

The importance of notifying all eligible persons in a family provision claim

Jurak v Latham [2023] NSWSC 1318



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The decision of *Jurak v Latham*³ is an important judgment that provides significant guidance to practitioners (both solicitors and barristers) on the importance of locating and notifying eligible persons following the commencement of family provision claims in the Supreme Court of New South Wales.

Notice requirements under the applicable law

For practitioners who are unfamiliar with the jurisdiction, the principal legislation is the *Succession Act 2006* (NSW) ('*Succession Act*'), the former *Family Provision Act 1982* (NSW) (for applications where the deceased died prior to 1 March 2009), pt 12 r 1A and sch J of the *Supreme Court Rules 1970* (NSW) ('*Supreme Court Rules*'), the *Civil Procedure Act 2005* (NSW) ('*CPA*') and the *Uniform Civil Procedure Rules 2005* (NSW) ('*UCPR*').

The relevant practice note is SC EQ 7 – *Succession and Probate Lists*.⁴

Sub-sections 61(1) and (2) of the *Succession Act* empowers the court to disregard the interests of a person other than a beneficiary who may make, but has not made an application for family provision, provided that notice 'in the manner and form prescribed by the ... rules of court'⁵ has been served on the applicant or the court determines that such service is unnecessary, unreasonable or impracticable. The prescribed notices under the *Succession Act* are found in sch J of the *Supreme Court Rules* (Sch J – SA).⁶ When an applicant for family provision serves their summons and supporting affidavits on the administrator/executor⁷ they must also serve a Notice of Eligible Persons ('NEP') on the administrator/executor showing who, in their opinion, is or may be an eligible person.⁸

Following service of a NEP the administrator/executor must then serve the applicant's Notice of Claim ('NoC') on the identified eligible persons.⁹ In addition to the persons specified in paras (a)–(d) of sub-cl 4(2) of Sch J – SA, para (e) provides that the administrator/Executor must serve '[a]ny other person who, **in his or her opinion, is or may be** an eligible person'.¹⁰ Additionally, the wording of sub-para 18.10 of the practice note requires that the administrator/executor must also serve the applicant's NoC on '*persons beneficially entitled to the distributable estate*' (emphasis added).¹¹

Background

On 9 June 2023, Mr Douglas Louro Jurak (plaintiff and son of the deceased) commenced a family provision claim against the estate of the late Josef Jurak (the deceased). Ms Luci Latham (defendant and daughter of the deceased) acted as executor

of the estate. After discussions, the parties sought to have consent orders made to finalise the matter.

On 25 October 2023, the matter was listed for mention before Meek J. In that hearing, his Honour alerted the parties to earlier consent orders made by the court in March 2023 in other family provision proceedings concerning the estate ('March orders'). Those orders contained a notation that the interests of the plaintiff in the current proceedings should be disregarded.¹² That notation was made in circumstances where the solicitor for the executor had received an enquiry by the plaintiff about the estate on the same day.¹³ Meek J subsequently stood the matter over to allow the solicitor an opportunity to provide an explanation.¹⁴

On 30 October 2023, the matter was relisted and the solicitor for the executor attended with her counsel.¹⁵ Meek J advised that he had received an affidavit from the solicitor informing the court that the solicitor made a mistake which was unintentional.¹⁶ The solicitor acknowledged that she ought to have drawn the court's attention to the earlier contact she had with the plaintiff in the current proceedings prior to the finalisation of the March orders.¹⁷ The solicitor apologised to the court and the court unreservedly accepted that apology noting that the solicitor was a very experienced and capable practitioner.¹⁸

Meek J indicated that he would finalise the consent orders in the current proceedings making provision to the plaintiff, his Honour not considering it necessary to amend or set aside the previous s 61 notation made as part of the March orders, and that he would publish further reasons to provide guidance to practitioners on the importance of locating and notifying individuals who may be eligible persons in family provision claims.

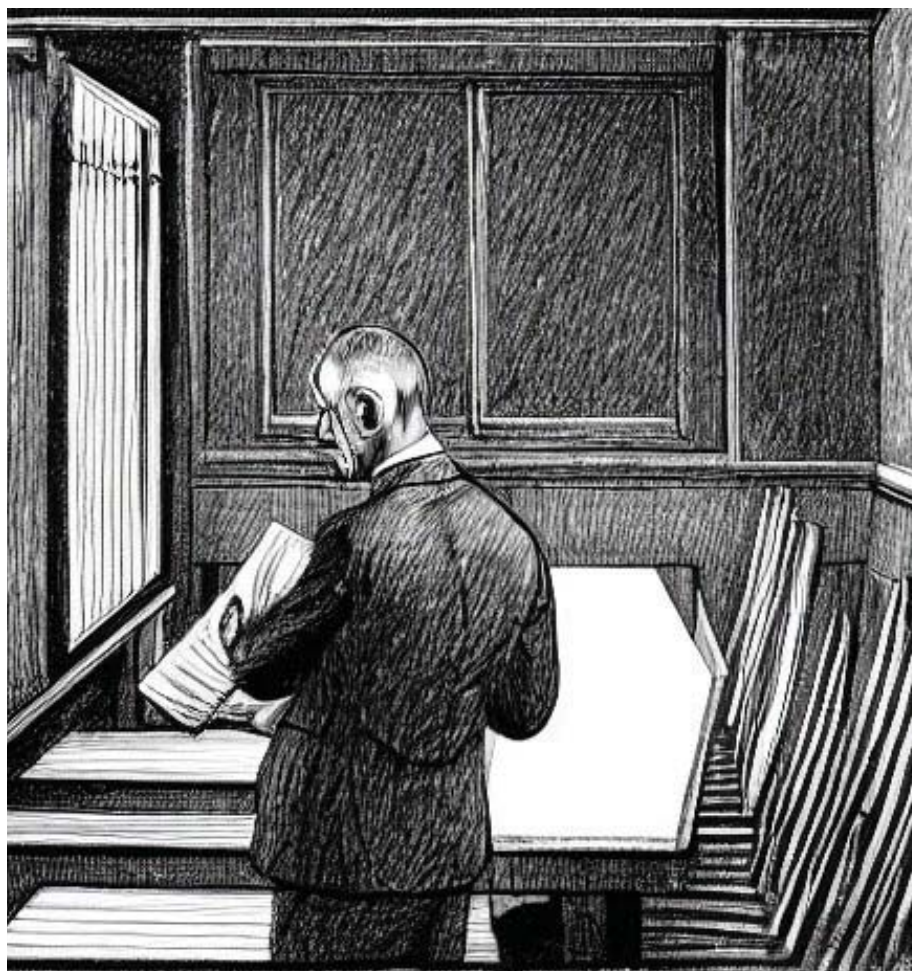
Decision

In the judgment, Meek J stressed the importance of practitioners being alert to ensure that affected persons are properly notified of their right to make a family provision claim and, when a practitioner becomes aware of relevant facts concerning such matters, putting that knowledge before the court.¹⁹ This is critical for many reasons:

- 1) Duty to the court – practitioners are obliged by their duty to the court to advise on ‘material matters bearing upon the making of an order’.²⁰
- 2) Procedural fairness – an individual who may be an eligible person needs to be afforded an opportunity to be heard on whether provision out of the estate should be made for them.²¹ For that opportunity to be afforded, the recipient must be alerted to the possible existence of their right to make a claim and the need for the recipient to make an application to enforce that right.²² It is a characteristic of a practitioner’s duty to the court that he or she will be astute to see that all persons affected by the claims in the proceedings (and not merely their clients) are afforded procedural fairness.²³
- 3) Overriding purpose – given the number of family provision claims now being brought, the court is heavily reliant on practitioners to ensure that any orders the court makes facilitate the just, quick and cheap resolution of such claims in accordance with sub-ss 56(1), (3) and (4) of the CPA and that court orders accord with the dictates of justice in compliance with s 58 of the CPA.²⁴
- 4) Efficiency and consistency of proceedings – as there will often be matters in which an estate can be subject to multiple claims, it is helpful for ‘all potential claims to be dealt with and ... heard by the court together’.²⁵ Such an approach not only enables the court to effect the just, quick and cheap disposition of the proceedings but further avoids ‘the prospect of there being inconsistent orders or findings in relation to family provision claims concerning the one estate’.²⁶

Who is or ‘may be’ an eligible person?

Section 57 of the *Succession Act* prescribes individuals who are eligible persons. In many cases, persons such as spouses, partners and children will be able to prove their eligibility by simply proving the existence of their relationship with the deceased. In other instances, a person’s eligibility will require



proof of the substance of their relationship with the deceased.²⁷

While the question of ‘who is an eligible person’ will, in many instances, be a contestable matter that the court will determine after receiving evidence and submissions from the parties, the real question that faces both the applicant for family provision and the administrator/executor for the purposes of notifying eligible persons at the interlocutory stages of the proceedings is *who in their opinion are or may be eligible persons*. As Meek J stated, ‘the object is to identify persons in such a way as to cast a broad enough net to sensibly be able to notify persons who might be contenders for eligibility’.²⁸

Locating eligible persons

Practitioners are expected to make ‘some attempt at enquiry to locate potentially eligible persons’.²⁹ Examples of such inquiries include conducting a property or electoral search.³⁰ Importantly, a statement by a practitioner or executor/administrator that he or she is unaware of the whereabouts of an eligible person will, without more, generally be inadequate to satisfy the court that notification requirements have been

met.³¹ Additionally, while some practitioners may consider notice unnecessary if all eligible persons are active parties to the proceedings, the court will still be assisted if the administrator/executor’s affidavit clarifies that all eligible persons have been made aware of their right to make a claim.³²

Form of notice

As there is no prescribed form for the NEPs, Meek J indicated that what practitioners do and are expected to do in practice is adapt UCPR Form 1 and modify it so as to nominate persons who are, or may be, eligible persons.³³ The wording to be used is found in sub-cl 4(1) Sch J – SA.³⁴ Additionally, the practice note indicates that the NEP should include the name and address (if known) of any person who is, or may be, an eligible person.³⁵ Meek J provided two examples of acceptable wording at [109] and [110] of the judgment that are illustrative of what the court expects on the content and format of a NEP. Finally, although not mandatory, Meek J explained that it can be helpful to add some description concerning the nature of the eligibility (for example, ‘[name], child of the deceased’).³⁶ In contrast with NEPs, sub-cl 4(3) of Sch J-SA prescribes the exact text required for the NoC.



A judge needs to be provided with sufficient material to make a considered decision about whether notice is required or not ...

One of the most common mistakes made by the executor/administrator in family provision claims concerns serving another document instead of the prescribed NoC.³⁷ Three common examples include the administrator/executor serving:³⁸

- 1) the plaintiff's summons and supporting affidavit;
- 2) the plaintiff's NEP; or
- 3) a 'Notice of Proceedings' form using UCPR Form 140.

This practice, however, is inappropriate, as the prescribed NoC is designed to alert the recipient to three important considerations:³⁹

- 1) the need for the recipient to consider whether they are entitled to make a claim;
- 2) the fact that the recipient must make a claim within a prescribed period should they wish to do so; and
- 3) the fact that the court may deal with the plaintiff's claim without any regard to the recipient's interests should the recipient fail to make a claim.

Service of the notice

In contrast to probate proceedings, there is no specific requirement for personal service in family provision claims unless mandated by the UCPR or otherwise ordered by the court (see UCPR r 10.20).⁴⁰ For service of the NEP by the applicant, Meek J referred to para 15.2 of the practice note, which indicates that service of the NEP can be achieved by attaching it to the plaintiff's summons or affidavit.⁴¹ However, while Meek J encouraged practitioners to attach the NEP to the plaintiff's summons or their affidavit, his Honour said it is not:⁴²

an egregious breach of the rules if the [NEP] is not attached to the summons or the plaintiff's affidavit or filed simultaneously but separately or filed at a time a little later than the filing of the summons.

For service of NoCs by the administrator/executor, Meek J stated that the court expects practitioners to 'use common sense in light of the purposes which underlie the jurisdiction

as to what method of service is appropriate in any given situation'.⁴³ Further, Meek J made it clear that the court can order a particular method of service in response to 'the exigencies of each particular case' including ordering personal service.⁴⁴

Evidence

Meek J identified some of the difficulties faced by judges when determining whether all potentially eligible persons have been identified. Examples include affidavits by family provision applicants and administrators/executors who identify potentially eligible persons but fail to provide sufficient detail on their relationship with the deceased.⁴⁵ His Honour reminds us that a 'judge needs to be provided with sufficient material to make a considered decision about whether notice is required or not ...'⁴⁶

The judgment lists various forms of evidence that can assist judges in these matters, including:

- 1) a family tree diagram – this can be a 'particularly effective method of readily drawing to the judge's attention the relevant persons to be considered';⁴⁷
- 2) death certificates – these documents can be helpful given their ability to 'identify potential former spouses and children of the deceased'.⁴⁸

Additionally, Meek J indicated that the operation of the Succession and Probate List allows for judges to seek clarification of certain matters and additional evidentiary material from practitioners by email correspondence when making orders in chambers.⁴⁹ In practice, this allows for practitioners to provide additional material or information requested either by affidavit

or, in some discrete instances, a 'solemn email assurance' from the practitioner.⁵⁰ His Honour further indicated that 'it is not desirable to outline hard and fast rules' regarding this practice which, by implication, will depend on the circumstances of the inquiry.⁵¹

Consent orders

Finally, his Honour provided a detailed overview of the jurisdiction of the court to make consent orders in family provision claims. Specifically, the judgment refers to the jurisdiction of the court to make such orders and eight different categories of consent order that can be made by the court depending on the specific circumstances of each case, including consent settlements:⁵²

- 1) invoking jurisdiction under the *Succession Act*;
- 2) involving offers of compromise;
- 3) involving discontinuance or dismissal of proceedings; and
- 4) involving judicial advice.

Closing remarks

One only needs to refer to the first paragraph of Meek J's judgment to appreciate the underlying rationale behind the decision – which conveys a message to be remembered by all practitioners:⁵³

Law is practised better, and administered more justly, when all those involved not only understand the purposes which underlie the substantive legal principles concerning the rules of procedural fairness but have a disposition and desire to ensure that they are adhered to and applied. **BN**

ENDNOTES

- 1 Barrister, 13th Floor St James Hall.
- 2 Barrister, 13th Floor St James Hall and counsel for the Plaintiff.
- 3 [2023] NSWSC 1318 (Meek J) ('*Jurak*').
- 4 *Jurak*: at [24]–[25].
- 5 *Jurak*: at [29].
- 6 *Ibid*.
- 7 See [15] of practice note SC EQ 7 – *Succession and Probate Lists* for description of relevant documents.
- 8 *Supreme Court Rules 1970* (NSW) Sch J – Succession Act sub-cl 4(1).
- 9 *Supreme Court Rules 1970* (NSW) Sch J – Succession Act sub-cl 4(2)(d).
- 10 *Jurak*: at [36].
- 11 *Jurak*: at [48].
- 12 *Jurak*: at [2].
- 13 *Jurak*: at [3].
- 14 *Jurak*: at [4].
- 15 *Ibid*.
- 16 *Jurak*: at [7].
- 17 *Ibid*.
- 18 *Jurak*: at [10].
- 19 *Jurak*: at [17].
- 20 *Jurak*: at [8].
- 21 *Jurak*: at [17], [62]–[63].
- 22 *Jurak*: at [64].
- 23 *Jurak*: at [17].
- 24 *Jurak*: at [12]–[14].
- 25 *Jurak*: at [67].

- 26 *Jurak*: at [70].
- 27 *Jurak*: at [95]–[97].
- 28 *Jurak*: at [101].
- 29 *Jurak*: at [149].
- 30 *Jurak*: at [150].
- 31 *Jurak*: at [149].
- 32 *Jurak*: at [153].
- 33 *Jurak*: at [107].
- 34 *Jurak*: at [108].
- 35 *Ibid*.
- 36 *Jurak*: at [111].
- 37 *Jurak*: at [122].
- 38 *Ibid*.
- 39 *Jurak*: at [123].
- 40 *Jurak*: at [128].
- 41 *Jurak*: at [43].
- 42 *Jurak*: at [115].
- 43 *Jurak*: at [131].
- 44 *Jurak*: at [132].
- 45 *Jurak*: at [135] – [137].
- 46 *Jurak*: at [138].
- 47 *Jurak*: at [140].
- 48 *Jurak*: at [141].
- 49 *Jurak*: at [145].
- 50 *Jurak*: at [147].
- 51 *Ibid*.
- 52 *Jurak*: at [174] – [243].
- 53 *Jurak*: at [1].