

PRACTICE DIRECTION

DISTRICT COURT PRACTICE DIRECTION (No. 2 of 1997) FAMILY PROVISION APPLICATIONS

1. This practice direction applies in all districts.
2. The objects of this practice direction are to reduce cost and delay by -
 - (a) making information available at the earliest practicable date so that a realistic assessment of prospects can be made by all parties;
 - (b) encouraging the early consensual resolution of applications;
 - (c) minimizing the number of appearances necessary to dispose of Family Provision Applications.

Commencement of Family Provision Proceedings

3. An application initiating a Family Provision claim will require attendance “upon a date to be fixed by agreement or failing agreement after notice of not less than fourteen (14) days from one party to the other parties” rather than specifying a return date.
4. If the application is instituted -
 - (a) outside the time limited for the bringing of applications, the application shall include a request that the application be heard and determined notwithstanding that: (*Succession Act 1981*, section 41 (8));
 - (b) when no grant of representation has been made, the application shall include a request that the application be heard and determined notwithstanding the absence of a grant: (section 41(8)).
5. If the applicant seeks an order exonerating some part of the estate from the incidence of the order, the application should describe the relevant part of the estate: (section 41 (3)).

Documents to be Served with Application: Applicant’s Supporting Affidavit, and Draft Directions Order

6. At the time of service of the application, the applicant shall also serve -
 - (a) a supporting affidavit or affidavits; and
 - (b) a draft directions order signed by the applicant or his/her solicitors and completed as to dates in the form set out in the schedule (with any appropriate and necessary variations).
7. The applicant’s supporting affidavit shall -
 - (a) show a *prima facie* case that the applicant is a person who is entitled to apply, that adequate provision has not been made and that the applicant is otherwise entitled to bring the application;
 - (b) show the identity of all persons who fall within the definitions of “spouse”, “child” or “dependant” in section 41(1);

- (c) contain material identifying persons having an interest in the estate, who should be served;
 - (d) if the application is brought out of time, contain material relevant to an application that the matter be heard and determined notwithstanding that fact;
 - (e) if there is no grant of representation, contain material relevant to an application that the matter be heard and determined despite the absence of a grant; (*eg. those facts then known to the applicant which may make a grant unnecessary in all the circumstances*);
 - (f) contain particulars of any bequest which the applicant seeks to have exonerated from the burden and incidence of any order of the court (*eg. very small pecuniary legacies, bequests of person effects, etc.*) so that the executors can distribute them in the normal course of administration regardless of the application;
 - (g) contain material showing that the matter is within the monetary jurisdiction of the District Court pursuant to section 68(1) (b) (x) of the *District Courts Act 1967* (as amended); (*ie. that the provision the applicant is seeking is an amount or has a value not in excess of \$200,000 or as the jurisdiction may be defined from time to time*);
 - (h) include, so far as is known to the applicant, information and material as to the assets and liabilities in the estate from which further provision might be made for the applicant;
 - (i) contain the applicant's best estimate of the applicant's costs through to and inclusive of final hearing;
 - (j) contain such other material as may be necessary to support the application.
8. The draft directions order shall be in the form set out in the schedule hereto, with appropriate and necessary variations; and -
- (a) shall require that any material directed to be sent to any person who may have an interest in the matter shall be accompanied by a letter to the following effect -

“If any order is made in these proceedings in favour of the applicant, the benefits to which you may be entitled under the will or as next-of-kin (as the case may be) may be affected. Our client, the executor/s, has an obligation to uphold the will and defend the application and to place material before the Court relevant to it, and we would be pleased to hear from you if you have facts or material which you believe should be brought to the attention of the respondent and/or the Court.

You may also have the right, and may wish, to be represented on the hearing of the application, but the costs of any party appearing are in the discretion of the Court and if parties whose interests are identical are separately represented, one set of costs only may be allowed, or the costs of some parties may be refused. You may therefore consider it desirable to communicate with us, or the executor/s or other beneficiaries, on the subject of your being represented or jointly represented.

If you choose to be separately represented then your attention is drawn to clause 3 of the directions order which requires that you give notice to us, and to the solicitors for the applicant, within a specified period, and

serve and file any affidavits by you or on your behalf.”

- (b) may contain a dispute resolution plan designed to exhaust the prospects of a consensual resolution of the application. This will-
- (i) specify what (if anything) has been done to bring about a consensual resolution;
 - (ii) specify a timetable and steps towards the early and inexpensive resolution in terms of -
 - (A) meetings or conferences between the parties;
 - (B) discussions between the parties’ representatives;
 - (C) exchanges of information;
 - (D) defining of issues;
 - (E) obtaining independent legal advice on the likely outcome of the proceedings;
 - (iii) contain directions about the submission of any continuing conflict to an ADR process such as mediation or case appraisal as agreed between the parties or ordered by the Court;
 - (iv) contain a direction that such steps be completed before the application is set down for hearing.

The formulation of a suitable dispute resolution plan should take into account the size of the estate. Where the estate is small, an appropriate ADR process is desirable and case appraisal is preferable, but the overall dispute resolution plan should be kept simple so as to minimize the costs incurred in following it. If the solicitors for both parties after considering the matter are agreed that, in the particular circumstances of the application, any ADR process would be futile, the direction in paragraph 8(b)(iii) may be omitted.

Response by the Respondent to the Draft Directions Order

9. (a) Within fourteen (14) days of service of the application, applicant’s affidavit/s and draft directions order the respondent shall either -
- (i) sign and return the draft directions order to the applicant or his/her solicitors; or
 - (ii) advise the applicant or his/her solicitors of any matter in the draft directions order with which the respondent disagrees and put forward an alternative proposal in respect of that or those matters.
- (b) within seven (7) days of receipt of the signed draft directions order from the respondent, the applicant shall file it in the Registry and it shall be operative from that date;
- (c) alternatively, in the event of a disagreement in respect of the terms of the draft directions order, the parties shall use their best endeavours to resolve that disagreement and agree to the terms of the order as quickly as possible;
- (d) if, but only if, the parties are unable to agree on the terms of the directions order, either party may list the application before the chamber judge upon not less than fourteen (14) days notice to the other party.

10. Any variation of an order once made may be sought under the liberty to apply provisions of the directions order.

Respondent's Affidavit

11. The affidavit of the respondent referred to in paragraph 5 of the draft directions order herein shall include -
- (a) a list of estate assets and liabilities, and estimates of value, specifying the date of estimation/valuation;
 - (b) the respondent's best estimate of the costs of -
 - (i) administration of the estate through to completion of executorial duties;
 - (ii) the respondent of and incidental to the application through to trial and judgment;
 - (c) all facts and matters relevant to any material in the applicant's affidavit requesting exoneration of any bequest from the burden or incidence of an order, and the respondent's responses thereto;
 - (d) material relevant to all matters in issue on the application.
12. Practitioners are reminded that Rule 149(3) providing for Certificates of Readiness applies to Family Provision Applications.

Judge J.P. Shanahan
Chief Judge of District Courts
12 June 1997(Date)

NOTE: Practitioners are reminded that hearsay, including evidence of oral statements by the deceased, is not admissible on the hearing of a Family Provision Application unless it can be brought within the rule in Hughes v National Trustees Executors and Agency Co. of Australiasia Ltd (1979) 143 CLR 134, and should therefore not be included in affidavits filed in such proceedings.

**SCHEDULE
DIRECTIONS ORDER**

1. On or before the day of 19 the applicant shall file and serve upon the respondent any further affidavits by or on behalf of the applicant.
2. On or before the day of 19 the respondent shall cause copies of the application, all affidavits by or on behalf of the applicant, and this order to be sent by a form of mail or delivery requiring a signed receipt from the recipient to -

(Insert list of persons to be served)

together with a letter in compliance with paragraph 8(a) of District Court Practice Direction No. 2 of 1997.

3. On or before the day of 19 any person served pursuant to paragraph 2 of this order who chooses to be separately represented shall give notice thereof, including an address for service, to the applicant and the respondent or their solicitors, and to the Registry.
4. On or before the day of 19 any person who has given notice under paragraph 3 of this order shall cause his/her affidavit/s to be filed and served upon the applicant and the respondent, or their solicitors.
5. On or before the day of 19 any affidavits by or on behalf of the respondent shall be filed and served upon the applicant and upon any other person who has given notice under paragraph 3 of this order, or their solicitors.
6. On or before the day of 19 any further affidavits by or on behalf of the applicant, the respondent, or any person who has given notice under paragraph 3 of this order shall be filed and served upon all other parties, or their solicitors.
7. (a) The parties shall undertake the following dispute resolution plan -
(Insert particulars of plan as per paragraph 8(b) of District Courts Practice Direction No. 2 of 1997)
(b) in the event the matter is not resolved pursuant to the dispute resolution plan, the parties shall undertake an ADR process, namely
(Insert particulars of proposed ADR process)
8. Upon compliance by the parties with all terms of this order and the filing of a Certificate of Readiness in compliance with Rule 149(3) of the District Court Rules, signed by or on behalf of the applicant, the respondent, and any person who has given notice in accordance with paragraph 3 of this order, the application shall be placed on the Civil Callover List with priority.
9. Any party shall be at liberty to apply on reasonable notice in writing to the other parties.
10. The costs of and incidental to the application and this order are reserved to the trial judge, or further order.

Solicitors for the Applicant
Date

Solicitors for the Respondent
Date