



Supreme Court of Victoria

Practice Note SC CL 7

Testators Family Maintenance List

1 INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 The purpose of this Practice Note is to describe the procedures to be followed in the Testators Family Maintenance List. The List is a case management list within the Common Law Division of the Court.

2 DEFINITIONS

- 2.1 In this Practice Note:
Act means the *Administration and Probate Act 1958*;
TFM Application means an application for provision or further provision out of a deceased estate under Part IV of the Act.

3 COMMENCEMENT

- 3.1 This Practice Note was issued and commences on 1 April 2020, as revised, and will apply to all proceedings in the List whenever commenced.

4 PROCEEDINGS SUITABLE FOR INCLUSION IN THE LIST

- 4.1 All TFM Applications should be initiated in the List.
- 4.2 Where the majority of witnesses or parties reside in regional Victoria, the TFM Application should be initiated in the Civil Circuit List (see Practice Note SC CL 1).

5 PROCEDURE FOR ENTRY INTO THE LIST

- 5.1 TFM Applications should be initiated in the List by endorsing the heading of the originating motion with "Testators Family Maintenance List". The heading of all subsequent documents filed in the proceeding should include this endorsement.
- 5.2 Proceedings may be transferred into or out of the List on the Court's own motion.
- 5.3 No additional fees will be payable for the inclusion of a proceeding in the List.

6 INITIATING DOCUMENTS

- 6.1 The originating motion initiating a TFM Application must include the following information:
- (a) the date of the death of the deceased in respect of whose estate the application is made;
 - (b) the date of the will (if any);
 - (c) the date of grant of probate of the will, or of letters of administration of the estate, of the deceased;
 - (d) the relationship of the plaintiff to the deceased; and
 - (e) the value of the estate as set out in the inventory of assets.

7 FIRST DIRECTIONS HEARING

- 7.1 A summons for directions is to be filed in accordance with r 16.06 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018*, with a return date no less than 14 days from the date of filing.
- 7.2 Directions hearings are generally heard every second Tuesday during the Court sitting terms (*List directions day*). List directions days are available on the Court's website.
- 7.3 Appearances at a first directions hearing is required for all parties. Orders will not be made on the papers in advance of the hearing. However, the parties are expected to confer and submit proposed consent orders prior to the hearing. Pro-forma first directions Orders are available on the Court's website.
- 7.4 By 2.00 pm on the Friday prior to the first return of the summons for directions, the plaintiff must file and serve:
- (a) either:
 - (i) a position statement where the value of the estate is \$750,000 or less; or
 - (ii) an affidavit where the value of the estate exceeds \$750,000, which shall state the facts relied upon by the plaintiff to establish each of the matters set out in r 16.03 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2018* and annex or exhibit copies of the last Will, Grant of Probate or Letters of Administration and the Inventory of Assets and Liabilities; and
 - (b) an affidavit of the plaintiff's solicitor stating:
 - (i) the solicitor's estimate of the plaintiff's costs, including disbursements, calculated on the standard basis up to the end of mediation; and
 - (ii) whether or not a conditional cost agreement has been entered and, if so, the estimated amount of any uplift fee.
- 7.5 Should there be non-compliance with preceding paragraph, in the absence of special circumstances, the Court may of its own motion vacate the first directions hearing and relist it on the next available List directions day, or as convenient to the Court, at which point compliance is expected. If the plaintiff has not filed the required material by the relisted date, in the absence of special circumstances, appearances by all parties will be required, the summons for directions will be further adjourned for compliance with this Practice Note by

the plaintiff, and the Court will require the parties to address the question of the costs of that day.

- 7.6 At the first directions hearing:
- (a) the plaintiff is expected to specify the extent of the provision or further provision sought from the estate, or explain why they cannot;
 - (b) the defendant may seek orders granting leave to a beneficiary to join as a defendant and to be provided with notice of the orders, with a clear explanation as to why the defendant is unable to represent their interests in the proceeding; and
 - (c) the parties should inform the Court of any child under the age of 18 years or an adult person under disability who may be affected by the proceeding.
- 7.7 Any position paper filed in a TFM application is to contain representations of relevant facts, which, to the best of the knowledge and belief of the person making them, are true and correct. Each position paper is to be provided with the objective that:
- (a) it may be relied upon by the opposing parties in entering to negotiations to explore the possibility of compromising the proceeding; and
 - (b) it is an outline of the anticipated evidence at trial of the person making the statement.
- 7.8 The absence of response to a plaintiff's solicitors costs estimate at a first directions hearing does not indicate that the estimate has been accepted by the defendant or the Court. Costs remain in the discretion of the Court.

8 INTERLOCUTORY APPLICATIONS

- 8.1 Requests for a return date for all interlocutory applications should be made, at first instance, to the TFM Coordinator at tfm@supcourt.vic.gov.au, accompanied by a completed "Associate Judges' Practice Court 2 Application form", which is available on the Court's website.
- 8.2 An interlocutory application may be heard by a Judge, an Associate Judge or on referral, a Judicial Registrar. If necessary, directions orders may be made for the preparation or the hearing an interlocutory application.

9 MEDIATION

- 9.1 Generally, all TFM Applications are referred to mediation.
- 9.2 Where the value of the estate is \$750,000 or less, and in special circumstances, the Court may refer the proceeding to judicial mediation to be conducted in accordance with PN SC GEN 6 *Judicial Mediation Guidelines*, accessible on the Court's website.

10 PRE-TRIAL DIRECTIONS

- 10.1 Any TFM Application that has not resolved at mediation, may be referred to a Judicial Officer for pre-trial directions and listing for trial. A pro-forma referral Order is available on the Court's website.

11 FINALISATION OF RESOLVED PROCEEDINGS

- 11.1 Where a TFM application has settled and all persons affected by the settlement are *sui juris*¹ and consent, parties can apply for orders finalising the proceeding on the papers. In such cases, the parties' legal representatives must confirm to the Court that no person under legal disability is affected by the settlement. A pro-forma Order is available on the Court's website.
- 11.2 If a proposed settlement affects a child under the age of 18 years, or an adult person under disability or if for any other reason there are affected parties who are unable to consent, an approval of compromise must be sought. Parties are referred for further assistance to 'A Guide to Practitioners - Applications for Approval of Compromises in Testators Family Maintenance (TFM) Cases' available on the Court's website.
- 11.3 Parties applying for orders finalising the proceeding must inform the Court of the costs, including disbursements, payable by each of the parties to the proceeding.
- (a) If the costs, including disbursements, payable by a party exceed by more than 20% the total amount disclosed in the affidavit filed pursuant to paragraph 7.4(b), that party's solicitor must file an affidavit showing how that party's costs, including disbursements, have been calculated.
 - (b) Alternatively, if it otherwise appears to the Court that a party's costs, including disbursements, may not be reasonable or proportionate, then the Court may require that party's solicitor to file an affidavit showing how that party's costs, including disbursements, have been calculated.

12 PROPOSED CONSENT ORDERS

- 12.1 Orders will be made on the papers where appropriate, however proposed consent orders that include the signature of a litigant in person may not be accepted.
- 12.2 All proposed consent orders should be sent in both Word and signed PDF format.

13 COMMUNICATIONS WITH THE COURT

- 13.1 Save for communications regarding applications for approval of compromise, communications with the Court should be by email with a copy to all other parties, and confined to uncontroversial matters.
- 13.2 All communications regarding proceedings in the List should be directed, at first instance, to the TFM Coordinator at tfm@supcourt.vic.gov.au. The file number and party represented should be made clear on every communication.

14 FURTHER INFORMATION

- 14.1 The Court's website includes a page dedicated to the List with up to date information about its operation.

¹ Adults with full legal capacity.

AMENDMENT HISTORY

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Note No 7 of 2015.

1 April 2020: This Practice Note was reissued with amendments replacing the version issued on 30 January 2017.

Vivienne Macgillivray
Executive Associate to the Chief Justice
1 April 2020