

SUPREME COURT RULES (AMENDMENT No. 259) 1991

NEW SOUTH WALES



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1. These rules are made by the Rule Committee on 9 December 1991.
2. The Supreme Court Rules 1970 are amended as follows:
 - (a) Part 78 rule 1:
 - (i) After the definition of “administrator” insert:

“affected person” means a person whose interest in the estate of a deceased might be affected by a declaration by the Court as to whether it is satisfied under section 18A of the Probate Act in respect of an informal testamentary document made by the deceased.
 - (ii) After the definition of “grant” insert:

“informal testamentary document” means a document which purports to embody the testamentary intentions of a deceased and has not been executed in accordance with the formal requirements of the Probate Act.
 - (b) Part 78 rule 5 (1):

After paragraph (g) insert:

 - (g1) declaring whether it is satisfied under section 18A of the Probate Act where:
 - (i) to the extent that rules 34E (1) or 34E (3) are applicable:
 - (A) those rules have been complied with; or
 - (B) the Court has dispensed with compliance with those rules,and no appearance has been entered within the time limited for entry of an appearance to a notice served under either of those rules; or
 - (ii) the value of the interest in the estate that would be affected by a declaration being made under that section does not exceed \$20,000;

- (g2) dispensing with compliance with the requirements of rule 34E (1) on the grounds mentioned in rule 34E (2);
- (g3) making orders under rule 34H (4) (b);
- (g4) granting leave under rule 34H (5);
- (g5) giving directions under rule 341 (c) (ii);
- (g6) making orders under rule 69 in relation to caveats lodged under rule 62A;
- (c) Part 78 rule 5 (1) (o):
Omit “\$400” and insert instead “\$4,000”.
- (d) Part 78 rule 6:
Omit the rule and insert instead:

Application of Part 61

6. Part 61 rule 3 (which relates to review of a registrar’s direction etc.) does not apply in respect of the registrar except where the registrar:

- (a) declares whether he is satisfied under section 18A of the Probate Act; or
- (b) makes an order in proceedings for passing accounts or for passing accounts and for commission.
- (e) Part 78 rule 88:
Omit the rule.
- (f) Part 78 rule 7 (a):
After “defendant” insert “, other than a defendant who may take part in the proceedings only to the extent permitted by Part 78 rule 341 (c)”.
- (g) Part 78 rule 9:
After subrule (3) insert:
(4) Subrules (1) and (2) do not apply to any parts of the proceedings in which a person who has entered an appearance under rule 34H (1) may take part.
- (h) Part 78 rule 10 (1):
Omit the subrule and insert instead:
(1) Notice, in the form prescribed, of an intended application for a grant or for resealing shall be published:
 - (a) if the deceased was resident at the date of his death in the State—in a newspaper circulating in the district where the deceased resided; or
 - (b) otherwise—in a Sydney daily newspaper.

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(i) Part 78 rule 24 (1) (b) (ivA):

Omit the rule and insert instead:

(ivA) where the deceased died on or after 1 November 1989:

- (A) that the plaintiff is not aware of the existence of any document purporting to embody the testamentary intentions of the deceased except for the will and any other specified document; and
- (B) if the deceased made any informal testamentary document—of the name and address of every person who is an affected person in relation to the estate of the deceased (designating as a disable person any person who, in the plaintiff’s opinion, is or may be a disable person) or, where the name and address of an affected person cannot be ascertained, the best information the plaintiff can give to assist in ascertaining the name, address and identity of the affected person.

(j) Part 78 rule 24 (5):

(i) Omit “may” and insert instead “shall”.

(ii) Omit “registered” where appearing and insert instead “certified”.

(iii) Omit “post” and insert instead “mail”.

(k) Part 78 rule 25 (1) (b):

After paragraph (iii) insert:

(iiiA) if the deceased made any informal testamentary document—of the name and address of every person who is an affected person in relation to the estate of the deceased (designating as a disable person any person who, in the plaintiff’s opinion, is or may be a disable person) or, where the name and address of an affected person cannot be ascertained, the best information the plaintiff can give to assist in ascertaining the name, address and identity of the affected person.

(1) Part 78 rule 25 (4):

Omit the subrule and insert instead:

(4) The notice referred to in subrule (3) (b) shall be served:

(a) personally; or

- (b) by sending a copy of the notice:
- (i) in the case of service within Australia—by certified mail to the person to be served; and
 - (ii) in the case of service outside Australia—by registered post to the person to be served,
- and by obtaining from the postal authorities a written acknowledgement, purporting to be signed by that person, of receipt of the certified or registered article.
- (m) Part 78 rule 25A (2) (b):
After paragraph (ii) insert:
- (iiiA) if the deceased made any informal testamentary document—of the name and address of every person who is an affected person in relation to the estate of the deceased (designating as a disable person any person who, in the plaintiff's opinion, is or may be a disable person) or, where the name and address of an affected person cannot be ascertained, the best information the plaintiff can give to assist in ascertaining the name, address and identity of the affected person.
- (n) Part 78 rule 25A (5):
Omit the subrule and insert instead:
- (5) The affidavits and notice referred to in subrule (4) (b) shall be served:
- (a) personally; or
 - (b) by sending copies of them:
 - (i) in the case of service within Australia—by certified mail to the person to be served; and
 - (ii) in the case of service outside Australia—by registered post to the person to be served,and by obtaining from the postal authorities a written acknowledgement, purporting to be signed by that person, of receipt of the certified or registered article.
- (o) Part 78 rule 26A (2):
Omit the subrule and insert instead:
- (2) The notice referred to in subrule (1) (b) shall be served:
- (a) personally; or

- (b) by sending a copy of the notice:
 - (i) in the case of service within Australia—by certified mail to the person to be served; and
 - (ii) in the case of service outside Australia—by registered post to the person to be served,and by obtaining from the postal authorities a written acknowledgement, purporting to be signed by that person, of receipt of the certified or registered article.
- (p) Part 78 rule 28 (1) (a):

After paragraph (iv) insert:

 - (ivA) where the deceased died on or after 1 November 1989:
 - (A) that the plaintiff is not aware of the existence of any document purporting to embody the testamentary intentions of the deceased except for any document the subject of the grant sought to be resealed and any other specified document; and
 - (B) if the deceased made any informal testamentary document—of the name and address of every person who is an affected person in relation to the estate of the deceased (designating as a disable person any person who, in the plaintiff’s opinion, is or may be a disable person) or, where the name and address of an affected person cannot be ascertained, the best information the plaintiff can give to assist in ascertaining the name, address and identity of the affected person.
- (q) Part 78 Division 5A:

From the heading omit “, 18A”.
- (r) Part 78 rule 35 (a):

After “defendant” insert “, other than a defendant who may take part in the proceedings only to the extent permitted by Part 78 rule 341 (c)”.
- (s) Part 78 rule 34C:

From the headnote omit “, 18A”.
- (t) Part 78 rule 34C (1):

Omit “, section 18A (1)”.
- (u) Part 1 rule 3:

Under the matter “DIVISION 5—*Application by creditors for administration*—rr. 32–34” relating to Part 78 insert:

DIVISION 5A—*Proceedings under sections 13, 15A and 29A of the Probate Act—rr. 34A–34D*

DIVISION 5B—*Proceedings under section 18A of the Probate Act—rr. 34E–34J*

(v) Part 78:

After rule 34D insert:

DIVISION 5B—*Proceedings under section 18A of the Probate Act*

Consent of or notice to affected persons

34E. (1) Subject to rule 34J, an applicant for a grant in relation to an estate shall, in respect of any person whose interest in the estate might be affected by a declaration by the Court as to whether the Court is satisfied under section 18A of the Probate Act in respect of an informal testamentary document made by the deceased:

- (a) if the affected person is not a disable person—file a consent, in the form prescribed, of the affected person; or
- (b) service notice, in the form prescribed, on the affected person,

in respect of the informal testamentary document.

(2) The grounds on which the Court may dispense with compliance with any of the requirements of subrule (1) include that:

- (a) the affected person is a disable person;
- (b) the affected person cannot be ascertained or cannot readily be ascertained;
- (c) the affected person, though ascertained, cannot be found; and
- (d) though the affected person can be ascertained and found, it appears to the Court expedient (regard being had to all the circumstances, including the amount at stake and the degree of difficulty of the point to be determined) to dispense with compliance for the purpose of saving expense.

(3) The applicant for the grant shall serve notice, in the form prescribed, on each person who has lodged a caveat under rule 62A which is in force.

Consenting or notified person to be bound by declaration

34F. A person:

- (a) whose consent is filed under rule 34E (1) (a);

- (b) upon whom notice is served under rule 34E (1) (b) or rule 34E (3); or
- (c) in respect of whom the Court has dispensed with compliance with the requirements of rule 34E (1) or rule 34E (3),

shall be bound by a declaration made by the Court as to whether it is satisfied under section 18A of the Probate Act in respect of any informal testamentary document referred to in the consent, or in the notice, to the same extent as if the person were a party at the time when the declaration was made, except where the declaration has been obtained by fraud or non-disclosure of material facts.

Service of notice

34G. (1) This rule applies to notices to be served under rule 34E.

(2) A notice may be served outside the State.

(3) Part 10 (which relates to service outside the State) does not apply to service of a notice.

(4) A notice shall be served:

(a) personally; or

(b) where the person upon whom the notice is to be served is not a disable person, by sending the notice:

(i) in the case of service within Australia—by certified mail to the person to be served: and

(ii) in the case of service outside Australia—by registered post to the person to be served,

and by obtaining from the postal authorities a written acknowledgement, purporting to be signed by that person, of receipt of the certified or registered article.

(5) Service of a notice on a disable person shall not take effect before the appointment of a tutor for the disable person.

Appearance by person upon whom notice is served

34H. (1) A person upon whom a notice is served under rule 34E may enter an appearance in the proceedings.

(2) Subject to subrule (3), Part 11 (which relates to appearance) applies to appearance by a person upon whom the notice is served as if that person were a defendant in the proceedings.

(3) Part 11 rule 6 (which relates to a late appearance) and rule 8 (which relates to setting aside originating process, etc.) shall not apply.

(4) The time to be limited by the notice for the person upon whom it is served to enter an appearance, shall be in the case of service:

- (a) within the State or the Australian Capital Territory—not less than 14 days after service; or
- (b) elsewhere—not less than 28 days after service or such other time as the Court may order.

(5) An appearance shall not be entered after the expiration of the time limited except by the leave of the Court.

Person appearing becomes party

341. Where a person enters an appearance under rule 34H (1) in any proceedings within the time limited for filing an appearance in respect of a notice served on him under rule 34E in the proceedings:

- (a) that notice, and any notice served on the person under rule 34E in the proceedings after the entry of the appearance, is in this rule called a “contested notice”;
- (b) the person shall, upon entering the appearance, become a defendant in the proceedings and the proceedings shall continue as if he were joined as a defendant by the originating process and as if he were served with the originating process on the day on which he was served with the notice;
- (c) the person shall take part only in such parts of the proceedings:
 - (i) as relate to the Court declaring whether it is satisfied under section 18A of the Probate Act in respect of each informal testamentary document to which a contested notice served under rule 34E (1) relates; or
 - (ii) as the Court directs; and
- (d) the person shall cease to be a defendant in the proceedings upon the conclusion of those parts of the proceedings referred to in paragraph (c).

Defended proceedings

345. Where there is a defendant to any proceedings for a grant the applicant for the grant:

- (a) shall not comply with rule 34E in respect of the defendant; and
- (b) shall serve on the defendant a copy of any informal testamentary document made by the deceased.

(w) Part 78 rule 55 (6):

Omit “mentally disable” and insert instead “incompetent”.

(x) Part 78 rule 60:

Omit the rule and insert instead:

Proof of service of citation to see

60. A party at whose request a citation to see proceedings has been issued shall not, without the leave of the Court, be entitled to be heard at the hearing or trial of the proceedings unless:

- (a) the person cited has entered an appearance in the proceedings; or
- (b) where the person cited has not entered an appearance in the proceedings, the party at whose request the citation has been issued has filed:
 - (i) an affidavit of service of the citation on the party cited; or
 - (ii) an affidavit stating that the citation has not been served on the party cited and explaining why it has not been served.

(y) Part 78:

After rule 62 insert:

Caveat in respect of informal testamentary document

62A. (1) A person, who claims to be an affected person in relation to an estate and who is not a defendant to proceedings for a grant in relation to the estate, may:

- (a) prior to service on that person of a notice under rule 34E in relation to that estate; or
- (b) by leave of the Court, at any time before grant,

lodge in the registry a caveat in the form prescribed in respect of any grant being made in the estate unless the caveator is given an opportunity to be heard on the question of whether the Court should be satisfied under section 18A of the Probate Act in respect of a document made by the deceased.

(2) The caveat shall state fully the nature of the interest claimed by the caveator and an address for service.

(3) Where a person, to the knowledge of the caveator, is making or is intending to make application for a grant in the estate, the caveator shall, within 7 days of the lodging of the caveat, serve a copy of the caveat on the person.

(4) A caveat lodged under subrule (1) shall cease to have effect:

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- (a) where the caveator is served with a notice under rule 34E (3) in respect of the estate to which the caveat relates—upon the expiration of the time limited for filing an appearance; or
- (b) where the caveator is made a defendant in the proceedings for a grant in respect of the estate to which the caveat relates—when the caveator is made a defendant,

whichever first occurs.

(z) Part 78 rule 69:

Omit subrules (1) and (2) and insert instead:

(1) Where a person intends to apply for:

- (a) a grant and there is in force a caveat, or more than one caveat, in respect of any grant being made in the estate; or
- (b) a reseal and there is in force a caveat, or more than one caveat, in respect of a reseal being made in the estate,

that person may apply for an order that the caveat, or each of the caveats, cease to be in force in respect of the intended application.

(2) The application shall be made:

- (a) where the person has commenced proceedings for a grant or resealing—by motion in the proceedings; or
- (b) otherwise—by summons.

(aa) Part 78 rule 70:

After “caveat” insert “under rule 61 (1)”.

(ab) Part 78:

Omit rule 91 and insert instead:

DIVISION 14—Distribution of assets

Notice of intended distribution

91. (1) A notice under section 92 of the Probate Act shall be published:

- (a) if the deceased was resident at the date of his death in the State—in a newspaper circulating in the district where the deceased resided; or
- (b) otherwise—in a Sydney daily newspaper.

(2) The notice may be in or to the effect of Form 121 of Schedule F.

(ac) SCHEDULE F Form 90:

Omit “Plaintiff (*name, address and occupation*)” insert instead:
(If a declaration under section 18A of the Probate Act is claimed, alter the claim accordingly.)

Plaintiff (*name, address and occupation*)

(ad) SCHEDULE F Form 97:

(i) Omit “deceased.” from paragraph 2 and insert instead
 “deceased (*where applicable except for specify document*).”.

(ii) After paragraph 12 insert:

13. (*where applicable, state particulars of affected persons as required by rule 24 (1) (a) (ivA) (B).*)

(ae) SCHEDULE F Form 98:

Omit the Form and insert instead:

Form 98

P 78, rr 24, 25, 25A, 26, 26A, 28.

AFFIDAVIT OF PUBLICATION AND SEARCH

On 7 May, 19 , I (*name, address and occupation*) say on oath:

1. (*Where deceased resided at the date of his death in the State A notice, a copy of which is annexed and marked “A”, was published on (date) in the (name) which is a newspaper circulating in the district where (name), the deceased, resided at the date of his death.*)

(*Where deceased did not reside at the date of his death in the State A notice, a copy of which is annexed and marked “A”, was published on (date) in the (name) which is a Sydney daily newspaper.*)

(*Where 2 years or more have elapsed since the date of death, add:*

2. I have this day searched in the registry of the Court and have found no evidence of any prior application for probate or administration or resealing in the estate having been made.)

(af) SCHEDULE F Form 100:

After paragraph 14 insert:

15. (*Where applicable, state particulars of affected persons as required by rule 25 (1) (b) (iiiA).*)

(ag) SCHEDULE F Form 100B:

After paragraph 14 insert:

15. *(Where applicable, state particulars of affected persons as required by rule 25A (2) (b) (iiiA).)*

(ah) SCHEDULE F Form 104:

(i) Omit “deceased.” from paragraph 2 and insert instead “deceased *(where applicable except for specify document)*.”.

(ii) After paragraph 16 insert:

17. *(Where applicable, state particulars of affected persons as required by rule 24 (1) (b) (ivA) (B).)*

(ai) SCHEDULE F Form 106:

(i) Omit from paragraph 3 “it.” and insert instead “it *(and where the deceased died on or after 1 November 1989)* and I am not aware of the existence of any other document purporting to embody the testamentary intentions of the deceased *(where applicable except for specify document)*.”.

(ii) After paragraph 11 insert:

12. *(Where applicable, state particulars of affected persons as required by rule 28 (1) (a) (ivA) (B).)*

(aj) SCHEDULE F:

After Form 106C insert:

Form 106D*Consent by Affected Person**P.78.r.34E (1).*

In the Supreme Court of New Estate of *(name)*
South Wales Probate Division late of *(place)* labourer

CONSENT

1. I, *(name)* of *(place)* *(occupation)* am over the age of 18 years, am not an undischarged bankrupt and have not assigned or encumbered any interest that I may have in the estate of the abovenamed deceased.
2. I have read and understood copies of the following documents which relate to the application for a grant of probate *(or administration)* in relation to the estate of the deceased:
 - (a) Summons *(or Statement of Claim)*;
 - (b) Affidavit of Executor *(or Affidavit of Applicant for Administration)*;

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- (c) Affidavit of Assets and Liabilities; and
- (d) (*where the informal testamentary document is not annexed to the abovementioned documents a document purporting to embody the testamentary intentions of the deceased which is not executed in accordance with the formal requirements of the Wills, Probate and Administration Act 1898.*)
3. Copies of the documents referred to in paragraph 2 are annexed hereto and marked “A” to “C” (*or “D” if applicable*) respectively.
4. I consent to the Court:
- (a) declaring whether it is satisfied that the deceased intended the document (*identify informal testamentary document in respect of which consent is given*) to constitute:
- (i) a will of the deceased;
- (ii) an amendment of a will of the deceased; or
- (iii) the revocation of a will of the deceased, and
- (b) making the declaration in my absence and without my becoming a party to the proceedings or having any opportunity to put forward argument or evidence.
5. In this consent “will” extends to a testament and to a codicil and to any appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, and to any other testamentary disposition.

Dated: *(date)*

Signed in the
presence of

}

AFFIDAVIT OF WITNESS TO CONSENT

On *(date)*, I *(name, address and occupation)* say on oath:

1. The above document was signed in my presence on *(date)* by *(name)*.

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2. The signatures (*set these out*) are respectively my signature and that of (*name of person consenting*).

Sworn at
before me

}

Form 106E

P.78.r.34E (1).

(Notice to Affected Person)

In the Supreme Court of New South Wales Probate Division Estate of (*name*)
late of (*place*) labourer

NOTICE

To (*name and address*)

1. An application for grant of probate (*or* administration) has been made by me (*or* us) in respect of the estate of the abovenamed deceased. Copies of the Summons (*or* Statement of Claim), Affidavit of Executor, (*or* Affidavit of Applicant for Administration) and Affidavit of Assets and Liabilities are annexed and marked “A” to “C” respectively.
2. A copy of a document purporting to embody the testamentary intentions of the deceased, which is not executed in accordance with the formal requirements of the Wills, Probate and Administration Act 1898, is annexed hereto and marked with the letter “D” (*or as the case may be*). The Court will decide whether the lastmentioned document is:
 - (a) a will of the deceased;
 - (b) an amendment of a will of the deceased; *or*
 - (c) the revocation of a will of the deceased.
3. In the preceding paragraph “will” extends to a testament and to a codicil and to any appointment by will *or* by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament *or* devise of the custody and tuition of any child and to any other testamentary disposition.
4. Unless the prescribed form of notice of your appearance is received in the Registry within 14 days after service of this notice upon you (*or*, if this notice is served outside New South Wales and the Australian Capital Territory, within

28 days of service of this notice upon you), the Court may hear and determine the proceedings in your absence with such consequences as may ensue according to law.

- 5. Upon filing an appearance you will become a defendant to the proceedings in so far as they relate to the declaration by the Court as to the effect of the document referred to in paragraph 2.

Plaintiff (*name, address and occupation*)

Plaintiff's address for service: (*Part 9 rule 6*)

Dated: (*date*)

(*Signature*)

Plaintiff's Solicitor

Form 106F

P.78.r.34E (3).

(*Notice to Caveator*)

In the Supreme Court of New Estate of (*name*)

South Wales Probate Division late of (*place*) labourer

NOTICE

To (*name and address*)

- 1. An application for grant of probate (*or* administration) has been made by me (*or* us) in respect of the estate of the abovenamed deceased. Copies of the Summons (*or* Statement of Claim), Affidavit of Executor, (*or* Affidavit of Applicant for Administration) and Affidavit of Assets and Liabilities are annexed and marked "A" to "C" respectively.
- 2. You have lodged a caveat under rule 62A of the Supreme Court Rules 1970 in respect of the estate of the deceased.
- 3. Unless the prescribed form of notice of your appearance is received in the Registry within 14 days after service of this notice upon you (or, if this notice is served outside New South Wales and the Australian Capital Territory, within 28 days of service of this notice upon you), the caveat will lapse and the Court may hear and determine the proceedings in your absence with such consequences as may ensue according to law.

4. Upon filing an appearance you will become a defendant to the proceedings in respect of such aspects of the proceedings as the Court directs.

Plaintiff: *(name, address and occupation)*

Plaintiff's address for service: *(Part 9 rule 6)*

Dated: *(date)*

(Signature)

Plaintiff's Solicitor

(ak) SCHEDULE F:

After Form 115 insert:

Form 115A

P.78.r.62A.

(Caveat relating to declarations under s.18A of the Probate Act)

In the Supreme Court of New Estate of *(name)*

South Wales Probate Division late of *(place)* labourer

CAVEAT

I demand that no grant be made in the estate of *(name)* late of *(place)* labourer, unless I am given an opportunity to be heard on the question of whether a declaration as to the Court's satisfaction under section 18A of the Wills, Probate and Administration Act 1898 should be made in respect of a document made by the deceased.

My interest is: *(state this)*.

Caveator: *(name, address and occupation)*.

Caveator's address for service: *(Part 9 rule 6)*.

Lodged: *(date)*

(This form is not suitable for prohibiting a resealing of a foreign grant)

(Signature)

Caveator's Solicitor

(a1) SCHEDULE F Form 121:

Omit "2 calendar months" and insert instead "one calendar month".

(am) SCHEDULE F Index to Forms:

(a) After the matter relating to Form 106A insert:

106B. Consent to distribution of gift (P.78, r.34A).

106C. Notice of intention to distribute estate (P.78, r.34D).

106D. Consent by affected person (P.78, r.34E (1)).

106E. Notice to affected person (P.78, r.34E (1)).

106F. Notice to affected person (P.78, r.34E (3)).

(b) After the matter relating to Form 115 insert:

115A. Caveat relating to declarations under s. 18A of the Probate Act (P.78, r.62A).

3. Subparagraphs (b), (h), (i), (k), (m), (p), (q), (s) to (v), and (ac) to (am) of paragraph 2 shall not apply to proceedings commenced in the Court before 13 January 1992.

4. Paragraph 2 (h) shall not apply to notices published before 13 January 1992 in accordance with Part 78 rule 10.

5. Paragraphs 2 (ab) and 2 (d) shall not apply to notices published before 13 January 1992 in accordance with section 92 of the Probate Act.

6. Subparagraphs (h), (y), (ab) and (al) of paragraph 2 shall take effect on 13 January 1992.

7. Paragraph 2 (y) shall not apply to estates in which proceedings for grant are commenced in the Court before 13 January 1992.

8. The Supreme Court Rules 1970 are further amended as follows:

(a) Part 9 rule 8:

Omit the headnote to the rule and insert instead:

Service on solicitor in court or tribunal below

(b) Part 51 rule 11A:

Omit the rule and insert instead:

Submitting appearance (Court of Appeal)

11A. (1) Where a respondent or opponent adds to that party's notice of appearance a statement pursuant to Part 51 rule 13B (which relates to a submitting appearance) and takes no active part in the proceedings, the appellant or claimant shall, unless the Court otherwise orders, pay the respondent's or the opponent's costs as a submitting party.

(2) Any costs that an appellant or claimant is liable to pay pursuant to subrule (1) to a submitting party properly joined in proceedings shall, unless the Court otherwise orders, be included in any costs payable by any other respondent or opponent to the appellant or claimant in respect of those proceedings.

9. The Supreme Court Rules 1970 are further amended as follows:

Part 36:

After rule 13B insert:

Expert's report admissible in proceedings included in the Special Sittings List

13C. (1) This rule applies to proceedings included in the Special Sittings List which is the subject of Practice Note No 72 dated 27 November 1991.

(2) Except as hereinafter provided, the provisions of rule 13B apply to proceedings on a trial without a jury and, unless the Court otherwise orders, to proceedings on a trial with a jury.

(3) A requirement under rule 13B (2) must be made not later than one month after proceedings are first called over before the registrar.

10. The Supreme Court Rules 1970 are further amended as follows:

Part 82 rule 5 (1):

After paragraph (b) insert:

(b1) whether or not the applicant has ever been found guilty of professional misconduct as a solicitor or as a barrister;

11. The Supreme Court Rules 1970 are further amended as follows:

(a) Part 75 rule 3 (d);

Omit “.” and insert instead “;”.

(b) Part 75 rule 3:

After subrule (e) insert:

(f) under Part 13 of the Criminal Procedure Act 1986 (which Part relates to disposal of property in police custody in connection with an offence).

EXPLANATORY NOTE

(This note does not form part of the rules).

1. The object of the amendment contained in subparagraphs (a), (i), (k), (m), (t) to (v), (y), (z) (aa), (ac) to (ak) and (am) of paragraph 2 is to:
 - (a) ensure that the existence of any document purporting to embody the testamentary intentions of a deceased person, not executed in accordance with the formal requirements of the Wills, Probate and Administration Act 1898, (hereinafter called “**an informal testamentary document**”) is brought to the attention of the Court so that it may, if appropriate, make a declaration under section 18A of that Act in respect of the document;
 - (b) provide for the lodging of a caveat, by anyone whose interest in the estate of a deceased might be affected by the Court making a declaration under section 18A of the said Act, against a grant of probate or administration in respect of the estate being made without the caveator being given an opportunity to participate in those parts of the proceedings which relate to the declaration;
 - (c) provide for notice to be given of any informal testamentary document made by a deceased to any person whose interest in the estate of the deceased might be affected by a declaration by the Court under section 18A of the said Act in respect of that document and to ensure that the person will have an opportunity to be made a party to those parts of the proceedings which relate to the declaration;
 - (d) provide that where proceedings for a grant are uncontested, apart from any contest concerning a declaration being made under section 18A of the said Act in relation to an informal testamentary document made by the deceased, the proceedings other than the section 18A aspects will be dealt with in the same way as uncontested proceedings normally are; and
 - (e) to make consequential and ancillary amendments.
2. The object of the amendments contained in paragraphs 2 (b) and 2 (c) is to enable the registrar to exercise the powers of the Court in:
 - (a) declaring whether it is satisfied under section 18A of the said Act where:
 - (i) all interested persons have consented to the Court making the declaration in their absence;
 - (ii) all interested persons have been given notice in the prescribed form and have not filed an appearance; or
 - (iii) the value of the interest in the estate that will be affected by the declaration does not exceed \$20,000;
 - (b) making orders relating to various aspects of obtaining consent and giving notice;
 - (c) dispensing with the necessity to obtain consent or give notice;
 - (d) directing the parts of proceedings in which persons interested in an informal testamentary document may participate;
 - (e) ordering that caveats lodged in respect of informal testamentary documents shall cease to have effect; and

(f) authorising the sale, lease or mortgage of real estate as to which any person dies intestate where the gross value of such real estate does not exceed \$4,000 and no objection is raised to the sale, lease or mortgage (replacing a previous limit of \$400).

3. The object of the amendments contained in paragraphs 2 (d) and 2 (e) is to enable a declaration by a registrar, as to whether he is satisfied under section 18A of the said Act, to be reviewed by the Court and for the Court to make such declaration in its place as it thinks fit

4. The object of the amendments contained in paragraphs 2 (h), 2 (ab) and 2 (a1) is to provide for publication of:

- (a) notice of intention to apply for a grant or resealing; and
- (b) notice of intention to distribute,

in a newspaper circulating in the district where a deceased New South Wales resident resided or, in the case of a non-resident, in a Sydney daily newspaper, and to reduce from 2 months to 1 month the period that must elapse between the publication of a notice of intention to distribute and the distribution. The amendment replaces more complicated publication requirements.

5. The object of the amendment contained in paragraph 2 (w) is to replace a superseded term.

6. The object of the amendment contained in paragraph 2 (x) is to provide that, where a citation to see proceedings has been issued, the Court is satisfied that the cited person has been served or with the reason for non-service.

7. The object of the amendments contained in paragraphs 2 (j), 2 (l), 2 (n) and 2 (o) is to substitute references to certified mail for references to registered post for service within Australia (registered post now being available only for overseas mail).

8. The object of the amendment contained in paragraph 8 (a) is to increase the accuracy of a headnote to a rule.

9. The object of the amendment contained in paragraph 8 (b) is to make provision for costs where a submitting appearance has been entered in a matter before the Court of Appeal without any Court order being necessary.

10. The object of the amendment contained in paragraph 9 is to enable an expert's report to be admissible as evidence without the attendance for cross-examination of the expert, in proceedings which are included in the Special Sittings of the Court which will take place in mid 1992.

11. The object of the amendment contained in paragraph 10 is to provide that the evidence, which must be adduced in support of an application by a solicitor or barrister appointed as a Public Notary, shall include information as to whether or not he has ever been found guilty of professional misconduct as a solicitor or barrister.

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12. The object of the amendment contained in paragraph 11 is to assign proceedings commenced in the Court under Part 13 of the Criminal Procedure Act 1986 (which relates to disposal of property in police custody in connection with an offence) to the Criminal Division.

13. Words and figures underlined in the above rules are intended to be represented in italics when printed.

M.A. Blay, Secretary of the Rule Committee