

# GREENS LIST

BARRISTERS

## Family Provision Litigation: do the basics brilliantly

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# Context

- ▶ Recent cases

- ▶ Civil procedure

- ▶ Evidence

- ▶ Efficiency

- ▶ Ethics

- ▶ Costs

# Key points

- ▶ Costs agreements
- ▶ Proper basis
- ▶ Cause of action?
- ▶ Timeliness
- ▶ Affidavits
- ▶ Focus on need
- ▶ Stick to the process
- ▶ Try to settle
- ▶ Costs

# Costs

- ▶ Historically - Courts have jealously guarded costs
- ▶ Court's inherent jurisdiction
- ▶ *Civil Procedure Act 2010; Legal Profession Uniform Law*
- ▶ *Re Jabe*

# Summary dismissal - a cause of action?

- ▶ Proper basis / no real prospect of success
- ▶ Part IV - not usually appropriate for summary dismissal - see *Re Winter-Cooke*
- ▶ But:
  - ▶ *Re Fitzgerald; Re Stojanovska; Dunn v Perpetual; Lemmens v Davis*

# Affidavits - nail them

- ▶ Evidence in chief
- ▶ Takes work
- ▶ Focus on what matters
- ▶ Beware of adverse costs - *Re Dodson (No 3)*
- ▶ Assess merits: *Re Janson*
- ▶ Prove the case: *Stanojevic v Riboskic*
- ▶ Corroboration: *Re Christu*
- ▶ Cross-examination: *Joss v Joss*;  
*Rodolico v Rodolico*; *Dunn v Perpetual*

# The basic law and facts - nail them (too)

- ▶ Eligibility and need
- ▶ Affidavit provides foundation
- ▶ Not so much the colour and movement: *Joss v Joss*
- ▶ Adult child: *Re Christu*
- ▶ Domestic partner: *Re Finnie*

# It is especially important to nail need

- ▶ Full and frank disclosure
- ▶ Court cannot speculate: *Re Janson*
- ▶ Costs against plaintiff: *Re Schlink*



# Do not waste time and effort

- ▶ Follow the process
- ▶ Generally no discovery
- ▶ No discovery to find an alternative cause of action: *Re Fitzgerald*
- ▶ No subpoenas until it is clear the issue is relevant: *Harrison v Bauld*

# Negotiate, settle - but be smart about it

- ▶ Look to resolve - mediation compulsory
- ▶ Costs - fair and reasonable: *Re Schlink*
- ▶ Unrepresented litigants, dealings outside of mediation: *Rodolico v Rodolico*

# Appeals

- ▶ Difficult to appeal - need to show an erroneous exercise of discretion
- ▶ Security for costs: *Kronemann v Papaioannou*