

2025

WILLS & ESTATES CPD SUPER DAY

SESSION 6:

'WHEN MEDIATION FAILS - WHAT TO DO WHEN YOU'RE GOING TO TRIAL'

U.S

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Communications with the Court

- Make sure all communication to the Court is sent to the correct email
- All communication to the Court should maintain the appropriate level of formality and should “cc” all parties
- Unless the Court has invited submissions via email, emails to the Court should not raise contentious issues.

Ongoing obligations - CPA

- Bear in mind your CPA obligations as you prepare for trial, including:
 - Only take steps to resolve or determine the dispute – s.19
 - Cooperate – s.20
 - Narrow the issues in dispute – s.23
 - Ensure costs are reasonable and proportionate – s.24
 - Minimise delay – s.25
 - Disclose critical documents – s.26
- *Re Morgan* [2023] VSC 233, McMillan J – costs against non-party solicitor for breach of overarching obligations

Has the matter settled?

- Is there in fact a binding agreement? Eg. *Janati v Nulis Nominees (Australia) Limited* [2024] VCC 1926, Tran J
- Are there conditions that might not be met?
- Is an approval needed? Eg. *Re Finnie* [2020] VSC 9

Can the matter settle?

- Are there any steps that could help continue the negotiations? For example:
 - Up-to-date valuations
 - Accountant's advice
- Cooling off after mediation – did personalities get in the way of a settlement? Has the prospect of trial sharpened the client's focus?

Protect you client on costs

- Calderbank letters
- Offers of compromise
- Can be made any time before judgment

Prepare Trial Brief

- Prepare a fresh trial brief
- Digital v hardcopy
- Practice Note SC Gen 5 Technology in Civil Litigation
 - Hardcopies are to be the exception not the rule
 - The use of technology is expected to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute
 - The particular technology will change over time – but must be in a format which enables text to be searched and copied electronically

Prepare Trial Brief (cont)

- eBrief Ready
 - Backsheet and memo
 - Separate folders for separate documents
 - Uploaded in a sensible groups
 - Do not include draft documents, irrelevant correspondence
 - Relevant correspondence in a logical order
 - Contact details – solicitor and assistance's name, email addresses, direct number, mobile number
 - Pronunciation and forms of address – clients, solicitors, witnesses

Conference between lawyers

- Regroup and work out what needs to be done
- Check all material claims are supported by admissible evidence – documentary or oral
 - Affidavits in reply?
 - Further witnesses?
 - Is any discovery needed? Subpoenas?
 - Notice to Produce?

Conference between lawyers (cont)

- Are interpreters needed?
 - If yes, make sure they are properly qualified and independent
 - If possible, test them out before the trial
- Is a FTF trial appropriate in the circumstances?
- Any need for:
 - Notice for admission of facts?
 - Notice for admission of documents?

Conference between lawyers (cont)

- Joinder
 - Do the beneficiaries need to be separately represented? Conflicts of interest?
 - Are there third parties who need to be joined? Have there been any unauthorised distributions?
- Are any of the estate assets at risk?
 - Injunction? Eg. *Re Estate of Hagendorfer (Injunction)* [2024] VSC 482
 - O. 53 required? Eg. *Lancaster v Conway* [2022] VSC 117
 - Accounting required?

Expert evidence

- Expert evidence
 - Eg. actuarial, medical, financial, valuations
 - Check qualifications carefully before instructing
 - Letter of instruction – neutral questions and agreed facts only
 - Do NOT ask for draft report
 - Ensure compliance with o.44
 - Understand the report! Ask questions.
 - Is there any agreement with the other side? Can the issues be narrowed?

Referral orders

- Once all interlocutory issues finalised – matter can be referred to pre-trial directions and the fixing for trial
- Proforma orders on the SC website must be followed
- No appearance is required

Joint Trial Document

- Referral orders require a Joint Trial Document to be filed at least three days prior to the pre-trial directions hearing. The JTD must include:
 - List of agreed facts and documents to be tendered by agreement – to narrow the issues in dispute
 - List of legal issues to be determined
 - Timetable for the hearing – openings, list of witnesses, closing submissions – include time for interpreters
 - Estimated costs up to and including trial

Pre-trial directions

- In preparation for directions hearing consider:
 - Do you want the matter referred back to mediation? Court may do so at any stage with or without consent: Rule 50.07
 - Do you need to apply for witness to give evidence by video link? *Grege v Grege & Ors (Ruling)* [2024] VSC 475, Gobbo AsJ
 - Are there any intervention order or safety issues? Does the matter need to be heard via Zoom?

Pre-trial directions (cont)

- Proforma orders for pre-trial directions are on the Supreme Court website
- Appearances are required by the counsel briefed for the trial
- Check with the client and key witnesses whether there are any dates that need to be avoided and advise the Court
- Dates in the orders will work backwards from the trial – but a trial date will be included by the Court late

DATE	ACTION
2 weeks prior to Plt’s draft CB	Parties to endeavour resolve obj
1 week prior to Plt’s draft CB	Table of outstanding objections
3 weeks prior to Plt’s submissions	Plt serve draft CB
2 weeks prior to Plt’s submissions	Def serve supp draft CB
3 weeks prior to dir hrg	Plt’s opening submissions + CB
1 week prior to dir hrg	Def’s opening submissions
2 months prior trial	Final directions
6 weeks prior trial	Notice of Trial – Form 48B
1 week prior trial	Call over form – SC website
TRIAL	

Once trial fixed

- Get an update of the estate assets
- Issue any subpoenas needed
- Setting down fee must be paid no later than 6 weeks prior to the date fixed for hearing to commence: *Supreme Court (Fees) Regulations 2018 (Vic)*
- If acting for the executor – probate parchment must be produced to the Court at trial
 - if issued prior to 1 July 2020 – original probate parchment
 - After that date – copy of the electronic grant

Preparing client and witnesses

- Conference with client – what to expect, appropriate dress, how to address the Judge, if relevant update the client's financial position
- Check all witnesses available – arrange a conference separately with each witness
- Do any witnesses need to be subpoenaed?

Court Book

- Get proposed index to counsel for their input
- Prepare Court Book early
- Make sure documents uploaded are clean copies
- Make sure documents are legible and don't need to be rotated
- Only include documents a party intends to tender into evidence or reasonable expects to refer to in XXN or submissions
- If later documents are added – add to the end so numbering is not changed

Submissions

- Solicitor to provide a memo of any points they consider important if they wish
- Counsel to draft
- It is helpful if the instructing solicitor can put together digital copies of the authorities referred to in the submissions

Transcript

- Practice Note SC Gen 7 Transcript in Civil Proceedings (second revision)
- Transcript required for all trials
- Preferred suppliers Legal Transcripts Pty Ltd and Epiq Australia Pty Ltd
- a hearing date will not be fixed unless the parties' solicitors have signed and delivered a purchase order form
- The solicitor or litigant who signs the purchase order must pay the costs at first instance – but the ultimate burden of the transcript cost will be dealt with as part of the costs of the proceeding.

County Court

- Practice Note PNCLD 4-2023 version 3.0
- Discovery/subpoenas only in exceptional circumstances
- Leave is required to file expert evidence
- Application to adjourn the trial date must be made by filing and serving an affidavit explaining why the matter is not ready for trial

County Court (cont)

- Ordinarily a beneficiary will not be joined
- Court Books must comply with the Information Technology Practice Note PNCLD-1 2022
- Evidence is given orally – no affidavits unless leave is given – unlikely to be granted if credit is a significant issue
- Special procedures in Low value estates (\$150k or less)

Settlement / cost protection points

1. Immediately post mediation
2. In the lead up to the pre-trial directions
3. When the Joint Trial Document is being prepared
4. A week before the plaintiff's submissions are due
5. In the lead up to the final directions
6. Ongoing in the two week before the trial starts
7. After the plaintiff has been cross-examined
8. Before judgment

The role of the solicitor at the trial

- Before Court starts:
 - Do not expect a conference on the morning of the trial
 - Deal with the client – bring them to Court
 - Make sure all witnesses and interpreters have arrived or are available
- At the Trial
 - Be familiar with the Court Book and be able to find document quickly
 - Listen to what's happening and take notes of anything you think is important
 - Post-it notes are best way to convey comments to counsel

The role of the solicitor at trial (cont)

- Multi-day trial:
 - Do not expect a long conference with the client at the end of the day to discuss what happened
 - Expect late night texts, phone calls, emails from counsel
 - Contact counsel at anytime with matters that you think are important

Conclusion

- Continue to communicate with the other side
- Continue to try to resolve the matter
- A strong relationship between counsel and solicitor reaps the best rewards
- Organisation is key to success
- Enjoy the process