

19 May 2026

The Hon. Justice Natalie Whitby  
Supreme Court Probate Committee  
Supreme Court of Western Australia  
David Malcolm Justice Centre  
28 Barrack Street  
PERTH WA 6000

By email: [associate.justice.whitby@justice.wa.gov.au](mailto:associate.justice.whitby@justice.wa.gov.au)

Dear Justice Whitby

**ACCESS TO RULE 9B STATEMENT UNDER RULE 43A(D) OF THE *NON-CONTENTIOUS PROBATE RULES 1967***

I write at the request of the Law Society's Elder Law and Succession Committee to raise the issue of the inconsistent application of rule 43A(d) of the *Non-Contentious Probate Rules 1967* (WA) ("NCPR"). Specifically, this relates to requests to Probate Registrars to obtain a copy of the rule 9B statement of assets and liabilities for a deceased estate.

Pursuant to rule 43A(d), leave of a Registrar is required for a copy of the statement to be obtained. Law Society members report that Probate Registrars frequently decline to grant leave to prospective applicants under the *Family Provision Act 1972* (WA) (the Family Provision Act) who are seeking to obtain a copy of the rule 9B statement, specifically for the purpose of progressing an application.

Law Society members have also experienced leave being refused for applications to access a copy of the statement when acting for:

- personal and professional trustee executors (as the applicant in non-contentious Probate matters); and
- administrators and guardians appointed by the State Administrative Tribunal.

**Current authorities**

The Law Society acknowledges that Registrars are bound by the prior decisions of the Court in determining rule 43A(d) applications.

In *De Haas v Murcia & Associates*<sup>1</sup> Templeman J concluded that "very cogent reasons" should be provided if a document is to be made available under rule 43A(d). In the *Estate of Glenn Jeffrey Simonsen*<sup>2</sup> Seaward J clarified that "very cogent reasons"<sup>3</sup> requires a "legitimate purpose" for seeking the document in question. Neither of these decisions related to *Family*

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<sup>1</sup> Supreme Court of Western Australia, Templeman J, 14 September 1998 BC9805868.

<sup>2</sup> [2023] WASC 423

<sup>3</sup> Ibid at [31]

*Provision Act* claims<sup>4</sup>. At [42] in *Simonsen*, Seaward J noted that an interest of that kind was of a type that might properly warrant leave being granted under rule 43A(d).

Law Society members report that Probate Registrars have taken the view that a foreshadowed claim under the *Family Provision Act* does not warrant leave being granted under rule 43A(d). In some circumstances, and without a consistent approach, Probate Registrars have instead been prepared to disclose the net value of the estate.

The Law Society is concerned about the lack of uniformity in the response to these applications. We enquire whether there may be circumstances in which a different approach may be adopted and if so, whether it may be possible to include some guidance to practitioners and unrepresented parties in the Consolidated Practice Directions.

### **Rationale for adopting a different approach to applications for rule 9B statements**

The rule 9B statement is a document that a prospective *Family Provision Act* claimant (or a legal personal representative appointed to act for that person) has a legitimate purpose in obtaining.

The size and nature of the estate of a deceased is a critical factor in assessing the merits of a prospective claim. A *Family Provision Act* applicant must also ensure that an Originating Summons filed to commence a claim properly complies with the Supreme Court Consolidated Practice Directions, which require the relief sought to be specifically pleaded.<sup>5</sup>

It is impracticable for a claimant to undertake either of these tasks without the knowledge of the estate.

A copy of the rule 9B statement is usually disclosed by the estate's legal personal representative when they are put on notice that a claimant is considering starting proceedings under the Act. Regrettably, it is not uncommon for the legal personal representative to refuse to disclose a copy of the rule 9B statement, even where standing to bring a claim under section 7(1) of the Act is not disputed. This leaves potential claimants in a position where they either have to:

- (i) incur fees on an application for pre-action discovery under Order 26A rule 4 of the *Rules of the Supreme Court* (RSC). The pitfalls with this are discussed further below;
- (ii) commence proceedings without adequate information contrary to the Supreme Court Consolidated Practice Directions; or
- (iii) forego their claim altogether.

The very nature of a *Family Provision Act* claim means that many applicants are in dire financial circumstances. Given the low threshold for the Court ordering pre-action discovery,<sup>6</sup> it is almost certain that an applicant with standing pursuant to section 7(1) of the Act would obtain such an order.

Aside from the cost of pre-action litigation, early resolution of any substantive *Family Provision Act* claim is likely to be impacted by the need to recover the costs of two separate Supreme

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<sup>4</sup> *In De Haas v Murcia & Associates* the application was brought by solicitors who acted for parties alleging that the Estate was liable to them in damages. In *Simonsen*, the application was brought by the Deceased's brother, who wanted to use the documents in a separate foreshadowed proceeding against the Estate.

<sup>5</sup> Noting that Supreme Court Consolidated Practice Directions 9.2.2.3 and 9.2.2.4 require the Originating Summons to specify the relief sought in particular terms, and not vaguely.

<sup>6</sup> An applicant needs only to establish that they *may* have a cause of action

Court proceedings, in addition to further ill-feeling between the parties generated by the pre-action discovery proceedings.

For these reasons, the Law Society submits that access to the rule 9B statement under rule 43A is a reasonable and sensible pathway in circumstances where a request has been made of the legal personal representative, and denied.

### **A suggested path forward**

The Law Society respectfully requests the Probate Committee consider whether Consolidated Practice Directions might be amended to include guidance on the registrar's discretion. Such an amendment could include a (non-exhaustive) list of factors relevant to the exercise of a Probate Registrar's discretion under rule 43A(d) to grant access to a rule 9B statement to a prospective *Family Provision Act* claimant.

The Law Society acknowledges that a rule 9B statement contains sensitive and confidential information and that any release should require the exercise of discretion. However, it is also relevant that once a *Family Provision Act* claim is commenced, the estate's legal personal representative is routinely ordered to disclose the information to the applicant, and indeed to provide an applicant with a detailed statement updating the information to assist at mediation.

Following *Simonsen*, we suggest the factors to be weighed in determining whether to grant access to the statement might include the following requirements:

- (i) clear identification of the applicant to ensure that they (or their client) have standing to bring a *Family Provision Act* claim under section 7(1) of the Act;
- (ii) details which establish the applicant has made reasonable efforts to obtain a copy of the rule 9B statement from the executor, and the response received to such requests (if any);
- (iii) whether the applicant has identified risks of harm which disclosure may cause and if so, outlining how those concerns may be addressed. These could include requiring any applicant or practitioner to provide an undertaking that the rule 9B statement will only be used to assess the merits of any *Family Provision Act* claim, and otherwise to commence that claim.

The Law Society's Elder Law and Succession Committee members would be pleased to meet with you to discuss the progression of these matters as priorities for reform.

If you have any queries, please contact Susie Moir, Director Advocacy and Professional Development on [smoir@lawsocietywa.asn.au](mailto:smoir@lawsocietywa.asn.au) or telephone 9324 8646.

We thank you in advance for your kind consideration of the issues raised.

Yours sincerely



Judy McLean  
**President**