Preparing and Defending Family Provision Claims in New South Wales

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1. Family Provision applications accounted for almost one quarter of the filings in the Equity Division of the Supreme Court of New South Wales in 2023.[1] This paper seeks to provide practitioners with a practical guide to preparing and defending a family provision claim.

A. History

2. Family provision legislation was introduced in New South Wales with the *Testator's Family Maintenance and Guardianship of Infants Act 1916*. The original legislation only applied in circumstances where there was a will and the only eligible persons were the husband, widow or children of the deceased testator. In respect of estates where the deceased died on or after 1 March 2009, family provision claims are now dealt with under Chapter 3 of the of the *Succession Act 2006* (NSW).

3. Whilst there has been an expansion to the categories of people that can make a claim since introduction of a statutory right, the statutory language of *"adequate provision"* for the *"proper maintenance, advancement and education"* has remained for over 100 years.[2]

B. Applicable Law and Rules of Court

4. The following apply to family provision claims in New South Wales:
    a. The *Succession Act 2006,* in particular Chapter 3;
    b. Supreme Court Practice Note SC Eq 7;
    c. Schedule J - Succession Act of the *Supreme Court Rules*; and
    d. The principles derived in case law.

C. What are Family Provision proceedings?

5. Family provision proceedings are a creature of statute which has the effect of restricting or modifying testamentary freedom. Section 59 of the *Act* provides that a Court *may* make a family provision order for the maintenance, education or advancement in life of the eligible person, having regard to the facts known to the Court at the time the order is made if it is satisfied that:

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[1] Supreme Court of NSW Provisions Statistics 2023 (at 25 January 2024) < https://supremecourt.nsw.gov.au/content/dam/dcj/ctsd/supreme-court/documents/Publications/Annual-Reviews-+-Stats/Provisional_Statistics_January_2024.pdf>

[2] Including under the *Family Provision Act 1982*.

> *"at the time when the Court is considering the application, adequate provision for the proper maintenance, education or advancement in life of the person in whose favour the order is to be made has not been made…"*

6. Williams J in *Vella v Vella; Vella v Vella* [2020] NSWSC 849 provides context to the statutory language as follows:

> The adequacy of the provision made by the deceased's will is concerned with quantum, whereas proper prescribes the standard of maintenance, education and advancement in life. The inquiry into adequacy is not limited to considering whether the plaintiff has enough to survive or to live comfortably without provision (or further provision, as the case may be) from the deceased's estate. Adequacy is a broader concept that requires consideration of matters necessary to guard against unforeseen contingencies. In deciding whether adequate provision has been for the plaintiff's proper maintenance, education or advancement in life, attention may be given to how the parties lived and might reasonably have expected to live in the future. The concepts of adequate and proper are not assessed in a vacuum, but in the context of all of the circumstances of the case, including the plaintiff's financial position, the size and nature of the deceased's estate, the totality of the relationship between the plaintiff and the deceased and the relationship between the deceased and other persons who have legitimate claims on the deceased's estate: Harris v Carter (supra) at [114]–[122] and [149]–[154]

D. Who may bring a claim?

7. Section 57 creates categories of "eligible persons" being persons who "may apply" to the Court for a family provision order in relation to a deceased estate, being:

> (a) a person who was the spouse of the deceased person at the time of the deceased person's death,
> (b) a person with whom the deceased person was living in a de facto relationship at the time of the deceased person's death,
> (c) a child of the deceased person,
> (d) a former spouse of the deceased person,
> (e) a person--
> (i) who was, at any particular time, wholly or partly dependent on the deceased person, and
> (ii) who is a grandchild of the deceased person or was, at that particular time or at any other time, a

member of the household of which the deceased person was a member,

(f) a person with whom the deceased person was living in a close personal relationship at the time of the deceased person's death.

8. For those being eligible persons pursuant to subsections (d), (e) and (f), they must additionally demonstrate that "*there are factors which warrant the making of the application"* (s 59(1)(b)). See McLelland J in *Re Fulop* (1987) 8 NSWLR 679 at 681.

9. It must be emphasised that *eligibility* merely describes who is entitled to commence a claim for provision. It is not an entitlement to a family provision order.

E. Principles Relevant to Some Common Categories of Applicant

Spouse & De Facto Partners (s 57(a)-(b)).

10. Unsurprisingly, spouses of deceased persons and those with whom they were in a de facto relationship at the time of the deceased's death are eligible to bring a claim.

11. Whilst one must be cautious in deriving an ordinary position from judicial statements as to certain categories (the jurisdiction is intrinsically fact specific), a number of judicial pronouncements exist concerning spouse claims. In *Steinmetz v Shannon* (2019) 99 NSWLR 687; [2019] NSWCA 114 at [102], Brereton JA referred to the statement of Powell J *in Luciano v Rosenblum* (1985) 2 NSWLR 65 at 69-70 regarding the "broad general rule" in respect of the obligations owed to a widow:

> "It seems to me that, as a broad general rule, and in the absence of special circumstances, the duty of a testator to his widow is, to the extent to which his assets permit him to do so, to ensure that she is secure in her home, to ensure that she has an income sufficient to permit her to live in the style to which she is accustomed, and to provide her with a fund to enable her to meet any unforeseen contingencies."

12. However, the guidance provided by the above must not be elevated to an inflexible rule.

13. Where the spouse and the deceased were separated at the date of death, White J in *Kalmar v Kalmar; estate of Kalmar* [2006] NSWSC 437 at [50] stated:

> [T]he bond of matrimony, prime facie, gives rise to a testamentary obligation (*Re Clissold (deceased)* (1970) 2 NSWLR 619 at 621). Although each case will depend on its own facts, it cannot be assumed that that obligation comes to an end on the parties separating without their being divorced, at least where there has been no disentitling conduct by the claimant (*Re Clissold*

(deceased) at 621–622*; Re Mercer (deceased)* [1977] 1 NZLR 469 at 672-673, cited with approval in *Palmer v Dolman* [2004] NSWCA 361 at [118]).

Issues of Eligibility – De Facto Relationship

14. Leeming JA in *Sun v Chapman* [2022] NSWCA 132 noted that the category of de facto relationship *"is one that may be more contestable than some of the other categories of eligible persons defined in s 57(1) of the* Succession Act 2006 (NSW)." The term "de facto relationship" is not defined in the *Succession Act,* rather the impressionistic definitions contained section 21C(2) of the *Interpretation Act 1987* (NSW) applies. A recent example of where the de facto relationship was placed in issue is *McGuire bht McGuire v New South Wales Trustee and Guardian* [2023] NSWSC 1013.

Former De Facto Partners

15. There is no *specific* category for a person who was in a de facto relationship with the deceased at a time other than at the date of death. Former de facto partners may be able to establish eligibility pursuant to the definition of eligible person in s 57(1)(e). The applicant must show that they were at some time dependent or partly dependent on the deceased and were a member of the household of the deceased. They additionally must establish "*factors which warrant the making of the application"* under s 57(1)(b). See *Nelligan v Crouch* [2007] NSWSC 840.

Children of the Deceased

16. Most family provision claims determined following contested hearing are brought by adult children. In *Georgopoulos v Tsiokanis & Anor* [2022] NSWSC 563 at [309]-[310], Hallen J identified the following principles relevant to a family provision claim by an adult child:

> "(a) The relationship between parent and child changes when the child attains adulthood. However, a child does not cease to be a natural recipient of parental ties, affection or support, as the bonds of childhood are relaxed.
>
> (b) It is impossible to describe, in terms of universal application, the moral obligation, or community expectation, of a parent in respect of an adult child. It can be said that, 'ordinarily the community expects parents to raise and educate their children to the very best of their ability while they remain children; probably to assist them with a tertiary education, and where that is feasible; where funds allow, to provide them with a start in life – such as a deposit on a home, although it might well take a different form. The community does not expect a parent, in ordinary circumstances, to provide an unencumbered house, or to set their children up in a position where they can

acquire a house unencumbered, although in a particular case, where assets permit and the relationship between the parties is such as to justify it, there might be such an obligation': Taylor v Farrugia [2009] NSWSC 801 at [57] (Brereton J); McGrath v Eves [2005] NSWSC 1006; Kohari v Snow [2013] NSWSC 452 at [121]; Salmon v Osmond (2015) 14 ASTLR 442; [2015] NSWCA 42 at [109] (Beazley P, McColl and Gleeson JJA agreeing).

(c) Generally, also, 'the community does not expect a parent to look after his or her children for the rest of [the child's life] and into retirement, especially when there is someone else, such as a spouse, who has a prime obligation to do so. Plainly, if an adult child remains a dependent of a parent, the community usually expects the parent to make provision to fulfil that ongoing dependency after death. But where a child, even an adult child, falls on hard times and where there are assets available, then the community may expect parents to provide a buffer against contingencies; and where a child has been unable to accumulate superannuation or make other provision for their retirement, something to assist in retirement where otherwise they would be left destitute': Taylor v Farrugia at [58] (Brereton J).

(d) There is no need for an applicant adult child to show some special need or some special claim: McCosker v McCosker; Kleinig v Neal (No 2) [1981] 2 NSWLR 532 at 545-546 (Holland J); Bondelmonte v Blanckensee [1989] WAR 305; Hawkins v Prestage (1989) 1 WAR 37 at 45 (Nicholson J); Taylor v Farrugia at [58] (Brereton J).

(e) The adult child's lack of reserves to meet demands, particularly of ill health, which become more likely with advancing years, is a relevant consideration: MacGregor v MacGregor [2003] WASC 169 at [179]-[182] (Templeman J); Crossman v Riedel [2004] ACTSC 127 at [49] (Gray J). Likewise, the need for financial security and a fund to protect against the ordinary vicissitudes of life are relevant: Marks v Marks [2003] WASCA 297 at [43] (Wheeler J). In addition, if the applicant is unable to earn, or has a limited means of earning, an income, this could give rise to an increased call on the estate of the deceased: Christie v Manera [2006] WASC 287.

(f) The applicant has the onus of satisfying the Court, on the balance of probabilities, of the justification for the claim: Hughes v National Trustees, Executors and Agency Co of Australasia Ltd at 149 (Gibbs J)."

F. When must a claim be brought? What if I am out of time*?*

17. An application for a family provision order must be made within 12 months after the date of the death of the deceased person, unless the Court otherwise: section 58(2).

18. Section 58(2) provides that an application may be made out of time:

    a. if the parties to the proceedings consent; or
    b. if the Court "orders otherwise" on "sufficient cause being shown".

19. In *Stone v Stone* [2016] NSWSC 605 at [36], Brereton J made the following observations about the operation of s 58(2) of the Act:

> "The effect of the section is to confer on the Court a discretion to extend time, having regard to all the circumstances of the case, but only if sufficient cause is shown for the application not having been made within the 12-month period. This limitation period is not merely procedural nor a mere formality, but is substantive. An applicant for such an extension must demonstrate that there was sufficient cause for not having made the application within the 12-month period. So much is mandatory. This requires some explanation for the failure to make the application during that period. Once sufficient cause is shown for not having made the application within that period, the discretion to extend time (by making an 'otherwise order') is enlivened. It is not a jurisdictional prerequisite that sufficient cause be shown for any further delay after the expiry of the 12-month period; however, any such further delay and the reasons for it are plainly part of 'all the circumstances of the case' to which the Court must have regard in exercising the discretion. Other discretionary considerations include whether the extension of time would occasion prejudice to any beneficiary under the will; whether there is any unconscionable conduct on the part of the applicant (which is essentially concerned with deliberate decisions not to make an application, upon which an executor or a beneficiary has acted to their detriment); and the strength of the applicant's case for relief under the Succession Act. A mere change of mind on the part of an eligible person, who has decided not to make a claim - even if that change of mind is triggered by the success of a claim of another eligible person, or by another eligible person bringing a claim - is ordinarily not sufficient cause for granting an extension of time."

20. If an out of time application is reliant on property being designated notional estate consideration ought to be given to what was said in *Boatswain, Justin v Boatswain; Boatswain, Alicia v Boatswain* [2023] NSWSC 763 at [237] – [267].

21. Evidence relevant to the determination to extend time must be addressed in the plaintiff's substantive affidavit.

PROCEDURE

G. Acting for Plaintiffs

Summons

22. Family provision proceedings are commenced by summons (Form 4A). The summons must state the date of death of the deceased: PN at [13].

23. The summons must join as a defendant any administrator, unless the plaintiff is the sole administrator: Schedule J – SA Cl 1(a). No person is to be joined as a defendant *"unless there is sufficient reason for doing so"*: Schedule J – SA Cl 1(b).

24. Contrary to the ordinary position in civil litigation (see the discussion in *Bayside Council v Estate of Goodman* [2019] NSWSC 530), family provision proceedings may be commenced notwithstanding the absence of a grant of representation having been made in respect of the deceased's estate: section 58(1).

25. A conventional summons ought to seek an order for provision from the estate and notional estate of the deceased. Where the notional estate is capable of identification, the summons should identify the property that is sought to be designated as notional estate.

26. Where third parties hold notional estate, it would be appropriate for those persons to be joined as defendants: *Yee v Yee* [2017] NSWCA 305 at [196]

27. An application filed out of time must seek an order that the time for making the application be extended up to and including the time of filing this summons.

28. It may be appropriate for a family provision claim to be pleaded out in a Statement of Claim, such as where it runs together with alternate actions that ought to properly be pleaded (e.g. an estoppel claim or debt claim).

Notice of Eligible Persons

29. The Plaintiff's application must be accompanied by a "notice of eligible persons". The Practice Note requires that the notice be attached to the Summons or to the plaintiff's affidavit.

30. Combining the requirements in Schedule J and the Practice Note, the notice addressed to the administrator is to include the name and, if known, the address of each person *"who, in his or her opinion, is or may be an eligible person"* and identifying any eligible person who may be a person under legal incapacity.

31. The notice is not determinative of who else *is* in fact an eligible person: *Jurak v Latham* [2023] NSWSC 1318 at [103].

32. There is no prescribed form for the notice. General Form 1 may be modified to meet the requirements.

The Plaintiff's Substantive Affidavit

33. Paragraph 15.1 of the Practice Note requires an affidavit "*by the plaintiff adapted from the form which is Annexure 1"* of the Practice Note. The Practice Note identifies the matters specified in section 60(2)(a)-(o), being matters the Court may have regard to in considering a claim. Whilst a useful guide, it is not entirely applicable to every case. It must be adapted to meet the circumstances of the case.

34. As with any affidavit drafting, the drafter must set out with intent to prove his or her case. If eligibility is in dispute, the affidavit must in – in admissible form – set out to establish the asserted basis of eligibility. Where an application is brought out of time, the drafter must set out with the intent of providing the Court with explanation for the delay.

35. As a useful guide, the affidavit should be focused on:

    a. Setting out the nature of the relationship of the Plaintiff and the Deceased, in particular the degree of dependence;
    b. Set out the current and likely future material and financial circumstances of the plaintiff (and his or her household); and
    c. Establish, by way of credible evidence, the plaintiff's needs to be satisfied by the estate.

Financial Circumstances

36. Young CJ in Eq in *Hill v Buckley [*2008] NSWSC 1374 at [14], commented:

> *"A properly prepared case under the Act sets out in plain detail, brought up-to-date as at the hearing, the plaintiff's statement of assets, her statement of liabilities and her statement of income."*

37. A dereliction of that obligation by the plaintiff will be fatal to his or her claim. In *Collings v Vakas* [2006] NSWSC 393 Campbell J – determining a case under the former Act – wrote at [66]-[68]:

> *"Before the Court can make an order in the plaintiff's favour, it needs to be satisfied that she was left, at the testator's death, without adequate provision for her maintenance, education or advancement in life. It is clear that she*

owns no real estate (unlike her brothers), and that she has ongoing family responsibilities.

However, before a court can be satisfied that a plaintiff has been left without adequate provision, the court needs to be persuaded that it has been presented, at least in broad outline, with the whole picture concerning the plaintiff's financial situation. In the present case, even though there are two elements of the plaintiff's financial situation about which I am satisfied (that she owns no real estate, and has family responsibilities), when another crucial element of the plaintiff's financial situation (namely, her income and expenditure) is not satisfactorily proved, it is not possible to conclude that she has been left without adequate provision.

In these circumstances, the plaintiff's claim is dismissed."

38. With the same result, Stevenson J in *Stollery v Stollery* [2016] NSWSC 54 stated:

> *46. An applicant for provision under the Act must place before the Court an accurate statement of his or her financial position. Otherwise, the Court is in no position to assess whether the provision made for the applicant in the will in question is otherwise than adequate.*
>
> *...*
>
> *49. Mr Stollery did not disclose to the Court anything like the "whole picture" of his financial situation; not even in "broad outline".*
>
> *50. Based on Mr Stollery's evidence, I have no idea what his true financial position is, save that it is nothing like what he swore to be true in the affidavits filed in support of his application.*
>
> *51. For that reason alone, I would dismiss his application.*

39. The Practice Note affidavit seeks to direct plaintiffs' attention to that fact, such as follows:

> *10. Annexed hereto and marked "###" is a summary of my assets and liabilities (including superannuation).*
>
> *11. Annexed hereto and marked "###" is a summary of assets that I hold with another person.*
>
> *12. My current gross monthly income is $###. My current net monthly income is $###.*

13. Annexed hereto and marked "###" is a summary of my (or my family's) monthly expenditure.

40. Often, the financial position of the plaintiff is a matter of bare assertion. Bare assertions hold no probative value if the matter proceeds to contested hearing. Prior to hearing the plaintiff must make good those bare assertions through the provision of primary documents such as superannuation statements, bank statements, and the like. The updating affidavits are an appropriate opportunity to close any admissibility gaps in that regard.

41. In *Gail Patricia Stone v Michael John Stone* [2019] NSWSC 233 (*"**Stone v Stone"***) at [72] – [73] Hammerschlag J stated:

> *72. The affidavit envisaged by Para 6 of SC Eq 7* [now paragraph 15.1] *is intended to facilitate early disclosure to encourage settlement of the dispute and to diminish the incurring of legal costs. Plainly, it is not expected to meet the requirements for the admissibility of evidence in all respects.* ***But Para 6 does not change the legal requirement for ultimate admissibility.***
>
> *73. From a practical point of view, a plaintiff may seek to read the affidavit as the principal affidavit in chief in the proceedings. Material in it (or for that matter in any other affidavit) may be saved by Para 21 of SC Eq 7, which is dealt with below. There might also be no objection.* ***A plaintiff needs to take care, as in any other case, that the evidence intended to be relied on at trial is admissible.***

42. Practitioners must not forget *"if the applicant is cohabiting with another person--the financial circumstances of the other person"* are relevant*:* s 60(2)(e). The plaintiff's election not to disclose her de facto partner's financial circumstances fully and frankly (including by way of her de facto partner proffering an affidavit) was part of the reasoning for dismissing the plaintiff's claim in *Stone v Stone.*

Establish Quantum

43. It is incumbent on the plaintiff to provide credible evidence in his or her evidence upon which a Court can make a quantum order for provision.

44. In *Maria Oliveira by her tutor Ivo De Oliveira v John Antonio Oliveira* [2023] NSWSC 1130 Kunc J recently dismissed a claim by a 52 year old non-verbal severely disabled adult child, who received a legacy of $20,000 under the will. In that case, all of the Plaintiff's *"daily needs are met by her NDIS package and her Commonwealth pension."* (at [18]). The central issue in the case was whether an order for provision for "contingencies" ought to be made.

45. At [12] his honour observed:

> "There must be a **demonstrable basis both as a matter of reason and evidence for making an allowance for contingencies.** In my respectful view, in most cases that is provided by an inference that the Court draws by accepting as not reasonably open to question and common knowledge (see *Evidence Act 1995* (NSW), s 144) that the unexpected does happen in the course of life which may require expenditure. Putting it colloquially, it is analogous to 'rainy day' savings that a prudent person tries to maintain if they can. So understood, this also explains why**, in the absence of specific potentialities being established by proper evidence, such allowances are generally not large and rarely in six figures** (although the size of the available estate will always be a matter to be taken into account in making any such award)."

Affidavit of Costs

46. Paragraph 15.3 of the Practice Note requires the plaintiff, or their legal representative, file and serve an affidavit "*estimating the plaintiff's costs and disbursements, calculated on an ordinary basis up to and including the completion of a mediation."* In the context of mediation (or similar alternate dispute resolution discussions) disclosure of the party's costs on the full solicitor-client basis may assist settlement discussions.

Rushed Applications within the Prescribed Period

47. Paragraph 16 of the Practice Note provides:

> *If the prescribed period for making a family provision application is about to expire and the proceedings are being commenced to preserve rights, the plaintiff must file and serve the two affidavits and the notice referred to in the immediately preceding paragraph, no later than 5 working days before the first directions hearing (or at such other time as the Court may order).*

H. Proof of Certain Matters

48. Paragraph 35 of the Practice Note provides:

> 35. Unless the court orders otherwise, or reasonable notice is given that strict proof is necessary, parties may give evidence as follows:
>
> 35.1 a kerbside appraisal by a real estate agent of any real property;
>
> 35.2 an estimate of the value, or a monetary amount, for the non-monetary
> assets of the estate other than real estate;

35.3 internet, or other media, advertisements of the asking price of real estate;

35.4 the plaintiff's, or beneficiary's best estimate of costs or expenses of items the plaintiff or the beneficiary wishes to acquire;

35.5 the plaintiff's, or the beneficiary's, best estimate of costs or expenses of any renovation or refurbishment of property the plaintiff or the beneficiary wishes to incur;

35.6 a description by the plaintiff, or by the beneficiary, of any physical, intellectual, or mental, disability, from which it is alleged the plaintiff, or the beneficiary, or any dependant of the plaintiff or beneficiary, is suffering, together with a copy of any medical, or other, report, in support of the condition alleged.

49. The relaxation of strict proof must be approached cautiously. For example, that a plaintiff is entitled to rely upon advertisements for the asking price of real estate does not mean that (1) the need for real estate or (2) the appropriateness of that specific real estate is established by annexing a print out of a RealEstate.com.au listing. The plaintiff, in circumstances where accommodation is sought, must set out the factual basis for why property of a specific type, size and location is appropriate.

50. Hammserschlag J in *Stone v Stone* at [82] warned:

> *Whatever may be the legal underpinning of Para 21* [now paragraph 35] – *a matter which it is now not necessary to consider – the paragraph is of limited application. It permits departure from the requirements of strict proof in carefully and precisely articulated ways. It does not excuse departure in other ways. To the contrary, the implication is that departure in other ways is not envisaged.*

I. Acting for Administrators/Defendants

51. The defendant in family provision claims has the duties of upholding the will and putting all relevant evidence before the Court, relating, not only to the case generally, but to any particular circumstances which the Court should take into consideration relating to any particular gift in the will: *Vasiljev v Public Trustee* [1974] 2 NSWLR 497 at 503.

52. The defendant has the duty to either compromise the claim, or contest it and seek to uphold the provisions of the will. Meek J in *Jurak v Latham* recently summarised the position in the following terms:

> An administrator must exercise a due sense of proportionality in the conduct of any such defence and seek to compromise a claim, if at all possible, in a

> way that would save both the applicant and the other beneficiaries costs. Indeed, almost two decades ago, Young CJ in Eq indicated that the duty of the administrator in defending family provision claims does not extend to doing so where it is of no commercial benefit to anyone, and regard should be had to the extent to which upholding the Will would benefit beneficiaries: *Szlazko v Travini* …

53. Paragraph 18 of the Practice Note and Schedule J prescribe the procedural steps to be taken by the administrator in family provision claims.

54. The requirements of an affidavit in accordance with 18.1 – 18.11 and 18.13 are self-explanatory and not discussed in this paper.

Service of a Notice of Claim and Affidavit of Service (Practice Note Paragraph 18.10)

55. The administrator must serve a notice on the following:

> (a) the surviving spouse (if any) of the deceased person,
> (b) every child of the deceased person,
> (c) every person not mentioned in paragraph (a) or (b) who is entitled to share in the distributable estate of the deceased person,
> (d) any person mentioned by the plaintiff in his or her notice served under subclause (1) and not mentioned in paragraph (a), (b) or (c) [that is, the persons referred to in the plaintiff's notice of eligible persons],
> (e) any other person who, in his or her opinion, is or may be an eligible person.

56. Paragraph 18.10 of the Practice Note additionally includes an obligation to serve notice on *"any person holding property as trustee or otherwise"*.

57. The notice is to set out the following:

> *NOTICE OF CLAIM The plaintiff has applied to the Court under the Succession Act 2006 for a family provision order in respect of the estate of (name) deceased who died on (date). If you are entitled to, and wish to apply for, an order for provision for you out of that estate, you must apply within a period prescribed by the Succession Act 2006 or allowed by the Court. If you do not, before the Court deals with the plaintiff's application, apply for an order for provision for you out of that estate, the Court may deal with the plaintiff's application without regard to any possible application by you. Dated— (signature) Solicitor for the administrator (Address for service) (or as the case may be)*

58. Again, there is no prescribed UCPR form. General Form 1 may be modified.

59. The Notice required in family provision claims is distinct from Forms 135 and 140 issued in probate proceedings.

60. Proof of service of the notice is to be verified by affidavit: PN 18.10.

Competing Financial Circumstances

61. Paragraph 18.12 makes it clear that the defendant's duty includes putting the material and financial circumstances and needs of each beneficiary before the Court. The defendant must place that evidence before the Court if desired by the beneficiary, unless the defendant knows it to be false: *Vasiljev v Public Trustee* at 503.

62. The material and financial circumstances of those entitled to the estate are an important element in the Court's evaluative judgment of a plaintiff's claim. The fact that an executor has not led evidence as to the financial position of a particular beneficiary will often provide a basis for the court to infer that each has sufficient income and resources to meet his or her needs: *Tobin v Ezekiel* (2012) 83 NSWLR 757 at [93].

J. What affidavits must not do

63. In *Thomas v SMP (International) Pty Ltd* [2010] NSWSC 822 Pembroke J stated:

> *It is common for some litigants to want to use their evidence as an opportunity to unburden themselves in unmanageable detail of the many facts which have preoccupied them in the years preceding the hearing of their case. But a fair hearing of their case can be seriously hindered by such unfiltered outpourings. That is why, among other things, counsel have a duty to the court which is additional to their duty to the party whom they represent. This duty is a legal duty, not merely a rule of practice or etiquette: Teece, The Law & Conduct of the Legal Profession in New South Wales, second edition, Law Book Co, pages 30-35 and 41-44.*

64. The above comments are especially relevant to family provision claims, which have a significant human element: see *Olsen v Olsen* [2019] NSWSC 217.

K. *"Past performance is not a reliable indicator of future performance"* every superannuation fund tv commercial.

65. In *Grey v Harrison* [1997] 2 VR 359, Callaway JA said at [366]:

> *There is no single provision of which it may be said that that is the provision that a wise and just testator would have made. There is instead a range of*

> *appropriate provisions, in much the same way as there is a range of awards for pain and suffering or a range of available sentences. Minds may legitimately differ as to the provision that should be made. Furthermore, it is not at all clear that reasons for an appropriate provision need be fully articulated. To borrow again from the analogy of sentencing, what is required is an instinctive synthesis that takes into account all relevant factors and gives them due weight.*

66. De Groot & Nickel in *Family Provision in Australia* maintain tables of awards made in published family provision decisions. They are classed by category of eligibility, specify the size of the estate and identify the order of provision as a percentage of the estate. Whilst the tables are useful for identifying decisions of relevance to your own particular case, no general rule should be derived from them. Once the jurisdictional question is satisfied, any order for provision is wholly discretionary. Cases are to be determined on their own unique circumstances.

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