



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*;
 - Associate Judge* means the Associate Judge assisting in the management of the List;
 - Judge* means the Judge in Charge of the List;
 - List* means the Testators Family Maintenance List;
 - Registrar* means the Registrar of Probates;
 - TFM Application* means an application for further provision out of a deceased estate under Part IV of the Act;
 - TFM Associate* means the associate to the List.

3 COMMENCEMENT

- 3.1 This Practice Note was issued and commences on 30 January 2017 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 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 SC CL 1).

5 PROCEDURE FOR ENTRY INTO THE LIST

- 5.1 Proceedings of the nature set out in paragraph 4.1 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".
- 5.2 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.
- 5.3 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.
- 5.4 No additional fees will be payable for the inclusion of a proceeding in the List.

6 INITIATING DOCUMENTS

- 6.1 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.
- 6.2 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*.

7 FIRST DIRECTIONS HEARING

- 7.1 Pursuant to rule 16.06 of the *Supreme Court (Miscellaneous Civil Proceedings) Rules 2008*, 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 generally held on every second Tuesday during the Court sitting terms save for when the scheduling is affected by public holidays and legal vacations (*List directions day*). The Court website provides a calendar of List directions days.
- 7.2 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 \$500,000 or less – 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.
- 7.3 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**.
- 7.4 Attendance at a first directions hearing is required by all parties. Orders will not be made on the papers in advance of the hearing.
- 7.5 At the first directions hearing, the Plaintiff is expected to specify the extent of further provision sought from the estate.
- 7.6 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.
- 7.7 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.
- 7.8 Following the first directions hearing, parties are encouraged to contact the TFM Associate (tfm@supcourt.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.

8 INTERLOCUTORY APPLICATIONS

- 8.1 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 on List directions days.
- 8.2 An Associate Judge may refer any interlocutory application to the Judge.

9 MEDIATION

- 9.1 Unless otherwise ordered, all TFM Applications will be referred to mediation.
- 9.2 Where the value of the estate is \$500,000 or less, and in special circumstances, the Court may make available an Associate Judge or Judicial Registrar to undertake a judicial mediation.

10 OVERARCHING OBLIGATIONS

10.1 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.

11 CONSENT ORDERS

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

11.2 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 person under a disability (which includes a minor).

12 APPROVAL OF COMPROMISE

12.1 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.

12.2 The summons must be supported by affidavit material, an advice of counsel and a draft of the proposed orders.

12.3 Before the summons is issued, however, the documents in support of the application, including the original grant of probate or letters of administration, original affidavit(s) or position statement(s), terms of settlement, counsel's advice and a proposed form of order as per the court's preferred precedent in word format, should be filed with the TFM Associate in the first instance.

12.4 Once the Court is satisfied that these documents are satisfactory, the TFM Associate will provide an appropriate return date for the summons.

13 EVIDENCE AT TRIAL

- 13.1 It has been the experience of the Judges and Associate Judges that affidavits filed in support and opposition to the application for family provision include much irrelevant and inadmissible material. Henceforth, and notwithstanding that the Plaintiff may initially support the application by an affidavit, it is envisaged that short concise position statements will then be ordered so that, subject to the orders and directions of the trial Judge, the evidence in chief will be given *viva voce* rather than by affidavit and the position statements will stand as an outline of the anticipated evidence of the witness. Facts that are uncontroversial are expected to be agreed between the parties and the trial Judge will order the filing of an agreed statement of those facts.

14 USE OF TECHNOLOGY

- 14.1 The provisions of Practice Note SC Gen 5 “Technology in Civil Litigation” apply to proceedings in the List.
- 14.2 For the purposes of paragraph 9.11 of that Practice Note, documentary evidence in excess of 1500 pages is to be considered a large amount of documentary evidence.

15 COMMUNICATIONS WITH THE COURT

- 15.1 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.
- 15.2 All communications regarding proceedings in the List should be directed to the TFM Associate (tfm@supcourt.vic.gov.au).
- 15.3 Parties are reminded that pursuant to rule 27.03(11)(b) of the *Supreme Court (General Civil Procedure) Rules 2015*, all court documents must include the name and email address of an individual to whom reference can be made in respect of the proceeding.

16 FURTHER INFORMATION

- 10.1 The Court’s website (www.supremecourt.vic.gov.au) includes a page dedicated to the List with up to date information about the operation of the List including:
- a) Judicial officers managing the List;
 - b) this Practice Note in Word and PDF formats;
 - c) Precedent minutes of orders, including for approvals of compromise.

AMENDMENT HISTORY

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

Vivienne Macgillivray
Executive Associate to the Chief Justice
30 January 2017

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

[These directions assume the plaintiff has filed affidavits or position statements as referred to in Schedule 1 of the Practice Note]

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/position statements in opposition to the Plaintiff's claim.
4. By 4 pm on [_____] the Plaintiff file and serve any affidavits/position statements on which the Plaintiff intends to rely in reply.
5. The parties' affidavits/position statements are to contain representations of relevant existing facts which, to the best of the knowledge and belief of the person making them, are true and correct. Each position statement 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;

- b) it is an outline of the anticipated evidence at trial of the person making the statement.
6. 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 judicial mediation by an Associate Judge or a Judicial Registrar, such mediation to be concluded by [].
7. 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.
8. 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.
9. 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 (or the executor or administrator, as the case requires) must make, file and serve an Affidavit setting forth the financial position of the Estate so far as it is then known to him or her.
10. The parties shall bring to the mediation and provide to the mediator a calculation of their costs of the proceeding up to and including the mediation.
11. 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.
12. The further hearing of this application for directions is adjourned to

[].

Or where the proceeding is ready to be referred for trial directions:

13. The proceeding is adjourned for further directions at 10.00 am on [] before the Judge in Charge of the Testators Family Maintenance List for trial directions and the fixing of a trial date.
14. At that hearing for trial directions, each party (other than a party appearing in person) is to be represented by the legal practitioner who is to represent the party at trial, and that practitioner is to be familiar with the matter. The practitioners (or where the party appears in person, that person) must have knowledge of:
 - a) all of the issues involved in the proceeding;
 - b) the number of witnesses to be called and cross-examined;
 - c) the anticipated length of the hearing;
 - d) the dates which are suitable to the practitioners and witnesses for the holding of the trial; and
 - e) an estimate of the costs of the proceeding at that date and the anticipated costs of the matter to the conclusion of the trial.
15. Subject to any order of the Trial Judge, the evidence in chief in this proceeding at trial shall be given *viva voce*.
16. By 4.00 pm. on [] the parties shall file an agreed statement of uncontroversial facts. Such an agreed statement shall constitute evidence before the Court of the facts it contains.
17. Each party has liberty to apply.
18. The costs of this application are reserved.

Schedule to orders

Dear Sir or 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 OR to whom letters of administration were 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,