THE NEW FAMILY PROVISION PRACTICE DIRECTION
AMENDED PD 14 OF 2023

Introduction

1. You can imagine how disconcerting it was for those of us who practice frequently in the family provision jurisdiction to arrive in chambers on 12 March last year to find that our procedural lifeblood, PD 8 of 2001, had been repealed overnight along with 60 other Supreme Court practice directions.

2. PD 8 of 2001 had originated in PD 2 of 1997 which it replaced, post-UCPR, with very few changes, and it had served the profession and litigants reasonably well. So well that, as is fairly well known, very few family provision applications proceed to trial, nearly all are compromised, and thus for the most part, the only time Supreme Court judges saw family provision applications was to make final orders giving effect to, or to sanction, compromises.

3. Of course, PD 8 of 2001 also applied, and it continues to apply, to family provision applications in the District Court. We now have the unfortunate situation where different procedural regimes apply in the two courts that have jurisdiction to hear family provision applications and I am unaware of any move on the part of the District Court to adopt a new PD of its own.

4. After the repeal, the Bar Association made some representations to the court and the court adopted a new practice direction comprising paras 31-42 of Amended PD 14 of 2023 (the Wills and Estates List PD) and the annexure to it. My aim today is to run you through the new procedure as briefly as possible.

The new procedure

First directions hearing

5. The *first* thing to note is that the new procedure applies to all family provision applications in the Supreme Court, regardless of the registry in which the application is filed, although the listing of the first directions hearing will depend on the registry.

6. In Brisbane, in a significant departure from PD 8 of 2001, all family provision applications will be set down for a first directions hearing within 28 days after being filed.[1] The court took the view that under PD 8 of 2001, family provision applications were the only applications that could be filed with no hearing date listed, and that closer judicial supervision was required. Hence, the new procedure goes back to the pre-1997 procedure by requiring a first directions hearing.[2]

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1 The timing of the first directions hearing will vary depending on the practice of the registry in Cairns, Townsville and Rockhampton.

2 PD 1 of 1981.

Initial steps – the applicant's material

7. The applicant is required to file two affidavits with the originating application:

   (a) The *first* is an affidavit satisfying the requirements for the making of the application and identifying the provision the applicant seeks from the estate. The "requirements for the making of the application" may be thought to encompass the eligibility of the applicant to apply, that the application has been made within time and facts going to need and moral claim. Echoing a requirement of the relevant Victorian PD, an applicant must also identify "the provision the applicant seeks from the estate". My observation is that all too often applicants ignore this entirely. Applicants (perhaps understandably) want to get as much as they can and so avoid identifying what their need for provision is and what may be required to satisfy that need., preferring to leave their options open. Applicants are now required to address this at an early stage;

   (b) The *second* is an affidavit of the applicant's solicitor estimating the applicant's costs on the standard and indemnity basis up to the conclusion of a mediation. There is a common assumption in Queensland that applicants' costs are always paid out of the estate on the indemnity basis. This requirement seems to challenge that by requiring applicants to also estimate their standard costs and suggests that the court may in future take a different approach to the question of costs.

8. Once that material has been filed, the applicant must serve it on the personal representative not less than 14 days before the first directions hearing. The applicant is also required to serve a notice identifying all persons who the applicant knows who are or might be:

   (a) eligible to apply for provision;

   (b) beneficiaries, either under the deceased's will or on intestacy.

9. Then there will be a first directions hearing.

Draft directions order

10. The annexure to Amended PD 14 of 2023 contains a form of order that may be adapted to suit the circumstances of the case. It is important that practitioners think critically about the extent to which the draft directions order should be adopted or whether it should be adapted to better suit the circumstances of the case. For example, in rare cases there may be a preliminary issue that needs to be dealt with and directions may have to be made to enable that to occur. For example, the application might have been filed out of time and the circumstances may make it appropriate for the question whether time should be extended to be dealt with as a preliminary issue. Or there may be

an issue about the applicant's eligibility to apply, such as paternity, that may require preliminary directions under s 41(9) of the *Succession Act 1981* (Qld) and the *Status of Children Act 1978* (Qld).

11. The new procedure does not impose a one size fits all approach. It encourages the use of the draft directions order but equally requires parties to consider what procedural steps should be taken "to effect the just, expeditious and efficient resolution" of the particular family provision application.[3]

12. Before I turn to the draft directions order annexed to Amended PD 14 of 2024, it is important to note that, if agreement is reached about the directions that should be made, para 34 of Amended PD 14 of 2024 enables those directions to be made on the papers.

13. Turning then to the draft directions orders, the steps they contemplate are, broadly, as follows, remembering that these steps follow the first directions hearing.

14. *First*, the personal representative is to file an initial affidavit. If they haven't already been exhibited to an applicant's affidavit, the personal representative must exhibit any grant of probate or letters of administration that has been made and the will (if there is one). Importantly, it must also contain "an estimate, formed from the evidence available to the [personal representative], of the assets, liabilities and value of the estate of the deceased as at the date of death and the date of the affidavit".[4] This is an important step and personal representatives need to approach it seriously. One often sees personal representative play games about the disclosure of the estate assets and liabilities. The duty of personal representatives when it comes to making this disclosure is to be full and frank. At this early stage, the personal representative can get away with providing an "estimate", but importantly, it is an estimate that has to be "formed from the evidence available" at the time. That allows for the fact that, early in an estate administration, the personal representative may not have all of the information necessary to enable his or her affidavit to be definitive. But at this stage, the personal representative must give the best estimate that the available evidence permits.

15. *Secondly*, the personal representative must then serve all of the documents filed in the proceeding on two categories of persons:

    (a) persons who are also eligible to apply;

    (b) persons whose interests may be affected by the outcome, ie, the beneficiaries.[5]

    Once that has been done, an affidavit of service has to be filed.[6] In the past, this is something that has often had to be chased up as a prelude to obtaining final orders or a sanction. That should no longer be necessary.

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3 Amended PD 14 of 2023, para 1.
4 Draft directions order, para 1.
5 Draft directions order, para 2.
6 Draft directions order, para 3.

16. The *third* step is an important one. It requires any person who also wishes to make an application for provision, or any beneficiary who wishes to be separately represented, to apply to be joined as a party – an applicant or a respondent. I want to dwell on this requirement because it does seem to be causing some problems in practice when it really shouldn't.

17. When it comes to the joinder of a person who also wishes to make an application for provision,[7] then there should not be too much difficulty. In most cases the application will be uncontroversial if it can be seen from the person's affidavit[8] that he or she is eligible to apply and has a claim which could not be summarily dismissed (bearing in mind that summary dismissal in family provision applications is exceedingly rare). Most joinder applications by applicants for provision should be able to be dealt with by consent.[9]

18. More care is needed when it comes to the joinder of beneficiaries as respondents. Under PD 8 of 2001, there was a frequent practice of beneficiaries filing a notice of address for service and then participating in the proceeding as if they had been joined as parties when they hadn't. They would come to the mediation and upset the applecart by, *inter alia*, seeking to have their costs paid out of the estate; similarly at trial.

19. The law about this has never changed. It is necessary to begin by considering the duties of personal representatives in response to a family provision application. In *Re Lanfear*, Williams J said:[10]

> "In an ordinary case, especially where the estate is a small one, it is the duty of the executors either to compromise the claim, or to contest it and seek to uphold the provisions of the will. For that purpose they should place 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."

20. That passage was approved by Hutley JA (with whom Hardie and Reynolds JJA agreed) in *Vasiljev v Public Trustee*. Hutley JA noted that the then current rules in New South Wales "put the executor in a position of great responsibility, as he is the only defender of the will" and served "to discourage any person other than the executor from making himself responsible for defending the will, except in those special cases where this is impossible, eg, where the executor is himself the applicant". "Beneficiaries may be allowed to intervene on special grounds", said his Honour, "but their

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7 See *Succession Act*, s 41(6), which, when an application has been made by any person, permits the court to treat it as an application on behalf of all persons who might apply, and in particular, on the question of limitation.

8 Draft directions order, para 4(a)(ii).

9 It should be borne in mind that, unless the applicants are represented by the same solicitors, then the court's leave for them to be represented by separate solicitors may be necessary, and an order to that effect should be built into the order joining the additional applicant(s): see *White Book*, 1999, Vol 1, p 213 [15/4/4]; *Ryan, Weld & Lee, Queensland Supreme Court Practice*, p 3804 [14.2.7]; *Civil Procedure Queensland*, [r 65.35]; and the cases there cited, in particular the discussion by Bond J in *Cart Provider Pty Ltd v Park* [2016] QSC 277 at [18]-[24].

10 (1940) 57 WN (NSW) 181 at 183.

intervention is unwelcome".[11] That said, however, Hutley JA went on to recognise that "though the executor is a party, he is there to do what the beneficiaries require him to do".[12]

21. More recent authorities have restated but refined the duties of personal representatives. In *Szlazko v Travini*, Young CJ in Eq reiterated that the duty of personal representatives to place all relevant evidence before the court does not justify a personal representative defending a family provision application as if it was "a jury trial in a fraud case".[13] Rather, personal representatives are under a duty:[14]

> "… to compromise claims in relation to small estates and to be careful when presenting evidence not to allow the costs of the defence to exceed sensible proportions. Accordingly, although the executor has the duty in the authorities, he or she must be careful to have a due sense of proportionality…
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> An executor … has a duty to uphold the will but not to the stage where it is of no commercial benefit to anybody to do so…"

22. In *Collett v Knox*, McMeekin J said that "[r]esort to generalisations that executors are entitled or obligated to uphold the will may provide no guidance at all in some cases",[15] and went on to say:[16]

> "The effect of s 41 of the Act is to impose on every testator or testatrix an obligation to make 'adequate and proper' provision for their spouse and children. If they fail to do so the court not only has the power, but the obligation, to ensure that is done upon application being made. Notions that an executor can effectively determine the fate of an application by vigorously contesting it, irrespective of the sense or merits in doing so, are in my view misguided and wrong. Executors cannot ignore the duty that lay on the testator. Thus when an application is made or notified the executor's obligation is to objectively assess the evidence, impartially assess the merits of that application, and if necessary compromise the suit."

Personal representatives cannot take away the power of the court to make proper provision for an applicant by acting unreasonably in defending the claim and incurring costs, eg, to prefer their own interests as beneficiaries.[17] Nor can personal representatives act unreasonably under the guise of "doing what the beneficiaries require". Rather, confronted with a such a difficulty, responsible personal representatives would "seek the direction of the court as to the appropriate course to take", and the court may, in a modest estate and having regard to the probable effect of the costs of litigation on it, direct them to "preserve the estate, agree to abide the order of the court, and let the parties litigate with their own funds if so minded, with the usual costs orders protecting the successful party".[18]

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11 [1974] 2 NSWLR 497 at 503B-C.
12 [1974] 2 NSWLR 497 at 504D.
13 [2004] NSWSC 610 at [11].
14 [2004] NSWSC 610 at [11]-[12]. See also *Re Scali* [2010] NSWSC 1254 at [10] per Brereton J; *Morrison v Abbott* [2012] NSWSC 320 at [75] per Hallen J and *Jurak v Latham* [2023] NSWSC 1318 at [159] per Meek J.
15 [2010] QSC 132 at [166].
16 [2010] QSC 132 at [167].
17 [2010] QSC 132 at [169].
18 [2010] QSC 132 at [181].

23. As Brereton J explained in *Boldi v Crozier*, the reason why the separate representation of beneficiaries is "unwelcome" is because, if personal representatives properly perform their duties, including the duty to put before the court evidence made available by the beneficiaries that is relevant to the issues, it is unnecessary for the beneficiaries to be joined. His Honour said:[19]

> "In proceedings under [the NSW family provision legislation] the proper defendant is the executor. Courts ordinarily discourage beneficiaries from defending the application. This is because it is the particular and peculiar duty of the executor to defend the will and, in those circumstances, the intervention of anyone else to uphold it is ordinarily regarded as unnecessary. A practical reason for this approach is to avoid the proliferation of parties and minimise the impact of costs on the estate. Thus, courts not infrequently decline to award costs to any beneficiary who has unnecessarily become a party to the proceedings.
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> Nonetheless, there are circumstances in which a beneficiary will be joined as a defendant. Obvious cases include where the executor is an applicant for family provision and there is no co-executor to defend the application. By analogy, where there may otherwise be conflict between the interests of the beneficiary and the executor – for example, if the executor is a competing beneficiary – separate representation of the beneficiary may be permitted.
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> A number of cases have indicated that a beneficiary will more readily be permitted to intervene where the beneficiary receives very substantial benefits under the will which are liable to be disturbed if a family provision order is made."
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> [citations omitted]

24. In *Bartlett v Coomber*, having referred to the duties of personal representatives, Hodgson JA said:[20]

> "The beneficiaries may be joined as parties, but generally only if it appears that the legal personal representative is not fulfilling this duty to represent their interests, or there is some other reason justifying this unusual course."

25. These judicial statements are not novel. Rather, they are based on what Williams J said in *Re Lanfear*:[21]

> "In special cases where for instance the executors are themselves beneficiaries under the will, or where very substantial benefits are conferred upon beneficiaries, it can be proper for beneficiaries to intervene and be separately represented, but as a general rule such separate representation should not be necessary if the executors do their duty. If beneficiaries desire to intervene an application to do so must be made before or at the hearing, and it is by no means a matter of course that such application will be granted. If the executors take up an attitude, which compels beneficiaries to seek separate representation to protect their gifts, they run a grave risk of the court holding that they have acted improperly, and, in a case where the court considers that only one set of costs should be allowed between the respondents, the result may follow that the court will order that set of costs to be applied in the first instance on behalf of the beneficiaries who have been forced to intervene, and only the residue to be applied on behalf of the executors."

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19 [2015] NSWSC 2155 at [2]-[4].
20 [2008] NSWCA 100 at [70]-[71].
21 (1940) 57 WN (NSW) 181 at 183.

26. There may be "special case" justifying the joinder of a beneficiary as a respondent where:[22]

    (a) the personal representative is also an eligible applicant who wishes to make a family provision application, and there is no other personal representative who can act as respondent;

    (b) the personal representative is also a beneficiary under the will or rules of intestacy and his or her interests conflict with the interests of other beneficiaries;

    (c) the interests of the beneficiaries conflict, eg, as to how the burden of any order for provision should be borne between them *inter se*;[23]

    (d) the beneficiary takes a very substantial benefit under the will or rules of intestacy;

    (e) the personal representative has breached his or her duties, to compromise the family provision application or contest it, by failing to put relevant evidence before the court, or in some other way, which has the effect of compelling the beneficiaries to seek separate representation;

    (f) the beneficiaries require the personal representative to do something in relation to the defence or compromise of the proceeding which the personal representative considers to be unreasonable.

27. My own view is that Amended PD 14 of 2023 has these principles in mind by requiring any beneficiaries who wish to be separately represented to apply, at an early stage in the proceeding, to be joined. The court and the parties are given an opportunity, early in the proceeding, to consider the necessity for the separate representation of beneficiaries given the circumstances of the case, and also, if separate representation is permitted, any directions that should follow from that, eg, directions committing the conduct of the defence to the beneficiaries and authorising the personal representative to sit on the sidelines.

28. Returning to the draft directions order, *fourthly*, once joinder applications have been dealt with, each of the respondents – the personal representative and any beneficiaries joined as respondents – are to file the affidavits they intend to rely on at trial. They must also file a costs affidavit estimating their costs to the conclusion of mediation on the standard and indemnity basis.[24] This represents a departure from PD 8 of 2001, under which all parties were given multiple opportunities to file affidavits, which frequently tended to lead to ever increasing amounts of material that was at best only marginally relevant being filed.

29. *Fifthly*, the proceeding will then be referred to mediation. Paragraph 9 of the draft directions order says that the period of the mediation is fixed at a maximum of half a day. In my experience, virtually

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22 See the discussion in Dickey, *Family Provision After Death*, pp 176-177, 182-184; de Groot and Nickel, *Family Provision in Australia*, 6th ed, pp 359-363 [6.6]-[6.8]; Dal Pont, *Law of Succession*, 3rd ed, pp 616-617 [17.45]-[17.47]; *Australian Succession Law*, paras [520.130]-[520.270]; *Collett v Knox* [2010] QSC 132 at [181].

23 *Succession Act 1981* (Qld), s 41(3)-(4).

24 Draft directions order, para 6.

no FPA mediation is capable of being concluded in half a day. For most parties it is their big day out; their best opportunity to achieve an outcome; and inevitably there will be numerous personal issues that need to be resolved before the legal issues can be resolved. That takes time. It is far more likely that an FPA mediation will run late (especially if it is held on a Friday) than finish by 12 or 1 pm, so my practice is always to amend that paragraph of the draft directions order to state one day.

30. *Sixthly*, if the mediation resolves the FPA, any application for final orders and sanction is to be filed and dealt with. I know there are practitioners who do not like having to get final orders and seek to avoid it. But of course, the Court of Appeal has told us what the law is, and it is that:[25]

> "[T]he final disposition of a family provision application is an exercise of the court's discretion. It cannot be achieved by agreement or deed. Any agreement reached at a mediation or between the parties at any stage cannot in any way circumvent the requirement that the court must consider whether it should make an order in the terms sought because it would finally dispose of the family provision application. The court can only make an order if it has jurisdiction to act under the terms of the statute."

31. *Finally*, if the FPA is not resolved at mediation, paras 39-40 of Amended PD 14 of 2023 (and para 14 of the draft directions order) requires that the proceeding either be placed on the Wills and Estates List for judicial case management or listed for a further directions hearing, at which the usual sorts of trial directions – the preparation of a realistic trial plan, statement of agreed facts, chronology, list of issues, etc – will be made.

Evidence

32. Finally, para 41 of Amended PD 14 of 2023 adopts an innovation from the relevant NSW practice direction in these terms:

> "Unless the court orders otherwise, or reasonable notice is given that strict proof is necessary, parties may agree to give evidence in a family provision application as follows:
>
> (a) a kerbside appraisal by a real estate agent of any real property;
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> (b) an estimate of the value, or a monetary amount, for the non-monetary assets of the estate other than real estate;
>
> (c) a description by the applicant or beneficiary, of any physical, intellectual, or mental disability, from which it is alleged the applicant or beneficiary, or any dependent of the applicant or beneficiary, is suffering, together with a copy of any medical or other report in support of the condition alleged."

33. The aim is, obviously, to reduce the time and costs of formally proving these matters unless there is some necessity for them to be proved formally. So, in the average FPA, a real estate agent's appraisal should suffice, unless there is a need for a valuation. Similarly, there is often little to be gained from valuing chattels which, in most estates, aren't nearly worth as much as some of the

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[25] *Abrahams v Abrahams* (2015) 13 ASTLR 406 at 414-415 [30], referring to *Affoo v Public Trustee of Queensland* [2012] 1 Qd R 408 at 416 [24].

parties may think. And finally, in what probably formalises an existing (although questionable) practice rather than establishes a new one, parties can depose to their own health conditions and exhibit whatever medical or other reports they have about it, rather than having to prove each condition *ab initio*.

34. None of this means that, if strict proof is required, these matters do not have to be formallys proved. But it does require the parties to think about whether strict proof is required, and if it is, the onus seems to lie on the party who requires it to say so. If the parties then cannot reach agreement about that, an order of the court will be required at the pre-trial directions hearing.

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