&A Act* for adult persons under disability and s 51A(6) of the *SC Act* for minors.

²⁴ Section 113(1) of the *SC Act*.

²⁵ See FIC website at www.fundsincourt.vic.gov.au.

²⁶ *Diver v Diver* [2007] 16 VR 318 [51] ('*Diver*'); *Blackburn v Pearl Foods Pty Ltd* [2008] VSC 334 [11]; *Smith v Reynolds* [1989] VR 309.

out to an administrator is the 'general rule'.²⁷ Factors taken into account include the credentials of the administrator, the fees charged by an administrator and the effect that may have on returns, and the wishes of the person under disability, carers and relatives.²⁸ Funds held in Court are invested but generally remain available at call for any reasonable purpose on application by the beneficiary or a support person.²⁹ Where a proposed compromise seeks to have funds held in Court, but to limit access to the funds or to require that the funds be applied for particular purposes, advice should be obtained from the Legal Section of FIC before entering into the proposed compromise and certainly before the application for approval. There have been cases where a compromise is made on terms that cannot be accommodated by FIC. Where FIC have been consulted, this should be disclosed in the material in support.

25. Secondly, any property transferred to a person under disability in any civil proceeding must be transferred to an administrator for that person.³⁰ The Court cannot receive transfers of property (although property may later be purchased with funds held in Court).
26. Finally, in appropriate cases, money or property held for a person under disability within an estate may remain within an estate to be administered in accordance with the Will or distribution on intestacy, as amended by the compromise. For example, an O 54 approval may involve a payment to a plaintiff from part of an estate that is left to a person under disability and it is proposed that the reduced amount then remaining will be administered according to the Will. Section 66 of the *G&A Act* or s 51A of the *SC Act* only apply where it is proposed to order the payment of funds or transfer property to the person under disability.

²⁷ *Diver* [2007] 16 VR 318 [58].

²⁸ *Diver* [2007] 16 VR 318 [59].

²⁹ See 'For Beneficiaries' section of FIC website.

³⁰ Section 51A(3) and (4) of the *SC Act* for minors and s 66(5) and (6) of the *G&A Act* for adult persons under disability.

Costs

27. The Court requires counsel's advice to set out how the costs are made up, calculated and to be paid (including which part of the estate bears the burden of costs). In appropriate cases, a fixed sum or a maximum sum may be ordered for costs. Often, the order will provide for costs to be taxed in default of agreement. Costs for a person under disability are paid to the solicitors to that person.³¹
28. Practitioners should note that a proposed compromise that gives an 'all-in' sum for the TFM claim and the costs may be closely scrutinised. This is because it tends to place the practitioner for the person under a disability in a position where their personal interest conflicts with the interest of their client.³²

³¹ *Chapman v Freeman* [1962] VR 259.

³² *Sztockman v Taylor* [1979] VR 572, 574.

APPENDIX

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
TESTATORS FAMILY MAINTENANCE LIST

S CI 20YY XXXXX

IN THE MATTER of Part IV of the *Administration and Probate Act 1958*

- and -

IN THE MATTER of the Will and Estate of [name], deceased

BETWEEN:

[name] Plaintiff(s)

- and -

[name] (who is sued as the [Executor/ Administrator] of the estate of Defendant(s)
[name] deceased)

**ORDER APPROVING COMPROMISE OF CLAIM [OF/AFFECTING] A PERSON
WITH A DISABILITY**

JUDGE: The Honourable Associate Justice

DATE MADE: [date]

ORIGINATING PROCESS: Originating Motion filed [date]

HOW OBTAINED: On return of the [plaintiff's/defendant's] summons filed
[date].

ATTENDANCE: [XX] OR [On the papers]

OTHER MATTERS:

A. [Name] ('deceased'), died on [date] leaving a Will ('Will') probate of which was granted to the [defendant] on [date] ('Grant').

[OR]

[Name] ('deceased'), died intestate on [date] with Letters of Administration was granted to the [defendant] on [date] ('Letters of Administration').

- B. The plaintiff is [the/a child, spouse etc.] of the deceased and as such is an eligible person for the purposes of s 91 of the *Administration and Probate Act 1958* (Vic) ('Act').
- C. [Party's name], born on [date], is a [minor/adult] person under a disability within the meaning of O 15 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules'), [IF APPROPRIATE] and s 66 of *Guardianship and Administration Act 1958* (Vic) ('G&A Act').

[AND/OR]

- D. The [residuary] beneficiaries of the Estate:
- (a) [name] born on [date];
 - (b) [name] born on [date]; and
 - (c) [name] born on [date],
- are minors whose interests are affected by this settlement.
- E. [IF APPROPRIATE] By Order of the Victorian Civil and Administrative Tribunal ('VCAT') under the *G&A Act* dated [date] ('VCAT Order'), [administrator's name] was appointed the plaintiff's Administrator ('Administrator').
- F. The plaintiff commenced the proceeding [by his/her Litigation Guardian/Administrator, [name]] on [date] claiming further provision from the estate of the deceased for [his/her] proper maintenance and support pursuant to s 91 of the Act.
- G. [IF APPROPRIATE] The proceeding is out of time. The parties agree to an extension of time pursuant to s 99 of the Act. The Court considers an extension appropriate and warranted.
- H. By Terms of Settlement made [date] ('Terms of Settlement') between the plaintiff, defendant [and any other party X] ('parties') the plaintiff's claim was compromised ('Compromise'), subject to the approval of the Court, by the parties agreeing, among other things that [salient details of the Compromise].
- I. [IF APPROPRIATE] By the operation of s 66(3) of the *G&A Act*, if in any civil proceedings before a Court it is adjudged or ordered that money be paid to a person with a disability (whether or not that person is a party to a cause or matter), the money is to be paid into Court and unless the Court otherwise orders is to be paid out to the administrator (if any) of the estate of that person or State Trustees.

[OR]

By the operation of s 51A(1) of the *Supreme Court Act 1986* (Vic) ('SC Act'), if in any civil proceedings before a Court it is adjudged or ordered that money be paid to a child (whether or not that child is a party to a cause or matter), the money is to be paid into Court and unless the Court otherwise orders is to be paid out to the an administrator specified by the Court.

- J. [IF APPROPRIATE] The Compromise in this case provides for the payment of a fixed sum to [name] in lieu of [his/her] entitlement to [the share in the estate] out of the estate of the deceased and therefore s 66(3) of the *G&A Act* is applicable and the sum payable to [him/her] pursuant to the Compromise must be paid into Court and then paid out to [his/her] administrator [or State Trustees as appropriate].

[OR]

The Compromise in this case provides for the payment of a fixed sum to [name] in lieu of [his/her] entitlement to [the share in the estate] of the deceased estate and therefore, in the view of the Court, s 51A(1) of the *SC Act* is applicable and the sum payable to them pursuant to the Compromise must be paid into Court and then paid out to [his/her] administrator, [name].

- K. [IF APPROPRIATE] The Court will approve the Compromise on terms that require the Settlement Sum being paid into Court under O 79 of the *Rules* to be invested for the benefit of the [name].
- L. The Court read the following material:
- (a) affidavit of [name] [sworn/affirmed] on [date] and the exhibits to the affidavit; and
 - (b) the affidavit of [name] [sworn/affirmed] on [date] and the exhibits to that affidavit including the opinion of [name] of counsel dated [date] (exhibit XX-NN).
- M. The [plaintiff/defendant/and any other party that signed the terms of settlement] consents to the Compromise.
- N. The Court is satisfied that the distribution of the estate of the deceased as effected by [the Will of the deceased / intestacy] is such as to not make adequate provision for the proper maintenance and support of the plaintiff.
- O. This Order is authenticated by the Associate Judge pursuant to r 60.02(1)(b) of the *Rules*.

THE COURT ORDERS THAT:

1. [IF APPROPRIATE] Any procedural orders required to regularise the proceeding including errors in the heading of the proceeding and the appointment of a litigation guardian (if required).
2. [IF APPROPRIATE] Pursuant to s 99 of the *Act*, the time by which this proceeding is to be filed be extended, nunc pro tunc, to [date the proceeding was filed].
3. [IF APPROPRIATE] Pursuant to r 15.08(2) of the *Rules*, the time within which the [plaintiff/defendant] is to issue [his/her] application for approval of compromise be extended, nunc pro tunc, to [date application for approval filed].
4. The Compromise is approved by the Court.
5. [IF APPROPRIATE] Pursuant to r 54.02(2)(c)(i) of the *Rules*, the defendant, as [Executor/Administrator] of the estate of [name] ('deceased estate') is authorised to make the Compromise.

6. [In lieu of the provision made for [name] in the Will of the deceased/upon intestacy] provision be made out of the deceased estate for [name] by the defendant paying out of the estate of the deceased, by [date], the sum of [\$XX] to the Senior Master of the Supreme Court of Victoria for the benefit of [name].

[OR]

[In lieu of the provision made for the [name] in the Will of the deceased/upon intestacy] provision be made out of the deceased estate for [name] by the defendant paying out of the estate of the deceased, by [date], the sum of [\$XX] to the Senior Master of the Supreme Court of Victoria for the benefit of [name] and, pursuant to s 66(3) of the *G&A Act* then be paid out to [her/his] administrator [or State Trustees as appropriate].

[OR]

[In lieu of the provision made for [name] in the Will of the deceased/upon intestacy] provision be made out of the deceased estate for [name] by the defendant paying out of the estate of the deceased, by [date], the sum of [\$XX] to the Senior Master of the Supreme Court of Victoria for the benefit of [name] and, pursuant to s 51A(1)(b) of the *SC Act* then be paid out to [her/his] administrator [name].

7. Subject to any further Order, the Senior Master invest the Settlement Sum for [name], [not to be paid out save by further order of the Court / to be paid out to [name] on [his/her] attaining the age of 18 years].
8. The costs and expenses of the plaintiff of and incidental to this proceeding including any reserved costs be [fixed at \$XX / agreed or taxed] and paid out of the deceased estate.
9. The costs and expenses of the defendant of and incidental to this proceeding including any reserved costs [fixed at \$XX / agreed or taxed] and paid out of the deceased estate.
10. An authenticated copy of this order be annexed to the [Grant / Letters of Administration].
11. The exhibits to the affidavits filed in this proceeding be retained on the Court's confidential file [if any funds are paid into Court: and the affidavit of [name] [sworn/affirmed] [date] in support of the approval and the exhibits to that affidavit be sent to the solicitor to the Senior Master].
12. Subject to any further or other order of the Court, pursuant to rr 28.05 and 28A.06 of the *Rules* the affidavit in support of [name] [sworn/affirmed] [date] and the exhibits to that affidavit including the opinion of [name] of Counsel [date] shall remain confidential to the [plaintiff/defendant], [his/her] legal representatives [if any funds are paid into Court: and the Senior Master's office for the purposes of any application in relation to the management of the funds in Court] and shall not be otherwise be made available for inspecting or copying.
13. [IF APPROPRIATE] The directions hearing [or any other hearing] listed for [date] be vacated.

14. Reserve liberty to apply as to the further working out of this order.
15. The proceeding is otherwise dismissed without any adjudication on its merits.

DATE AUTHENTICATED: [date]

THE HONOURABLE ASSOCIATE JUSTICE