

PROBATE ACCOUNTS: PILOT GUIDELINES

(Version 1 – Date of Commencement – 11 January 2021)

Objective of Pilot

1. Currently applications for the passing of accounts and if applicable, orders for commission, are determined on the papers in chambers by a registrar. The Court is running a pilot for the determination of these matters. The objective of the pilot is to:
 - a. Reduce delay in the administration of estates where an application for the passing of accounts is filed and/or commission is sought; and
 - b. Provide guidance to executors, administrators, beneficiaries and legal practitioners in relation to the determination of these applications by the management and hearing of proceedings in open Court.
2. This guideline is set out in two parts. Part 1 sets out the procedure for the determination of uncontested proceedings for the passing of accounts and/or commission. Part 2 sets out the procedure for the determination of matters that are deemed contested proceedings for the passing of accounts and/or commission.
3. The guideline will apply to all applications filed from the date of publishing and any undetermined application filed prior to that date at the registrar's discretion.

Definitions

4. In this guideline:

Applicant means the executor, administrator, or trustee who has commenced an application for the passing of accounts and/or commission

PAA means the *Probate and Administration Act 1898*

SCR means the *Supreme Court Rules 1970*

UCPR means the *Uniform Civil Procedure Rules 2005*

PART 1: UNCONTESTED PROCEEDINGS

Commencement of proceedings by applicant

5. The commencement of proceedings to pass accounts must be made by filing a motion in the parent proceedings (Pt 78 R 76 SCR).
6. UCPR form 150 is the approved form to commence proceedings for the passing of accounts.
7. Where an order for commission is also sought, an applicant must file an affidavit in support of the claim for commission (Pt 78 R 77 SCR).

8. An applicant who fails to file the approved form and required supplementary material set out in the affidavit contained in form 150 will be given seven days' notice to file an affidavit that conforms with form 150.
9. Failure to file a rectified application will result in the motion being refused for filing by the Prothonotary pursuant to UCPR 4.10(4).
10. The announcement dated 20 May 2009 should be noted. It is no longer the practice of the Court to require an executor or administrator to pass accounts unless commission is being claimed. Notwithstanding this, the Court still receives applications seeking to pass accounts where no claim for commission is made. If there is a reason why the accounts are required to be passed, this should be provided on a cover letter addressed to the Prothonotary who will assess whether the file will be referred to a registrar for determination or will make the following order:

The court notes that:

1. The plaintiff has filed its (*1st/2nd/etc*) accounts.

The court orders that:

2. The requirement to pass accounts is stood over until further order.

The accounts will remain on the Court file and may be accessible by beneficiaries should they seek to access the file.

11. Motions that meet the minimum requirements set out above will be listed for final hearing before a registrar.

Case management of motion prior to hearing

12. Upon the allocation of a hearing date, the motion will be referred to a registrar in chambers for review and if necessary, to issue any requisition for further evidence in support of an order passing accounts (Pt 78 R 83(a)).
13. A response to the requisition must be filed 14 days prior to the hearing. Failure to respond to the requisition will result in the applicant being required to show cause why the motion should not be dismissed.

Hearing of motion

14. Any legal practitioner appearing at the hearing of the motion must be familiar with the administration of the estate and who has instructions sufficient to enable all appropriate orders to be made.
15. Motions will not ordinarily be adjourned as it is expected that sufficient evidence in support of the motion is filed in advance of the hearing to enable it to be determined and final orders made on the hearing date.
16. Orders for the passing of accounts (including a certificate as to passing of accounts) and commission will be made at the hearing of the motion. In determining a motion, the registrar will ordinarily give reasons in short form.

17. If the registrar is not satisfied that there is sufficient evidence provided in support of the motion, it is likely that the relief sought will be refused. If appropriate leave may be given to the applicant to file a fresh motion seeking the same relief when they are able to meet the evidentiary requirements of the application.

PART 2: CONTESTED PROCEEDINGS

Contested accounts in general

18. Contested accounts arise in the following circumstances:
- a. A notice of intended objection to the passing of accounts or the allowance of commission is filed prior to the commencement of proceedings for the passing of accounts (Pt 78 R 78 SCR);
 - b. Where proceedings for the passing of accounts has not finalised and a notice of appearance is filed (Pt 78 R 81 SCR); and
 - c. Where a summons or a motion in the parent proceedings is filed by a beneficiary/person entitled seeking an order for accounts to be filed and passed by the Court and such order is given by a judge.
19. An objection or order compelling an applicant to file and pass accounts does not give the objecting party/respondent the ability to make any submissions regarding the accounts until the accounts are at the stage to be passed.
20. An objecting party/respondent should note s. 85 of the PAA and the decision of Hallen J in *The Estate of Mitchell* [2020] NSWSC 1300. A registrar's power is limited to:
- a. Disallowing disbursements;
 - b. Directing refunds to be made to the estate where a disbursement has been disallowed;
 - c. Refusing to pass accounts;
 - d. Refusing to make an order allowing commission; and
 - e. Determining how the costs of the application will be borne.
21. A party seeking to object to the passing of accounts should also note the commentary of Janes, Liebhold and Studdert in *Wills, Probate and Administration Law in New South Wales* (2nd Ed, LBC, 2019) at page 1125:
- “... proceedings under Div 3 of Pt 2 of the *Probate and Administration Act 1898* are not an administration suit: *Gonzales v Claridades* (2003) 58 NSWLR 188, and having regard to the terms of s 85, the Registrar cannot:
- (a) remedy breaches of trust except to the extent of disallowing disbursements;

(b) determine whether particular assets form part of the estate of the deceased: *Will of Sarina* (1925) 42 WN (NSW) 186;

(c) determine whether assets alleged to form part of the deceased's estate ever existed;

(d) determine disputes as to amounts received or ought to have been received by the executor or administrator.

Except to the extent provided for by s 85, jurisdiction in respect of matters such as those above is vested in the general Equity Division: see *Uniform Civil Procedure Rules*, Pts 46, 54 and 55."

**PART 2A: INTENDED OBJECTION FILED PRIOR TO THE COMMENCEMENT OF PROCEEDINGS
(PT 78 R 78 SCR)**

Case management and hearing of motion

22. Paragraphs 5 to 10 of this guideline will apply.
23. Motions that meet the minimum requirements will be listed for directions hearing before a registrar.
24. Upon the allocation of a directions hearing date, the motion will be referred to a registrar in chambers to:
 - a. Serve a copy of the notice of intended objection to the passing of accounts or the allowance of commission on the applicant;
 - b. Give a direction to the applicant to serve a copy of the motion and supplementary material on the objector within seven days (Pt 78 R 78 SCR); and
 - c. Review and if necessary issue any requisition for further evidence in support of an order passing accounts (Pt 78 R 83(a)).
25. A response to the requisition must be filed with the Court and served on the objector 14 days prior to the directions hearing. Failure to respond to the requisition will result in the applicant being required to show cause why the motion should not be dismissed.
26. Any legal practitioner appearing at the hearing of the motion must be familiar with the administration of the estate and who has instructions sufficient to enable all appropriate orders to be made.
27. The purpose of the directions hearing will be for the registrar:
 - a. To indicate whether it is the intention of the Court to pass the accounts based upon the material filed; and
 - b. To ask the objector to confirm if the objection is maintained or withdrawn.
28. Where an objection is withdrawn or not maintained, the motion will proceed to hearing and the procedure in paragraphs 14 to 17 of this guideline will apply.

29. Where an objection is maintained:

- a. The objector will be directed to file an appearance within seven days resulting in the objector being added as a defendant to the proceedings;
- b. A timetable will be entered for the filing and service of evidence (if appropriate) and submissions relating to the passing of accounts and/or commission; and
- c. A hearing date before a registrar allocated where the procedure in paragraphs 14 to 17 of this guideline will apply.

**PART 2B: MOTION FOR ACCOUNTS UNDETERMINED AND A NOTICE OF APPEARANCE FILED
(PT 78 R 81 SCR)**

Case management and hearing of motion

30. Paragraphs 5 to 13 of this guideline will apply.

31. Upon the filing of an appearance, the:

- a. Appearing party will be joined as a respondent to the motion;
- b. Hearing date before the registrar of the motion will be vacated; and
- c. Matter will be listed for a directions hearing before the registrar.

32. Notwithstanding the vacation of the hearing date and relisting for directions, a response to the requisition must be filed with the Court and served on the respondent 14 days prior to the directions hearing. Failure to respond to the requisition will result in the applicant being required to show cause why the motion should not be dismissed.

33. Any legal practitioner appearing at the hearing of the motion must be familiar with the administration of the estate and who has instructions sufficient to enable all appropriate orders to be made.

34. The purpose of the directions hearing will be for the registrar:

- a. To indicate whether it is the intention of the Court to pass the accounts based upon the material filed;
- b. To ask the respondent to confirm the basis upon which an objection is made, that is to the passing of accounts and/or commission;
- c. Enter a timetable for the filing and service of evidence (if appropriate) and submissions relating to the passing of accounts and/or commission; and
- d. Allocation of a hearing date before a registrar where the procedure in paragraphs 14 to 17 of this guideline will apply.

PART 2C: AN ORDER GIVEN BY A JUDGE FOR ACCOUNTS TO BE FILED AND PASSED

Case management and hearing of motion

35. Paragraphs 5 to 10 of this guideline will apply.
36. The beneficiary/person entitled who obtained the order for accounts to be filed and passed should be included as a respondent to the motion.
37. Motions that meet the minimum requirements will be listed for a directions hearing before a registrar.
38. Upon the allocation of a directions hearing date, the motion will be referred to a registrar in chambers to:
 - a. Give a direction to the applicant serve a copy of the motion and supplementary material on the respondent within seven days (Pt 78 R 78 SCR); and
 - b. Review and if necessary issue any requisition for further evidence in support of an order passing accounts (Pt 78 R 83(a) SCR).
39. A response to the requisition must be filed with the Court and served on the respondent 14 days prior to the directions hearing. Failure to respond to the requisition will result in the applicant being required to show cause why the motion should not be dismissed.
40. Any legal practitioner appearing at the hearing of the motion must be familiar with the administration of the estate and who has instructions sufficient to enable all appropriate orders to be made.
41. The purpose of the directions hearing will be for the registrar:
 - a. To indicate whether it is the intention of the Court to pass the accounts based upon the material filed; and
 - b. To ask the respondent to indicate whether they are seeking to object to the passing of accounts.
42. Where an objection is not sought to be made, the motion will proceed to hearing and the procedure in paragraphs 14 to 17 of this guideline will apply.
43. Where an objection is made:
 - a. A timetable will be entered for the filing and service of evidence (if appropriate) and submissions relating to the passing of accounts; and
 - b. A hearing date before a registrar allocated where the procedure in paragraphs 14 to 17 of this guideline will apply.