

# SUPREME COURT OF TASMANIA

## PRACTICE DIRECTION

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The following Practice Direction is published by direction of the Chief Justice, the Honourable Mr Justice Underwood AO.

This Practice Direction replaces 6/2003 and 5/2004.

### **CONSENT ORDERS UNDER THE *RELATIONSHIPS ACT 2003* AND THE *TESTATOR'S FAMILY MAINTENANCE ACT 1912***

In future, consent orders will not be made under either of these Acts unless the parties or their solicitors provide sufficient evidence to satisfy a judge that the orders should be made. That evidence may be presented in one or more affidavits. It may also be presented in an agreement as to facts pursuant to the *Evidence Act 2001*, s191(3)(a), which must be signed by the parties or their solicitors. Such evidence is necessary because the relevant Acts impose various requirements whereby a judge must be satisfied of certain matters before an order can be made. For example, the *Relationships Act 2003*, s40(1), under which property interests can be adjusted, empowers a court dealing with a property application to "make any order it considers just and equitable having regard to" a series of matters listed in pars(a) to (e) of the subsection. As a result of the wording of the subsection, a court may not make an order adjusting property interests unless it is informed as to the relevant facts, and considers the proposed order to be just and equitable. Affidavit evidence and/or a written agreement as to facts is therefore necessary. All affidavits and agreements should be as brief and concise as possible.

The requirements set out below, where applicable, must be complied with before consent orders will be made.

#### **Cases with all Litigants Legally Represented**

If each party is legally represented (including each affected beneficiary in a *Testator's Family Maintenance Act* case), consent orders will ordinarily be made on the papers by a judge in Chambers in the absence of the parties and their legal representatives. If a judge is not satisfied with the evidentiary material, the parties or their solicitors may be advised by letter as to the deficiency in that material. Alternatively, the application may be listed on a Miscellaneous Civil Business day so that submissions can be made in relation to it.

### **Parties without Solicitors**

If one or more parties are not legally represented, the application for consent orders will be listed for a short hearing before a judge. The same will apply in *Testator's Family Maintenance Act* cases if one or more affected beneficiaries are not legally represented. Each unrepresented party (or beneficiary) will have to attend court unless a judge directs otherwise. At the hearing, each unrepresented party (or beneficiary) will be asked whether he or she agrees to the proposed orders and considers them fair. Unless each unrepresented party (or beneficiary) attends court and confirms that he or she agrees to the proposed orders and considers them fair, the consent orders will not be made. An application for consent orders will normally be listed on a Miscellaneous Civil Business day.

### **Testator's Family Maintenance Act**

Because of the wording of s3(1), a consent order may be made only if a judge thinks the order is proper, having regard to all the circumstances of the case. Information sufficient to satisfy a judge that the proposed orders are proper must be provided in one or more affidavits and/or an agreement as to facts.

### **Registered Personal Relationships**

If a deed of relationship has been registered under the *Relationships Act 2003*, in respect of the parties' relationship, that fact should be stated in an affidavit or an agreement as to facts.

### **Duration of Unregistered Personal Relationship**

If an order adjusting property interests under the *Relationships Act* is sought in respect of an unregistered personal relationship, the affidavit evidence and/or agreement as to facts must state the dates when the parties' "personal relationship" began and ceased. See ss8, 37(1) and 38.

### **Details of Unregistered Personal Relationship**

If the parties' personal relationship is unregistered, the affidavit evidence and/or agreement as to facts must also be sufficient to satisfy a judge that the parties' relationship was a "personal relationship" for the purposes of the Act. Under s6, a personal relationship is either a "significant relationship" or a "caring relationship".

### **Unregistered significant relationships**

If orders are sought on the basis that the parties had an unregistered "significant relationship", the evidentiary material should deal with enough of the relevant factors listed in s4(3) to satisfy a judge that a "significant relationship" existed between the relevant dates. A paragraph stating that the parties lived together as if they were married between certain dates will ordinarily be sufficient. Section 4(3) reads as follows:

"(3) If a significant relationship is not registered under Part 2, in determining whether two persons are in a significant relationship, all the circumstances of the relationship are to be taken into account, including such of the following matters as may be relevant in a particular case:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) whether or not a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (e) the ownership, use and acquisition of property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children;
- (h) the performance of household duties;
- (i) the reputation and public aspects of the relationship."

### **Unregistered caring relationships**

If orders are sought on the basis that the parties had an unregistered "caring relationship", the evidentiary material should deal with enough of the factors listed in s5(5), and exclude the matters listed in s5(2), so as to satisfy a judge that a "caring relationship" existed between the relevant dates. The relevant subsections provide as follows:

"(2) For the purposes of subsection (1), a caring relationship is taken not to exist between two persons where one of them provides the other with domestic support and personal care —

- (a) for fee or payment in the nature of wages; or
- (b) under an employment relationship between the persons; or
- (c) on behalf of another person or an organisation (including a government or government agency, a body corporate or a charitable or benevolent organisation).

(3) For the purpose of subsection (2)(a), a fee does not include a carer allowance or carer payment under the *Social Security Act 1991* of the Commonwealth made to a party to a caring relationship in respect of care provided by that party to the other party to the relationship.

...

(5) If a caring relationship is not registered under Part 2, in determining whether two persons are in a caring relationship, all the circumstances of the relationship are to be taken into account including such of the following matters as may be relevant in a particular case:

- (a) the duration of the relationship;
- (b) the nature and extent of common residence;
- (c) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- (d) the ownership, use and acquisition of property;
- (e) the degree of mutual commitment to a shared life;
- (f) the performance of household duties;
- (g) the reputation and public aspects of the relationship;
- (h) the level of personal care and domestic support provided by one or each of the partners to the other."

### **Unregistered Relationships for Less than Two Years**

If an order adjusting property interests under the *Relationships Act* is sought, and the parties were in a "personal relationship" for less than two years, the evidentiary material must contain information sufficient to satisfy a judge of the matters referred to in s37(2), which reads as follows:

- "(2) A court may make an order if satisfied that —
- (a) there is a child of the partner referred to in the application; or
  - (b) the applicant —
    - (i) has made substantial contributions of the kind referred to in section 40(1) for which the applicant would otherwise not be adequately compensated if the order were not made; or
    - (ii) has the care and control of a child of the respondent —

and the failure to make the order would result in serious injustice to the applicant."

### **Property Orders — "Just and Equitable"**

A consent order adjusting property interests under the *Relationships Act*, s40(1), will not be made unless the evidentiary material is sufficient to satisfy a judge that the proposed order is just and equitable, having regard to the matters listed in ss40(1) and 47(1) and (2). Those provisions read as follows:

"40 — (1) On an application by a partner for an order for the adjustment of interests in respect of the property of either or both the partners, a court may make any order it considers just and equitable having regard to —

- (a) the financial and non-financial contributions made directly or indirectly by or on behalf of either or both of the partners to the acquisition, conservation or improvement of any of the property; and
- (b) the financial resources of either or both of the partners; and
- (c) the contributions, including any contributions made in the capacity of homemaker or parent, made by a partner to the welfare of the other partner or to the welfare of the family constituted by the partners and one or more of —
  - (i) a child of the partners; or
  - (ii) a child accepted by either or both the partners into the household of the partners, whether or not the child is a child of either of the partners; and
- (d) the nature and duration of the relationship; and
- (e) any relevant matter mentioned in section 47"

"47 — (1) On an application by a partner for an order for maintenance, a court may make the order if satisfied that the applicant is unable to support himself or herself adequately because —

- (a) the partner's earning capacity has been adversely affected by the circumstances of the personal relationship; or
- (b) of any other reason arising in whole or in part from circumstances of the personal relationship.

(2) In determining whether to make the order and in fixing any amount to be paid under the order, a court is to have regard to the following:

- (a) the income, property and financial resources of each partner (including the rate of any pension, allowance or benefit paid, payable or entitled to be paid to either partner) and the physical and mental capacity of each partner for appropriate gainful employment;
- (b) the financial needs and obligations of each partner;
- (c) the responsibilities of either partner to support any other person;
- (d) the terms of any order made or proposed to be made under section 40;
- (e) any payments provided for the maintenance of a child in the care and control of either partner;
- (f) whether either partner has the care and control of a child of the partner who is under 18;

- (g) the age and state of health of each partner;
- (h) the standard of living that is reasonable for each partner in all the circumstances;
- (i) the extent to which the payment of maintenance to the partner whose maintenance is under consideration would increase the earning capacity of the partner by enabling the partner —
  - (i) to undertake a course of education or training; or
  - (ii) to establish a business; or
  - (iii) otherwise to obtain adequate income;
- (j) the extent to which the partner whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other partner;
- (k) the length of the personal relationship;
- (l) the extent to which the relationship has affected the earning capacity of the partner whose maintenance is under consideration;
- (m) any other fact or circumstances the court considers relevant."

### **Maintenance for a Partner**

For an order to be made for the payment of maintenance for a partner, the evidentiary material must be sufficient to satisfy a judge that the applicant is unable to support himself or herself adequately, either because his or her earning capacity has been adversely affected by the circumstances of the personal relationship, or because of some other reason arising in whole or in part from the circumstances of the relationship. See s47(1), which is quoted above.

The evidentiary material must also cover such of the matters listed in s47(2), which is quoted above, as are relevant.

### **Discharge or Variation of Maintenance Order**

A consent order for the discharge or variation of a maintenance order for a partner will not be made unless the evidentiary material is sufficient to satisfy a judge that the order sought is justifiable because, since the original order was made or last varied, the circumstances of one party have changed, or the cost of living has changed. See s52(2). If a change to the cost of living is relied on, details of the relevant changes in the consumer price index (or other relevant statistics issued by the Australian Statistician) will need to be provided in the evidentiary material.