



# Supreme Court of Victoria Common Law Division

## Practice Note No. 6 of 2016 Trusts, Equity and Probate List

### 1. INTRODUCTION

- 1.1 This Practice Note replaces *Practice Note No. 6 of 2015*, and provides updated guidance on the operation of the Trusts, Equity and Probate List (*List*) (formerly the Probate List), a specialist case management list within the Common Law Division of the Supreme Court of Victoria (*Court*). The procedures set out in this Practice Note will apply from 1 April 2016 to relevant proceedings commenced in the Trial Division of the Court.
- 1.2 The List provides specialist administrative handling of trust, equity and probate proceedings and an increased ability to track their progress. The aim of the List is to provide consistency, reduce delay, facilitate the expeditious resolution of cases, and reduce the costs of litigation.
- 1.3 The Judge in Charge of the List (*Judge in Charge*) is Justice McMillan. Her Honour is assisted by Associate Justice Derham.
- 1.4 References in this Practice Note to *Associate* are to be read as references to the Associate to the Judge in Charge.

- 1.5 References in this Practice Note to **Registrar** are to be read as references to the Registrar of Probates, Deputy Registrar of Probates or an Assistant Registrar of Probates except where otherwise specified.

## 2. PROCEEDINGS SUITABLE FOR INCLUSION IN THE LIST

- 2.1 The following types of proceedings should be initiated or included in the List:
- (a) Applications for grants of representation that are referred by the Registrar of Probates;
  - (b) Caveat proceedings where a summons for directions has been filed pursuant to rule 8.07 of the *Supreme Court (Administration and Probate) Rules 2014 (Rules)*;
  - (c) Applications for limited grants, including grants of letters of administration, *ad colligendum bona*, *ad litem*, *pendente lite*, *durante dementia* or *durante minore aetate*;
  - (d) Applications for revocation of grants of representation, rectification of a will, construction of a will and other proceedings pursuant to the *Wills Act 1997*;
  - (e) Applications pursuant to the *Trustee Act 1958* that are not appropriate for the Commercial Court;
  - (f) Applications for judicial advice pursuant to rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* that are not appropriate for the Commercial Court;
  - (g) Applications pursuant to the *Charities Act 1978*;
  - (h) Applications for equitable remedies, including the declaration of equitable interests in property, that are not appropriate for the Commercial Court; and
  - (i) Proceedings arising under the *Administration and Probate Act 1958 (Act)* excluding proceedings arising under Part IV of the Act.
- 2.2 The following proceedings should not be initiated in the List:

- (a) Applications arising under Part IV of the Act. These applications are managed in the **Testators Family Maintenance List** (see *Practice Note No. 7 of 2015*); and
  - (b) Applications relating to commission under Order 10 of the Rules. These applications are heard and determined by an associate judge in accordance with the procedures set out in the Rules.
- 2.3 For the avoidance of doubt, proceedings of the nature set out in paragraph 2.1 will only be heard in the Practice Court (Common Law) in the circumstances set out in Part 5 of this Practice Note.

### **3. PROCEDURE FOR ENTRY INTO THE LIST**

- 3.1 Proceedings of the nature set out in paragraph 2.1 should be initiated in the List by endorsing the heading of the originating process “Trusts, Equity and Probate List”. The heading of all subsequent documents filed in the proceeding should also be endorsed “Trusts, Equity and Probate List”.
- 3.2 Parties may apply to the Judge in Charge (by contacting the Associate) if they wish to have a proceeding included in the List, notwithstanding that it is not a proceeding of a type referred to in paragraph 2.1.
- 3.3 If at any time after the initiation of a proceeding it appears to the Court that it is appropriate to have the proceeding managed in the List, the proceeding may be transferred into the List on the Court’s own motion.
- 3.4 Conversely, a proceeding initiated in the List may be transferred out of the List on the Court’s own motion if it appears to the Court that it is appropriate to have the proceeding managed in a different list.
- 3.5 No additional fees will be payable for the inclusion of a proceeding in the List.

#### **4. PRE-TRIAL MANAGEMENT**

- 4.1 It is expected that standard directions will be dealt with by consent on the papers, and unnecessary attendance at Court may result in orders depriving parties of costs, or costs orders against parties.
- 4.2 Parties seeking a directions hearing must issue a summons (or, in uncontested proceedings, a notice to produce), returnable at 10.00am on any Friday during the Court sitting period before the Judge in Charge (*List directions*). The Registry assists with listing and will advise parties of availability and any days that the Judge in Charge will not be sitting in the List.
- 4.3 The plaintiff's solicitors are encouraged to deliver proposed consent orders to all other parties in advance of any directions hearing, with a view to obtaining orders by consent without the need for a hearing. The parties should email minutes of consent in both Word and signed PDF format to the Associate by 4.00pm two days prior to the directions hearing.
- 4.4 The Judge in Charge will determine whether orders will be made on the papers, or whether parties will be required to attend the directions hearing. Parties are required to appear at the directions hearing unless otherwise advised by the Associate.
- 4.5 Where the parties do not agree on proposed consent orders, attendance at the directions hearing is required by all parties. The parties should each email draft orders to the Associate by 12.00pm the day prior to the directions hearing.
- 4.6 The Judge in Charge will make such orders as are necessary for the conduct of proceedings in the List and will hear and determine both interlocutory applications and substantive proceedings where possible. Substantive proceedings estimated to take half a day or less may be heard and determined by the Judge in Charge on a Friday immediately following the List directions. Substantive proceedings with estimates exceeding half a day will be referred to an associate judge for the fixing of a trial date.

4.7 Where the Registrar refers a proceeding to the Judge in Charge, the proceeding will be heard during List directions. The Registrar will notify the parties of the specific date and time of the hearing.

4.8 **Schedule 1** to this Practice Note provides practitioners with examples of standard orders made in proceedings in the List.

## **5. URGENT APPLICATIONS**

5.1 Parties bringing an urgent application should contact the Associate in the first instance. The Associate will endeavour to allocate a hearing date before the Judge in Charge.

5.2 Alternatively, if the application cannot be heard by the Judge in Charge within an appropriate timeframe, parties will be directed to arrange for the application to be heard in the Practice Court (Common Law).

## **6. CIVIL PROCEDURE ACT CERTIFICATES**

6.1 Solicitors with conduct of proceedings in the List are reminded of the certification requirements pursuant to Part 4.1 of the *Civil Procedure Act 2010*.

## **7. COMMUNICATIONS WITH THE COURT**

7.1 At all stages of the proceeding, communications with the Court should be by email with a copy to all other parties, and should be confined to uncontroversial matters. Contact details for the Associate are on the Court website.

Vivienne Macgillivray  
Executive Associate to the Chief Justice  
18 March 2016

**SCHEDULE 1**  
**Probate List**  
**Standard Orders**

Practitioners and litigants should note the following examples of standard orders made in proceedings in the List:

- Proceedings concerning the testamentary capacity and knowledge and approval of the testator, or allegations of undue influence, will not ordinarily be appropriate for evidence to be given by affidavits. Instead, parties will be ordered to prepare position statements to assist with the mediation of proceedings prior to trial, and *viva voce* evidence will be given at trial.
- Where a grant of representation is sought by consent following the settlement of proceedings, the standard order by the Court will be for the proceeding to be referred to the Registrar for a grant subject to the requirements of the Registrar. The Judge in Charge will not ordinarily make a grant of representation without referring the proceeding to the Registrar.
- Applications for the revocation of a grant of representation should be brought by summons in the proceeding in which the grant was made. The applicant should then seek orders to be added as a defendant to these proceedings.
- Practitioners should note that where contested caveat proceedings are settled, and the parties intend for there to be a grant of representation to the plaintiff, the proceeding should not be dismissed but should instead be referred to the Registrar. Where a grant of representation is intended to be sought by a person other than the plaintiff, the contested caveat proceeding should be dismissed and a new application made.
- Where a withdrawal of a renunciation of probate is sought, and the renunciation was advised by the practitioner, the Court will not ordinarily make the order without an undertaking that the practitioner will bear the costs of seeking the withdrawal of the renunciation.

- Where a will is sought to be rectified in an uncontested proceeding, and the rectification was the fault of the practitioner responsible for drafting the will, the Court will not ordinarily make the order without an undertaking that the practitioner will bear the costs of seeking that the will be rectified.
- In draft documents submitted to the Court, a caveator or applicant for revocation of a grant of representation should not be included in the title to the proceeding until orders are made adding them as a defendant to the proceeding.