Family Provision Litigation: do the basics brilliantly

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Introduction

1. The family provision law has a rich history and a fascinating body of cases – testamentary freedom, the women's movement, moral duty, the role of precedent, community expectations, and so on. And the area of the law presents its fair share of interesting fact patterns – for example, this past year we had *Joss v Joss*.[1] But parties do not get points for bringing interesting facts to court.

2. While a review of the cases for the 2021 financial year reveals some interesting substantive law, it demonstrates that, overwhelmingly, the cases were about civil procedure, evidence, and costs; about getting costs agreements right, preparing excellent affidavits, knowing whether a claim has a basis in the first place, and working out how to settle. The cases are about efficiency.[2] And even when the Court does not make any specific reference to efficiency, it is always there in some way. The cases are also about how people conduct themselves – and that includes us as practitioners.

Key points

3. The key points that emerge from my reading of the recent cases are:

    - Have a valid costs agreement and make disclosures as necessary.

    - Have a proper basis.

    - Get the cause of action right.

    - Be timely.

[1] [2020] VSC 424 ('*Joss v Joss*').

[2] *Re Fitzgerald; Voss-Lassetter v Piacun* [2020] VSC 784 ('*Re Fitzgerald*') [21]; *Re Dodson; Dodson v Dodson (No 3)* [2020] VSC 862 ('*Re Dodson No 3*'), [26]-[27]; *Lemmens v Davis & Anor* [2020] VSC 795 ('*Lemmens v Davis*'), [57]-[64], [120]; *Re Stojanovska; Stojevski v Stojevski and Anor* [2020] VSC 702 ('*Re Stojanovska*'), [27].

- Prepare excellent affidavits.
- Spend time addressing and proving need.
- Avoid interlocutory steps.
- Try to settle, but properly.
- Be aware of the potential for adverse costs orders.

The costs agreement – yes, that basic

4. It is always important to start at the start, and for practitioners, costs agreements are an essential part of starting.

5. Historically, costs agreements were:

> … viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense…

6. Today, a statutory scheme largely governs costs agreements. Before a legal practitioner acts for a client, a written costs agreement is necessary.[3] The *Civil Procedure Act 2010* (Vic) requires costs to be reasonable and proportionate[4] and the *Legal Profession Uniform Law* requires costs to be fair and reasonable and places disclosure obligations on legal practitioners.[5]

[3] *Legal Profession Uniform Law Application Act 2014* (Vic) ('*LPUL*') sch 1 ss 180(2), 185(1).

[4] *Civil Procedure Act 2010* (Vic) ('*CPA 2010*') s 24.

[5] *LPUL* ss 172, 174

7. McMillan J reconciled the historical approach and the statutory scheme in a Part IV context in *Re Jabe; Kennedy v Schwarcz* ('*Re Jabe*'):[6]

> 44. The Court has inherent and general jurisdiction to ensure that legal practitioners as officers of the Court are remunerated properly. This includes jurisdiction to ensure legal practitioners are paid no more than what is fair and reasonable.
>
> 45. The inherent jurisdiction of the Court precludes overcharging even in situations where the excessive charges were agreed as a matter of private contract….
>
> 46. The statutory scheme set out in the LPUL should be seen as complementary to the inherent jurisdiction of the Court…

8. In *Re Jabe*, the deceased had excluded her daughter, the plaintiff, from her will and left $300,000 to her doctor's receptionist and solicitor's law clerk, who was also an executor along with her firm's principal.[7] They engaged their own firm to act for the estate.[8] The claim settled at mediation, with the plaintiff receiving $100,000 inclusive of costs which were $50,000.[9] The Court raised concerns of its own motion about the costs.[10]

9. The plaintiff's solicitor originally estimated $62,000 to run the matter.[11] He then proposed a $55,000 fixed fee plus disbursements agreement through to mediation.[12] The agreement did not include an estimate of mediator's fees or counsel's fees, and nor did the solicitor update on those costs.[13] The Court held that the plaintiff's solicitor's costs agreement was void because of disclosure defects, including a failure to give an estimate inclusive of disbursements such as the mediator's fees and counsel's fees, and a failure to update on those costs when it became apparent they would be incurred.[14] The Court further held that

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[6] [2021] VSC 106 ('*Re Jabe*') (footnotes omitted).

[7] Ibid [2].

[8] Ibid [5].

[9] Ibid [9]-[11]

[10] Ibid [14].

[11] Ibid [11], [19].

[12] Ibid [17], [58], [69].

[13] Ibid [17], [58], [59], [62].

[14] Ibid [63]

the costs agreement was neither proportionate or reasonable.[15] And on the issue of fixed price fee agreements, the Court said:[16]

> The Court is hesitant to enforce these where they are favourable to the solicitor unless made in circumstances that preclude any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense.

10. The Court also questioned the defendant's solicitor's costs. He had conflated probate and litigation costs and made an oral rather than written agreement, which was particularly problematic because the firm was administering the estate.[17] The Court noted that the law clerk was charging the Supreme Court Scale for attendances by someone exercising legal skill, and that this was disproportionate.[18] The Court referred the matter to the Costs Court for taxation.

11. It is also worth observing, finally, that in response to everyone's submission that it was a complex matter of great importance to the parties, the Court said that it was 'relatively straightforward' and so the lawyers should have known from the outset that it would involve little substantive work.[19] The need for costs to be reasonable and proportionate was also mentioned in *Re Finnie; Petrovska v Morrison* ('*Re Finnie*'),[20] *Re Dodson; Dodson v Dodson (No 3)* ('*Re Dodson No 3*'),[21] and *Lemmens v Davis & Anor ('Lemmens v Davis')*.[22]

Summary dismissal – a cause of action?

12. The next step, if engaged in a Part IV matter, is to ensure that there is a proper basis for the claim or run the risk of summary judgement.

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[15] Ibid [72]-[73].

[16] Ibid [70] (footnotes omitted).

[17] Ibid [30]-[32], [34], [42], [74]-[75], [77]-[78], [84]-[85].

[18] Ibid [85], [90].

[19] Ibid [86].

[20] [2021] VSC 153 ('*Re Finnie*'), [130].

[21] [26].

[22] [57].

13. The general position is that a court may give summary judgement in civil proceedings if satisfied that a party has no real prospect of success.[23] However, the Court has discretion to allow a matter to proceed if, despite there being no real prospect of success, it is not in the interests of justice to summarily dismiss it, or the nature of the dispute is such that at it is appropriate for there to be a full hearing.[24]

14. Croft J said in a paper that summary dismissal is the second side of the proper basis coin; if a party a complies with its overarching obligation of swearing to have a proper basis, then it is difficult to see how a party could have no real prospect of success.[25] Nevertheless, the Court is cautious in exercising its power to summarily dismiss proceedings,[26] and this is particularly so in family provision claims which involve a significant degree of discretion.[27]

15. For example, the Court did not summarily dismiss proceedings in *Re Winter-Cooke*[28] because it involved 'complex issues of evidence and law regarding a family's financial and legal interactions over many decades, particularly regarding events surrounding the execution of the deeds and the interplay between the deeds and the family provision claim'.[29] It is also notable that eligibility was not in question in *Re Winter-Cooke*; it was a question about whether the Court should exercise its discretion to make further provision, and that involved a weighing exercise beyond the summary dismissal process in complex circumstances.[30] However, the Court did dismiss proceedings in the four other summary dismissal cases.

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[23] *CPA 2010* s 63.

[24] *CPA 2010* s 64.

[25] Justice Clyde Croft, "Summary Judgment Pt 4.4 of the Civil Procedure Act", Supreme Court Victoria, November 2010, accessed 9 August 2021 at https://www.supremecourt.vic.gov.au/about-the-court/speeches/summary-judgment-part-44-of-the-civil-procedure-act.

[26] *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27.

[27] *Jackson v Newns* [2011] VSC 32, [11].

[28] [2020] VSC 588 ('*Re Winter-Cooke*').

[29] *Re Stojanovska* [35].

[30] [175]-[176].

16. In *Re Fitzgerald; Voss-Lassetter v Piacun* ('*Re Fitzgerald*'),[31] the plaintiff was the deceased's 68-year-old daughter. She was in poor health.[32] The deceased left her $10,000 from his $60,000 estate, although the plaintiff was convinced the estate was larger.[33] The defendant sought summary dismissal on the basis that the application was scandalous, vexatious or an abuse of process, primarily because of the size of the estate.[34] However, the Court concluded that the defendant had no material to support its application for summary dismissal because a person is allowed to bring a Part IV claim even when an estate is small.[35]

17. The Court went on to say that proceedings can be dismissed on the Court's own motion.[36] The Court then held that allowing the proceedings to continue would be counterproductive because the estate was small, the costs were disproportionate, and the applicant had not taken any steps to increase the size of the estate.[37]

18. In *Re Stojanovska; Stojevski v Stojevski and Anor* ('*Re Stojanovska*'),[38] the plaintiff sought provision from his maternal aunt's estate on the basis that he and the deceased had previously shared a household, were likely to again soon, and he had been dependent on the deceased for support. The relationship between the plaintiff and the deceased was close.[39] After the deceased's husband died, the plaintiff provided significant assistance to the deceased.[40] In 2013, the deceased moved in with the plaintiff, and then got into a routine of living between the plaintiff's house and her own.[41] The deceased asked the plaintiff to stop

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[31] [1].

[32] Ibid.

[33] Ibid.

[34] Ibid [42].

[35] Ibid [44].

[36] Ibid [5], [47], [48], [52].

[37] Ibid [59]-[63].

[38] [3].

[39] Ibid [9], [23].

[40] Ibid [11], [15], [22].

[41] Ibid [13].

renovating his home and help her renovate three of hers, and she said she would give him one of them.[42] Later when the deceased became sick, her sister moved in with her to help but the plaintiff did not visit much because he was in conflict with other family members.[43] The defendant sought to have the claim summarily dismissed.[44]

19. The Court found that there was no evidence that the plaintiff and deceased would again live in the same household because the deceased's sister was caring for her, and the plaintiff's contact with the deceased had declined.[45] And although there was evidence of the plaintiff providing 'significant personal, practical and material assistance to the deceased over many years, there … [was] no evidence of the deceased providing the plaintiff with any financial, material or practical support or assistance at any time'.[46] The Court therefore concluded that the proceeding had no prospect of success.[47]

20. It is also important to note that the plaintiff tried to argue contract, estoppel, and constructive trust based on the work he performed and the deceased's houses.[48] However, the Court said that a hearing about whether a family provision claim should be dismissed is no place to raise alternate claims.[49]

21. In *Dunn v Perpetual Trustee Company Ltd* ('*Dunn v Perpetual*'),[50] the plaintiff niece had spent special holidays with the deceased and had many fond memories of staying with the deceased as a child and of living with her at a couple of different points. The plaintiff had been, and was, living in Los Angeles for her career, and she owned a house in Oakleigh.[51] There had been some

[42] Ibid.

[43] Ibid [21].

[44] Ibid [2].

[45] Ibid [38].

[46] Ibid [41].

[47] Ibid [6], [60].

[48] Ibid [26], [56].

[49] Ibid [56].

[50] [2020] VSC 611 ('*Dunn v Perpetual*'), [13], [15], [19].

[51] Ibid [25], [28], 29.

discussion about the plaintiff returning to Melbourne and living with the deceased.[52] The defendant sought summary judgement on the basis that the applicant's claim had no real prospect of success because the plaintiff was unlikely to live with the deceased again and was not materially dependent on her.[53]

22. The Court said that it was inappropriate to determine the question of whether the plaintiff was likely to return to living with the deceased in the future in the absence of the plaintiff being cross-examined.[54] However, the Court held that the applicant was a 'capable independent adult' who was not in receipt of material aid or assistance when the deceased died and so the plaintiff was not an eligible person and it was appropriate to summarily dismiss the proceedings.[55]

23. In *Lemmens v Davis*,[56] the plaintiff had not taken steps to advance proceedings for more than six years. The defendant brought an application for summary dismissal for want of prosecution on the basis of that the Court has an inherent power, preserved in rule 24 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('*Rules of Court*'), to dismiss a proceeding for want of prosecution.[57] The Court held that the plaintiff had failed to establish any acceptable excuse for the delay, noting that it is always difficult for people to conduct legal proceedings while grieving, and that an assertion of medical reasons unsupported by evidence is unacceptable.[58] Further, the respondent's delay had prejudiced the applicant's capacity to properly conduct a defence, and the defendant had been unable to finalise administration of the estate.[59]

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[52] Ibid [27].

[53] Ibid [32]-[35].

[54] Ibid [47].

[55] Ibid [56].

[56] [57].

[57] Ibid [1], [47], [64].

[58] Ibid [40], [80]-[81], [86]-[87].

[59] Ibid [16], [18], [96], [97], [115].

Affidavits – nail them

24. Affidavits are essential to demonstrating a proper basis.[60] Across the summary dismissal cases, decided on affidavit evidence, the word *affidavit* was mentioned 126 times, suggesting the importance of getting off to a good start with a good affidavit.

25. A good affidavit takes work. An affidavit is a person's evidence, and so the issues raised by the law of evidence are important – relevance, hearsay, and opinion, for example.

26. An affidavit is not a pleading, but a statement of fact, the purpose of which is to help the Court determine where the truth lies.[61] An affidavit does not become evidence until it is read in Court or otherwise relied on by a party,[62] but once filed, any other party may rely on it, and so a party can be cross-examined on it.[63]

27. As such, it is important to prepare an affidavit as though it is the parties' evidence in chief. And while the Court might make orders for the parties to give *viva voce* evidence at trial because of a *Briginshaw* consciousness, or because it thinks that is the best way to get to the truth, the affidavit does not go away or become irrelevant.[64]

28. *Re Dodson (No 3)* concerned a plaintiff's affidavit that contained a 'substantial amount of inadmissible and irrelevant material'.[65] Fifteen of 20 pages were historical information, and the remaining five made 'bare assertions' about need.[66] The Court emailed the plaintiff's solicitor about this, and the solicitor replied to say that the issue was noted.[67] Soon after, the Court reminded the

[60] I note that affidavits are not filed in County Court.
[61] *Aherne v Freeman* [1974] VR 121, 124.
[62] *Manson v Ponninghaus* [1911] VLR 239.
[63] *Barristers' Board of Western Australia v Tranter Corp Pty Ltd* [1976] WAR 65 at 67.
[64] *Feehan v Toomey* [2014] VSC 488, [6].
[65] [1].
[66] Ibid.
[67] Ibid.

plaintiff's solicitor that it would be necessary to review the affidavits, and the solicitor advised it had instructed counsel to review the affidavits.[68] There was no further correspondence before trial.[69] The Court ordered the plaintiff's solicitor to forward details of wasted costs in respect of this affidavit, and also in relation to another one that was not relied on at trial.[70]

29. The Court held that the applicant's affidavit stood as evidence in chief at trial, which avoided the need for lengthy viva voce evidence, thus reducing time and cost.[71] However, the Court also held that the practitioners disregarded the Court's communications about the affidavit, failed to cooperate with the Court in connection with the conduct of the proceeding, and ignored the Court's warning as to costs – notably, while the solicitor had said he had instructed counsel to review the affidavit, there was no corresponding fee slip.[72] The practitioners were ordered to pay 50% of the applicant's affidavit.[73] They were also ordered to pay the full costs of the affidavit that was not used at trial.[74]

30. It is also important to be conscious of the way the Court uses and analyses affidavits. In *Joss v Joss*,[75] the Court sifted through a large volume of material and in doing so found inconsistencies between affidavit evidence and oral evidence. In *Rodolico v Rodolico*,[76] the Court carefully considered affidavit material against what was said in cross-examination and contrasted the parties' evidence with a third party to make conclusions of fact. In *Dunn v Perpetual*,[77] the Court noted misstatements in the affidavit.

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[68] Ibid.

[69] Ibid.

[70] Ibid [2].

[71] Ibid [18].

[72] Ibid [35].

[73] Ibid [46].

[74] Ibid.

[75] [92]-[95].

[76] [2020] VSC 535 ('*Rodolico v Rodolico*'), [6], [20], [30].

[77] [21]-[24].

31. But also, the detailed preparation of an affidavit should help in assessing the merits of a case. For example, on the issue of need in *Re Janson; Gash v Ruzicka* ('*Re Janson*'),[78] it is clear that the plaintiff had no idea about her household finances and was therefore unable to speak to need.

32. And drawing and settling affidavits might focus the mind on how to prove the case. For example, in *Stanojevic v Riboskic* the Court of Appeal said:[79]

> After setting out the details of the parties and the estate, the judge made a number of observations about [the plaintiff's] evidence. He found that when called to give evidence, [the plaintiff] understood the oath that was administered, and he was satisfied that she understood that she was being asked to consider whether the contents of her affidavits were true and correct. However, he considered that [the plaintiff's] evidence 'took a turn for the worst when she was cross-examined', and that she persistently gave obtuse and non-responsive answers during cross-examination'. After emphasising the difficulty that this created, the judge resolved to 'deal with [the plaintiff's] evidence by only accepting her evidence where it is otherwise corroborated by other creditworthy and reliable evidence'.

33. Corroboration was important in *Re Christu; Christu v Christu* ('*Re Christu*') too:[80]

> At times the evidence of the … [parties] showed inconsistencies. This is unsurprising given that many of the events occurred years ago and memories of the same event may vary. Moreover, witnesses may unwittingly tailor their evidence to align with their case. Consequently, where a witness' evidence is not otherwise corroborated or consistent with documents, it is treated with caution. In respect of the evidence of the plaintiff and … [one of the defendants], at times their evidence exhibited a negative attitude toward the other. Further, … [one of the defendants] was not forthright in disclosing the financial assistance provided by [a "friend"]. Consequently, where evidence is in conflict, greater weight is given to that of … [of other witnesses] if there was otherwise no documentary evidence.

[78] [2020] VSC 449 ('*Re Janson*'), [39]-[42].

[79] [2020] VSCA 230 ('*Stanojevic v Riboskic*'), [51] (footnotes omitted).

[80] [2021] VSC 162 ('*Re Christu*'), [102].

The basic law and facts – nail them (too)

34. A good affidavit is the foundation of a good case, and a good Part IV case is framed around the basics of eligibility and need. The substantive cases decided over the course of the year demonstrate the extent to which the cases are decided more on these issues, and the extent to which it is difficult to diminish a testator's moral duty.

35. In *Joss v Joss*,[81] there was clearly drama and scandal raising arguments from the defence about whether the deceased owed a moral duty to his daughter. But the case was decided on more basic points: the applicant was an eligible person, she had become accustomed to relying on her father to provide her with accommodation and money for other reasons, and the defence did not contend that the plaintiff's claim should be reduced by reference to the needs of any other beneficiary or eligible person, and so further provision was granted to the plaintiff.[82]

36. In *Re Christu*,[83] the deceased left an estate of $780,000 to two of his three children. The plaintiff was the disinherited third child; he was 65, had three adult children, no work, back and leg pain, mental health issues, and took medication for high blood pressure.[84] The plaintiff owned his own home, had approximately $45,000 of superannuation and a motor vehicle, received an allowance of $620 per week, and had unsuccessfully applied for the disability pension.[85] The plaintiff argued for a pecuniary legacy of $150,000 to form a fund to protect against contingencies.[86] The first defendant was 57, received a disability support pension, had $266,000 of cash and shares, had HIV and had developed related heart problems and osteoporosis.[87] The second defendant was 51, a single mother of two daughters with severe learning disabilities, was employed as a

[81] [15], [168].

[82] Ibid [167], [197].

[83] [1]-[3].

[84] Ibid [88].

[85] Ibid.

[86] Ibid [96], [150], 155.

[87] Ibid [89].

maternal child health nurse, owned 75% of her house, had a car, had superannuation of $150,000, and had credit debt of $5,000.[88] The defence did not make any submissions concerning the plaintiff's need.[89] The case was conducted entirely on moral duty, with a focus on estrangement.[90] McMillan J held that the deceased had a moral duty to provide for the applicant's maintenance and support, and that the deceased had failed to make adequate provision for the applicant's proper maintenance and support.[91] Her Honour held that a wise and just testator would view $110,000 as adequate and proper.[92]

37. In *Re Finnie*,[93] the deceased died at 65 and was survived by the applicant, his partner of almost 20 years and three of four adult children from an earlier marriage. The deceased made his will prior to the commencement of his relationship with the applicant.[94] The deceased left his estate equally to his four children, with a gift over if any of the children predeceased him.[95] All of the beneficiaries were in financial difficulty.[96] The defendant accepted the deceased owed a moral duty to provide for the applicant and that the deceased failed to make adequate provision for proper maintenance and support.[97] The plaintiff argued for a 'a secure home, income and nest egg' from the estate.[98] However, McMillan J held that this was not a usual domestic partner case and the applicant was entitled to an amount no greater than necessary, limited by weighing the plaintiff's position relative to other beneficiaries.[99] Further, a spouse cannot necessarily expect sufficient provision to go on living an identical life as before.[100]

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[88] Ibid [90]-[91].

[89] Ibid [150].

[90] Ibid.

[91] Ibid [156].

[92] Ibid.

[93] [1].

[94] Ibid [2]-[3].

[95] Ibid [2].

[96] Ibid [88]-[94].

[97] Ibid [6].

[98] Ibid [111].

[99] Ibid [111].

[100] Ibid [122].

Her Honour ordered provision sufficient for the plaintiff to discharge her mortgage, and a small fund for contingencies.[101]

It is especially important to nail need

38. The general requirement is for plaintiffs to make full and frank disclosure about their financial position, so that the Court can make proper conclusions about need.[102] The plaintiff runs the risk of having his or her claim dismissed if he or she fails to properly articulate his or her needs and may be ordered to pay costs.

39. In *Re Janson*,[103] the deceased was survived by two adult daughters (one being the plaintiff), and his partner, who was the defendant. A brother received 30%, one daughter received 30%, the defendant received 14%, a niece received 12%, and the plaintiff received 1%, with there being a number of other beneficiaries receiving small distributions.[104] The plaintiff was unemployed and the full-time carer of her husband, who had multiple sclerosis.[105] The plaintiff was the only witness to give evidence.[106] In her first affidavit, she provided information about finances, but it was 'unsupported by documentary evidence'.[107] At trial, the plaintiff's evidence was 'equivocal' – she 'had little knowledge of her financial situation, … stating "I don't do money"' because her husband looked after it.[108] Further, there was no documentation of money received from international students staying in her home, a loan from her daughter, her husband's medical expenses, or general living expenses.[109] The plaintiff's counsel submitted that it

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[101] Ibid [128].

[102] *Hallam v Maxwell* [1998] VSC 131, [17]; *Collicoat v McMillan* [1999] 3 VR 803, 820 [47], 825 [58]; *De Angelis v De Angelis* [2003] VSC 432, [45]; *Warriner v McManus* [2015] VSC 314, [63]–[64]; *Davison v Kempson* [2018] VSCA 51, [36].

[103] [1].

[104] Ibid [2].

[105] Ibid [30.

[106] Ibid [17].

[107] Ibid [39].

[108] Ibid [39].

[109] Ibid [40].

was not normal to have to prove that you do not own property, are unemployed and drive a 22 year old car.[110]

40. However, McMillan J noted that the Court must consider 'the degree to which … [an adult child] is not capable, by reasonable means, of providing adequately for her own proper maintenance and support'.[111] Further:[112]

> … [this] necessitates the Court having an understanding of the plaintiff's need through evidence of her financial circumstances… While "need" is a relative concept and does not solely mean material need, the Court must have adequate evidence of an applicant's financial circumstances before an order for family provision can be made.

41. On the available evidence, Her Honour was unable to order further provision because to do so would be to speculate and would be contrary to the requirements of the Act.[113] It is necessary to persuade the Court, and insufficient to say you do not take notice of finances.[114] However, because the defendant conceded that 'further provision in the form of an additional 10 shares of the estate should be granted to the plaintiff', Her Honour gave the plaintiff 28 days to file documentary evidence of her financial circumstances.[115]

42. In *Re Schlink; Keane v Corns* ('*Re Schlink*'),[116] the plaintiff was unsuccessful in a family provision claim and sought costs of the proceeding from the estate, or alternatively that the parties should bear their own costs. The plaintiff was the deceased's adult daughter, and the defendant was the deceased's partner of 20 years.[117] The deceased left the plaintiff $50,000 and the residue to the

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[110] Ibid [41].

[111] Ibid [9].

[112] Ibid [37].

[113] Ibid [44].

[114] Ibid [42]-[43].

[115] Ibid [46].

[116] [2020] VSC 180 (*'Re Schlink'*), [1], [5].

[117] Ibid [2].

defendant.[118] Because the estate was illiquid, the defendant loaned the estate $86,000 for expenses and legal fees.[119]

43. The plaintiff sought 'costs be paid from the estate on the standard basis' because the plaintiff made 'exhaustive attempts to resolve her foreshadowed claim' and the defendant:[120]
    - 'forced the proceeding to trial';
    - failed to respond or engage in order to narrow issues;
    - failed to comply with directions;
    - filed burdensome and unnecessary attachments to her affidavits; and
    - filed affidavits as to her financial position and the estate's financial position the day before the trial.

44. As to rejecting the defendant's offers, the plaintiff said:[121]
    - the first offer (which did not comply with *Calderbank* principles) was contingent on the defendant's death and did not address costs; and
    - the second offer (which did comply with *Calderbank* principles) was made on the morning of the trial and costs would have been thrown away.

45. The defendant submitted that costs should follow the event because the estate was modest, the plaintiff had received a meaningful legacy, the plaintiff made unrealistic offers, and the defendant had personally funded proceedings.[122]

46. McMillan J started by saying that costs in family provision claims are 'determined in the exercise of the Court's general costs discretion, [and] there is no basis for an unsuccessful plaintiff to assume that they will be awarded their costs out of the estate'.[123] McMillan J noted that the only issue in dispute was quantum in circumstances in which there was a paramount claim and the estate was small.[124]

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[118] Ibid [2].

[119] Ibid [3].

[120] Ibid [5], [23]

[121] Ibid [24]-[26].

[122] Ibid [28]-[29].

[123] Ibid [9].

[124] Ibid [33].

The defendant was within her rights to not negotiate early on because the plaintiff's evidence had not been filed.[125] Further, McMillan J held that the plaintiff, 'properly advised, … should not have brought the claim', and that she failed to advance a claim couched in the context of her *need* for further provision.[126] In particular, this should have been known the day before the trial when the plaintiff rejected the defendant's final offer.[127]

47. Her Honour went on to say that while the *Calderbank* principles are relevant to considering the reasonableness of rejecting an offer, the 'Court may exercise its discretion to award indemnity costs in any proceeding in which the overall justice of the case supports such a conclusion'.[128] McMillan J concluded:[129]

> The defendant was successful in the proceeding. It would be unjust in the circumstances for the defendant to bear her own costs. The value of the estate is modest with the bulk of the value represented by the Boronia property, which is the defendant's home. The burden of costs should not fall on the defendant, either as trustee of the estate or as the residuary beneficiary… it is just and fair that the costs of the proceeding follow the event and that the plaintiff pay the defendant's costs on an indemnity basis.

Do not waste time and effort

48. The Court expects a plaintiff to frame their case from the outset – the process is geared towards that. It is important to follow the process; deviating, for example, by seeking discovery, is not rewarded.

49. Part IV claims are commenced by originating motion, and so there is no right to discovery.[130] The Court can order discovery on the return of a summons for directions, but the general position in Part IV proceedings is to only order it in

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[125] Ibid [33].

[126] Ibid [36].

[127] Ibid [38].

[128] Ibid [39].

[129] Ibid [41].

[130] *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('*Rules of Court*') r 29.01.

special circumstances,[131] and only 'if it can be established that the discovery sought relates to substantial issues in the proceeding as presently framed', noting that 'unlike other civil litigation, … the Court has an independent power to "inquire fully"' into a deceased estate.[132]

50. In *Re Fitzgerald*, the plaintiff applied for discovery aimed at uncovering evidence of transactions that might have diminished the deceased's estate, or of assets that were not disclosed in the probate inventory.[133] The Court reproduced extracts from the applicant's affidavit in support of discovery, which contained opinions and hearsay about the estate being misappropriated, and noted that 39 paragraphs in the applicant's affidavit dealt in 'detail with the actions of the plaintiff's solicitor and correspondence regarding disclosure'.[134]

51. The Court dismissed the application.[135] First, the Court held that the application for discovery did not relate to an issue that had already been framed in the proceeding.[136] The application was aimed instead at exploring whether a separate cause of action might exist, and so in a sense it was more akin to an application for preliminary discovery to determine whether there were grounds for removing the executor.[137] The Court went on to note that allegations of 'fraud or unconscionability impose serious ethical duties on practitioners and… [so s]uch allegations should not be raised obliquely by way of a discovery in another proceeding'.[138] Even if the documents were discovered, there use would be limited to the Part IV proceedings.[139] And finally, the discovery application was disproportionate to the size of the estate being just $60,000.[140]

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[131] *Re Borthwick* [1948] Ch 645.

[132] *Re Fitzgerald* [24], [26].

[133] Ibid [19].

[134] Ibid [16].

[135] Ibid [5].

[136] Ibid [33].

[137] Ibid [34], [39].

[138] Ibid [38].

[139] Ibid [39].

[140] Ibid [40].

52. In *Harrison v Bauld*,[141] the plaintiff issued a subpoena for trust documents to gain an understanding of the defendant's and other beneficiaries' financial resources and needs. However, the defendant had still not filed a substantive affidavit meaning it was not clear that their financial needs were going to be relevant, and so the subpoenas were set aside.[142]

Negotiate, settle – but be smart about it

53. Once proceedings with a proper basis have commenced, it is important to look for opportunities to resolve the dispute.[143]

54. *Re Schlink* demonstrated the importance of accepting a good offer, and that the Court will not be pedantic about *Calderbank* principles; if it is fair and reasonable to do so, the Court will make a costs order against a party who should not be litigating, or who does not know when to stop.[144]

55. But it is also important to negotiate under the right conditions. Compulsory formal mediation plays an important role.[145]

56. *Rodolico v Rodolico* shows the difficulties that can arise when negotiating outside of the mediation framework. It involved an application by the defendant to set aside a Part IV settlement agreement on the basis of unconscionable conduct or duress.[146] The parties were brothers.[147] The settlement sum was 'generous' to the plaintiff.[148] The defendant argued that he was grieving, unable to afford a solicitor, was "threatened" with the loss of his home and so felt pressure to accept

[141] [2021] VSC 73 ('*Harrison v Bauld*), [2].

[142] Ibid [25]-[30].

[143] LexisNexisAU, Wills Probate & Administration Vic (online on 9 August 2021) ('*Wills Probate & Administration Vic*') [42,055].

[144] [39], [41].

[145] *Wills Probate & Administration Vic* [42,050].

[146] [2020] VSC 535 ('*Rodolico v Rodolico*') .

[147] Ibid [13].

[148] Ibid [5].

the offer or lose his home, was unqualified to assess the offer, felt his cousin (who helped mediate between the brothers) and the defendant's lawyers pressured him into accepting the terms, and thought that the plaintiff should have disclosed his financial position (which was strong relative to the defendant's).[149] The plaintiff's response was that the defendant was intelligent, had post-graduate qualifications, a third party helped negotiate the settlement, the agreement was drawn up over a period of weeks and included a clause to the effect that the defendant had time to seek legal advice, and the defendant had simply changed his mind.[150]

57. The Court held that a threat to issue proceedings does not amount to illegitimate pressure unless the proceeding or action is brought maliciously.[151] While the defendant was clearly anxious as a result of the comment and because of the litigation, any action for duress must focus more on the conduct of the alleged perpetrator than the attributes or perceptions of the alleged victim.[152] It is not duress to bring proceedings you have a legal right to bring, even if that does carry the implication a home might be lost in a case when that home is the thing in dispute.[153] For context, the "threat" was made at a directions hearing after a judicial mediation had been cancelled because the defendant did not have a lawyer, and so it was reasonable for the plaintiff's lawyers to conclude the defendant was disengaged and needed to be removed as the executor of the estate.[154]

58. As to the defendant having a special disadvantage; he had some mental health issues, but there was no reason for the plaintiff or his lawyers to know.[155] And there was nothing in evidence to say he was too debilitated to understand what he was doing.[156] The agreement was executed by an intelligent person, with

[149] Ibid [15], [20], [44].

[150] Ibid [45].

[151] Ibid [51].

[152] Ibid [53].

[153] Ibid [53].

[154] Ibid [3], [15], [57].

[155] Ibid [61].

[156] Ibid.

lawyers who engaged with him appropriately, and with the assistance of his cousin as an intermediary.[157] As to whether the agreement should have been set aside because the plaintiff had not disclosed his financial position, the Court said that the defendant's previous solicitors had ample time to pursue that.[158]

59. The Court concluded that there was no unconscionability but nevertheless considered whether the agreement was fair.[159] The Court noted the defendant had a better claim to the estate given the plaintiff's financial position and had little contact with their mother while the defendant lived with and cared for her and was in some need.[160] As such the Court said that the plaintiff obtained a generous settlement.[161] However, the sum was not so generous as to be unfair and unreasonable given that it was inclusive of costs and given that the settlement sum only represented approximately 20% of the estate.[162] The settlement also conferred a benefit on the defendant in the sense that his position was certain, and he did not need to go through a trial.[163]

Appeals – are you sure?

60. Family provision cases involve the exercise of judicial discretion in a way that makes them difficult to impeach on appeal.[164] An appeal Court should only interfere if it is possible to show that the trial judge erroneously exercised his or her discretion.[165]

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[157] Ibid [65].

[158] Ibid [67].

[159] Ibid [68].

[160] Ibid [69].

[161] Ibid [70]-[71].

[162] Ibid.

[163] Ibid [71].

[164] [2020] VSCA 275 ('*Kronemann v Papaionnou*') [36].

[165] *Wills Probate & Administration Vic* [42,080]; *Coates v National Trustees Executors and Agency Co Ltd* (1956) 95 CLR 494, 511; *McCosker v McCosker* (1957) 97 CLR 566, 576; *Saric v Vukasovic* [2019] VSCA 57 [64].

61. The Court of Appeal may order security for costs when there is an appeal.[166] As the position on costs generally has changed, so too has the approach security for costs.[167]

62. In *Kronemann v Papaioannou*,[168] the respondent sought and obtained further provision from the deceased's estate. The applicant, as executor, resisted the respondent's claims.[169] The trial judge had held that the applicant pay the respondent's costs without indemnification from the estate, including some on the indemnity basis.[170] The applicant sought leave to appeal the trial judge's orders, including the orders as to costs.[171] The respondent sought security for costs of the application for leave to appeal, and if leave was granted, the appeal.[172]

63. The Court held that it was satisfied that the applicant should provide security for the respondent's costs in the sum of $15,000 because the applicant's prospects of success were low in circumstances involving the application of judicial discretion.[173] There was also no element of public interest that needed to be considered.[174]

64. And so that dovetails neatly into costs more generally. As mentioned, costs are in the discretion of the Court, and so there is no longer any basis for an unsuccessful plaintiff to presume that they will be awarded their costs out of the estate.

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[166] *Rules of Court* r 64.38(4).

[167] *Wills Probate & Administration Vic* [42,080].

[168] *Kronemann v Papaionnou* [1].

[169] Ibid [2].

[170] Ibid [1].

[171] Ibid [2].

[172] Ibid [2].

[173] Ibid [35]-[37], [49].

[174] Ibid [41]-[43].

Conclusion

65. The underlying theme that emerges from the recent Part IV cases is the need to not only get the basics right, but to do them brilliantly. The cases show that the Court expects practitioners to use its processes efficiently and ethically; to present evidence that is relevant to the legal questions; and to ensure that cases are resolved.