



Supreme Court of Victoria Common Law Division

Practice Note No. 7 of 2015 Testators Family Maintenance List

1. INTRODUCTION

- 1.1 This Practice Note establishes the Testators Family Maintenance List (*List*) as 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 January 2015 to relevant proceedings commenced in the Trial Division of the Court.
- 1.2 The Judge in Charge of the List (*Judge in Charge*) is Justice McMillan. Proceedings in the List are managed by the associate judges of the Court.

2. PROCEEDINGS APPROPRIATE FOR INCLUSION IN THE LIST

- 2.1 All applications for further provision out of a deceased estate under Part IV of the *Administration and Probate Act 1958* (*TFM Application*) should be initiated in the List.
- 2.2 However, where the majority of witnesses or parties reside in regional Victoria, the proceeding should be initiated in the **Civil Circuit List** (see *Practice Note No. 1 of 2015*).

3. PROCEDURE FOR ENTRY INTO THE LIST

- 3.1 TFM Applications should be initiated in the List by endorsing the heading of the originating motion “Testators Family Maintenance List”. The heading of all subsequent documents filed in the proceeding should also be endorsed “Testators Family Maintenance List”.
- 3.2 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.
- 3.3 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.
- 3.4 No additional fees will be payable for the inclusion of a proceeding in the List.

4. INITIATING DOCUMENTS

- 4.1 The originating motion initiating the TFM Application should 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.
- 4.2 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*.

5. FIRST DIRECTIONS HEARING

- 5.1 Pursuant to rule 16.06 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008 (Rules)*, the plaintiff should issue a summons for a first directions hearing within seven days after the time limited for an appearance. Directions hearings in TFM Applications are held on every second Tuesday during the Court sitting terms (*List directions day*).
- 5.2 Prior to the first directions hearing, the plaintiff must file and serve:
- a) Either:
 - i. Where the value of the estate exceeds \$500,000 – an affidavit of the plaintiff including the matters set out in **Schedule 1**; or
 - ii. Where the value of the estate is less than \$500,000 – a position statement including the matters set out in **Schedule 1**; and
 - b) An affidavit of the plaintiff’s solicitor estimating the costs and disbursements calculated on the standard basis up to and including the completion of mediation.
- 5.3 Parties are expected to confer in advance of the first directions hearing for the purpose of providing the Court with a timetable for the interlocutory progress of the proceeding. A pro forma set of directions is at **Schedule 2**.
- 5.4 Attendance at a first directions hearing is required by all parties. Orders will not be made on the papers in advance of the hearing.
- 5.5 At the first directions hearing, the plaintiff is expected to specify the extent of further provision sought from the estate.
- 5.6 At the first directions hearing, the Court may make directions requiring the executor or administrator to file an affidavit:
- a) Including a copy of the deceased’s will, grant of probate or letters of administration and the inventory of assets; and
 - b) Identifying every person who, in the opinion of the executor or administrator, is or may be:

- i. a person entitled to make a TFM Application;
- ii. a beneficiary under the estate; or
- iii. a person holding property of the deceased, as trustee or otherwise.

5.7 At the first directions hearing, the Court may make an order capping the costs that may be recovered by a party in circumstances including cases where the net distributable value of the estate (excluding the costs of the proceeding) is less than \$500,000.

5.8 Following the first directions hearing, parties are encouraged to contact the TFM Associate (tfm@supremecourt.vic.gov.au) if they seek further orders by consent. Orders will be made on the papers where appropriate, however minutes of consent that include the signature of a litigant in person will not be accepted.

6. INTERLOCUTORY APPLICATIONS

6.1 All interlocutory applications should be made by summons, returnable in the Associate Judges' Court 2. Interlocutory applications will not, as a general rule, be heard during the fortnightly List directions hearings.

6.2 An associate judge may refer any interlocutory application to the Judge in Charge.

7. MEDIATION

7.1 Unless otherwise ordered, all TFM Applications will be referred to mediation.

7.2 Where the value of the estate is less than \$500,000, the Court may make available an associate judge or judicial registrar to undertake a judicial mediation at no cost to the parties.

8. OVERARCHING OBLIGATIONS

8.1 With reference to the overarching obligations set out in Part 2.3 of the *Civil Procedure Act 2010*, in all TFM Applications the Court expects that:

- a) Each party not appearing in person shall be represented at all hearings by a practitioner familiar with the subject matter of the proceeding and with instructions sufficient to enable all appropriate orders to be made;
- b) The resources of the estate and of the Court will not be used in a manner that is out of proportion to the size of the estate and the provision that may be made;
- c) Practitioners will use reasonable endeavours to:
 - i. Resolve by agreement any issues in dispute; and
 - ii. Narrow the scope of the remaining issues in dispute;
- d) Practitioners will confer as to the number of witnesses to be called, and whether expert evidence is to be called; and
- e) Where the proceeding is to be determined on affidavit material alone, practitioners will confer as to any objections to the evidence.

9. CONSENT ORDERS

9.1 All minutes of consent should be sent in both Word and signed PDF format to the TFM Associate (tfm@supremecourt.vic.gov.au).

9.2 Minutes of consent disposing of TFM Applications must be accompanied by appropriate evidence that:

- a) Any direction or notice required to be given to any non-parties has been complied with; and
- b) The order sought does not affect the interest in the estate of any minor or person under a disability.

10. APPROVAL OF COMPROMISE

- 10.1 Where consent orders require the approval of a compromise, the application for approval must be made by summons returnable in the Associate Judges' Court 1 at 9:30am on a List directions day. Parties should contact the TFM Associate in the first instance, to obtain a hearing date.
- 10.2 The summons must be supported by affidavit material, an advice of counsel and a draft of the proposed orders.
- 10.3 Affidavits in support and the original grant of probate or letters of administration must be filed with the TFM Associate no later than the Wednesday before the hearing day.

11. COMMUNICATIONS WITH THE COURT

- 11.1 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.
- 11.2 All communications regarding proceedings in the List should be directed to the TFM Associate (tfm@supremecourt.vic.gov.au).

Vivienne Macgillivray
Executive Associate to the Chief Justice
5 November 2014

SCHEDULE 1
Testators Family Maintenance List
Affidavit or position statement of the plaintiff

The matters to be included in the affidavit or position statement of the plaintiff in support of an application under Part IV of the *Administration and Probate Act 1958* shall include:

- (a) The full name and address of the plaintiff;
- (b) The full name and last known address of the deceased;
- (c) The date of the last will of the deceased;
- (d) The date of the grant of probate or letters of administration and to whom they were granted;
- (e) The date of birth and the date of death of the deceased;
- (f) Either:
 - (i) In the case of an application in respect of the estate of a person who died **before** the commencement of Part 2 of the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014*, the relationship of the plaintiff to the deceased and the basis of the claim that the deceased owed a responsibility to make provision for the maintenance and support of the plaintiff; or
 - (ii) In the case of an application in respect of the estate of a person who died **on or after** the commencement of Part 2 of the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014*, the matters set out in rule 16.03(3) of the Rules.
- (g) The nature and extent of the deceased's estate;
- (h) The major gifts contained in the will and the beneficiaries entitled to both the gifts and the residue of the estate; and
- (i) The financial position of the plaintiff and of the other beneficiaries of the estate, insofar as it is known to the plaintiff.

SCHEDULE 2

Testators Family Maintenance List Standard directions for first directions hearing

Other Matters

Upon the Plaintiff stating to the Court by their Counsel that they seek further provision to the extent of _____ % of the Estate, which is of the approximate value of \$ _____ .

THE COURT ORDERS AND DIRECTS THAT:

Pre-Trial Directions

1. By 4.00 pm. on [_____] the Plaintiff send by prepaid ordinary post to [_____] a notice in the form of the Schedule attached to these orders.
2. The person named in paragraph 1 be granted leave to apply to be added as a defendant to the proceeding, provided that any application is made by summons returnable on or before [_____].
3. By 4 pm on [_____] the Defendant file and serve any affidavits in opposition to the Plaintiff's claim.
4. By 4 pm on [_____] the Plaintiff file and serve any affidavit on which the Plaintiff intends to rely in reply.
5. The proceeding is referred to mediation by a Mediator appointed by agreement between the parties, failing such agreement to a Mediator appointed by the Court, and such mediation be concluded by [_____].

OR

The proceeding is referred to mediation by an associate judge or a judicial registrar, such mediation to be concluded by [_____].

6. The mediation shall be attended by those persons who have ultimate responsibility for deciding whether to settle the dispute and the terms of any settlement, and the

lawyers who have ultimate responsibility to advise the parties in relation to the dispute and its settlement.

7. The costs of the mediation in the first instance will be paid equally by the parties, but otherwise those costs are reserved to the trial judge.

8. Not more than 14 days and not less than 7 days before the date fixed for:

a) the mediation of the proceeding; and

b) the trial of the proceeding;

the Defendant must make, file and serve an Affidavit setting forth the financial position of the Estate so far as it is then known to them.

9. Within 14 days after the date fixed for mediation, the Mediator must notify the TFM Associate in writing whether or not the mediation has concluded.

10. The further hearing of this application for directions is adjourned to

[].

11. Each party has liberty to apply.

12. The costs of this application are reserved.

Trial Directions

13. The hearing of the TFM Application proceed on affidavit material alone.

OR

The hearing of the TFM Application proceed partly on affidavit material.

Schedule to orders

Dear Madam,

Re: The Will and Estate of [] (Deceased)

Proceeding No: [] of
In the Supreme Court of Victoria.

We have been directed by the Honourable Associate Justice [] of the Supreme Court of Victoria to notify you that a proceeding has been commenced in the Court by [] the [] of the above-named Deceased, by which [he] / [she] is seeking further provision out of the Estate of the deceased. The proceeding is brought pursuant of Part IV of the *Administration and Probate Act 1958*. We are the solicitors for the Plaintiff.

The proceeding was commenced against [], who was the executor named in the Will of the above-named Deceased and to whom Probate of the will has been granted by the Court.

If the Court were to order that such provision as the plaintiff claims be made, the effect of that order might be to reduce or extinguish your entitlement as a beneficiary under the Will of the Deceased.

On [], the Honourable Associate Justice [] ordered that you have leave to apply to be added as a Defendant to the proceeding. Any such application by you must be made by Summons returnable on or before []. The order granting you such leave is paragraph 2 of the Order made on [], and a copy of that Order is enclosed herewith for your information.

Copies of any of the documents referred to in the Order, including the Plaintiff's Affidavit and a copy of the Deceased's will, may be inspected by arrangement with the writer.

If you wish to take advantage of your opportunity to apply to be added as a Defendant to the proceeding it is suggested that you seek advice from a solicitor as soon as possible and take to the solicitor this letter and the copy order enclosed herewith.

The Honourable Associate Justice [] has authorised us to inform you that, although legal costs incurred by a party to a proceeding of this type are usually allowed by the Court out of the Estate of the Deceased, it is unlikely that more than one set of legal costs of separately represented parties with the same or similar interests will be allowed.

Yours faithfully,