Family law proceedings involving parties with diminished capacity

Jacky Campbell

Forte Family Lawyers

11 September 2012

All courts have procedures for people who have a legal disability which prevents them from representing their own interests in litigation. The Family Law Courts, being the Family Court and the Federal Magistrates Court, are no exception. The *Family Law Rules 2004* ("FLR") follow the broad pattern of most other courts. There are two main distinctions between State laws and the Family Law Courts, being the name of the person representing the person with a disability and most parties involved in litigation have mental health problems or drug and alcohol problems. The representative of the person with a disability has the same title, "case guardian", whether the person with a disability is an applicant or respondent. The *Family Law Act 1975* ("FLA") (s 123(1)(o)) and the *Federal Magistrates Act 1999* (s 87(1)(h)) use the phrase "guardian *ad litem*". Under the *Federal Magistrates Court Rules 2001* (FMC Rules) the term is "litigation guardian". The term "case guardian" is used in this paper to cover both terms unless the context indicates otherwise.

This paper only deals with parties with diminished capacity but children may also need a case guardian because they are also under a legal disability. The involvement of children as parties in proceedings in Family Law Courts is extremely rare.

On the issue of whether parties need to be legally separated for a property settlement order under s79 to be made, we are in limbo until the High Court hands down its decision. This part of my paper was prepared on the on the run due to the *Stanford* timelines. I updated it to include excerpts and submissions made to the High Court which were filed in the last week which I thought might be useful for you. The paper had to be submitted before I had time to analyse the submissions and before the transcript of the hearing was available. I will try to address those gaps today.

This paper deals with:

1. The four steps of a property settlement under the *Family Law Act*.
2. Who is a person with a disability?
3. The procedure for appointing a case guardian.
4. Costs in proceedings with a case guardian.
5. Who may apply for the appointment of a case guardian?
6. Who may be appointed a case guardian?
7. Outcomes of some recent cases.
8. Does there need to be a separation?

    - *Stefanovski*
    - *Stanford* history

- Submissions to the High Court in *Stanford*
- Legislation referred to in *Stanford* but not otherwise referred to in this paper
- Chronology in *Stanford*

9. Conclusion

The four steps of a property settlement under the *Family Law Act*

Sections 79 and 90SM of the *Family Law Act* enable the court exercising jurisdiction under the FLA to alter interests in property as between the parties to a marriage or de facto relationship. The court has a broad discretion to make "such order as it considers appropriate". While the power is broad there is a list of seven factors that must be taken into account:

(a) the direct and indirect financial contributions of the parties
(b) the non-financial contributions by or on behalf of the parties(c) contributions to the welfare of the family, including contributions as homemaker or parent
(d) the effect of any order on the parties' income earning capacity
(e) the list of considerations in s 75(2) and s 90SF(3) FLA
(f) any other order made under the FLA affecting a party or child of the marriage or de facto relationship
(g) any child support payable, or likely to be paid in the future.

Importantly, s 79(2) and s 90SM(2) state that the "court shall not make an order under these sections unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". As a result, the Full Court of the Family Court has repeatedly stated that judgments should follow a four-step process of reasoning.

In *Omacini & Omacini* (2005) FLC 93-218 the Full Court said (at para 46) that the four important steps to be taken in determining a property dispute are well defined:

(a) To identify and value the net property of the parties (usually as at the date of trial);
(b) to consider the contributions of the parties within paragraphs (a)–(c) of s 79(4);
(c) to consider the s 75(2) factors; and
(d) to consider whether the order proposed is just and equitable".

The s 75(2) factors are:

(a) the age and state of health of each of the parties; and
(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment; and
(c) whether either party has the care or control of a child of the marriage who has not attained the age of 18 years; and
(d) commitments of each of the parties that are necessary to enable the party to support:
    (i) himself or herself; and
    (ii) a child or another person that the party has a duty to maintain; and

(e) the responsibilities of either party to support any other person; and

(f) subject to subsection (3), the eligibility of either party for a pension, allowance or benefit under:

(i) any law of the Commonwealth, of a State or Territory or of another country; or

(ii) any superannuation fund or scheme, whether the fund or scheme was established, or operates, within or outside Australia;

and the rate of any such pension, allowance or benefit being paid to either party; and

(g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable; and

(h) the extent to which the payment of maintenance to the party whose maintenance is under consideration would increase the earning capacity of that party by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; and

(ha) the effect of any proposed order on the ability of a creditor of a party to recover the creditor's debt, so far as that effect is relevant; and

(j) the extent to which the party whose maintenance is under consideration has contributed to the income, earning capacity, property and financial resources of the other party; and

(k) the duration of the marriage and the extent to which it has affected the earning capacity of the party whose maintenance is under consideration; and

(l) the need to protect a party who wishes to continue that party's role as a parent; and

(m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation; and

(n) the terms of any order made or proposed to be made under section 79 in relation to:

(i) the property of the parties; or

(ii) vested bankruptcy property in relation to a bankrupt party; and

(naa) the terms of any order or declaration made, or proposed to be made, under Pt VIIIAB in relation to:

(i) a party to the marriage; or

(ii) a person who is a party to a de facto relationship with a party to the marriage; or

(iii) the property of a person covered by subparagraph (i) and of a person covered by subparagraph (ii), or of either of them; or

(iv) vested bankruptcy property in relation to a person covered by subparagraph (i) or (ii); and

(na) any child support under the *Child Support (Assessment) Act 1989* that a party to the marriage has provided, is to provide, or might be liable to provide in the future, for a child of the marriage; and

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account; and

(p) the terms of any financial agreement that is binding on the parties to the marriage; and

(q) the terms of any Pt VIIIAB financial agreement that is binding on a party to the marriage

Who is a person with a disability?

A person with a disability may start, continue, respond to, or seek to intervene in a case only by a case guardian (r 6.08(1) FL Rules). The Dictionary in the FL Rules defines a person with a disability as:

> a person who, because of physical or mental disability:
>
> (a) does not understand the nature or possible consequences of the case; or
> (b) is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case.

Rule 11.08(1) FMC Rules is similarly worded but does not refer to physical or mental disability:

> a person needs a litigation guardian in relation to a proceeding if the person does not understand the nature or possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of the proceeding.

Parties to a family law case often act erratically and irrationally. Separation and litigation are stressful. A party may not have the mental incapacity required for the appointment of a case guardian, although their conduct may suggest it. Many family law litigants suffer from depression or anxiety related to the separation. Others have mental illnesses which may have contributed to the separation. *Forster & Forster* [2012] Fam CAFC 47, discussed later in this paper, is an example of a party with unusual views who did not need a case guardian.

In *Materanzi & Suskain (No 2)* [2011] FamCA 276 the mother's counsel argued that the mother was "not capable of adequately conducting, or giving adequate instruction for the conduct of, the case". She had a serious hearing deficit that impacted (at para 17):

> on her ability to be able to hear and understand what is happening and to speak and communicate with others, including the court, to the same extent that a person without such a hearing disability would be able to. However, the mother has been, throughout the course of the proceedings so far, assisted by the ever presence of an interpreter, who, from all appearances, writes down all of the important things that need to be communicated to her, and is able to, from what I understand, adequately communicate with the mother.

Forrest J wasn't satisfied that the mother was a person with a physical or mental disability requiring the appointment of a case guardian.

The procedure for appointing a case guardian

For there to be a case guardian in most proceedings under the FLA, there must be a court order to appoint one. The exception is if a person is authorised by the Attorney-General.

That person is deemed to be the case guardian subject to filing the documents listed in r 6.11(2) FL Rules, namely:

- a consent to act in relation to the person
- a copy of the notice of appointment of the person as an authorised person
- a Notice of Address for Service.

Under the FMC Rules the Attorney-General may appoint a person to be a manager of the affairs of a party and that person is entitled to be the litigation guardian (r 11.12).

A representative may have been appointed for the person under state or territory mental health law, taking the management and control of their affairs out of that person's hands. If so, the person is considered to be with a disability and incapable of giving instructions for the conduct of the matter. However, an appointment under State or Territory mental health law is not a prerequisite to the appointment of a case guardian under either the FL Rules or the FMC Rules, nor is it sufficient in itself without an order.

The form required to apply for the appointment of a case guardian is an Application in a Case. The material needed to support an application is usually on affidavit and includes:

1. Proof that the party has a sufficient physical or mental disability and lacks the necessary understanding or capacity.
2. Proof that the proposed case guardian can fairly and competently conduct the case for the person needing the case guardian and has no interest adverse to the person.
3. A consent by the proposed case guardian to act.
4. Details of how the costs and expenses of the application to appoint a case guardian and the case guardian's costs and expenses of the case will be met.
5. For appointing a case guardian for a proposed applicant (before proceedings have been commenced):

   – what the proposed application seeks

   – the basis of the application.

In *Price & Underwood (Divorce Appeal)* (2009) FLC 93-408, an oral application supported by an affidavit of the potential case guardian was sufficient. The application for appointment of a case guardian can be filed at the same time as the substantive application or even in the same application. This was done, for example, in *Cuza & Cuza* (1986) FLC 91-721 and *Danine & Drew* [2008] FamCA 1169. This is particularly important when there is a possibility of the potential applicant dying in the near future. Proceedings can be continued after the death of one of the parties under s 79(8) FLA but cannot be commenced.

Filing a substantive application for a person with a disability before the appointment of a case guardian is an irregularity capable of cure by the appointment of the case guardian. Filing both the substantive application and the application for the appointment of the case guardian together is convenient, but carries risk. If the proposed case guardian is not

appointed, the legal practitioner may have problems as to their authority to start the case and payment of their costs, save from the proposed case guardian.

An order by a judge for the appointment of a case guardian is capable of appeal. An order made by a registrar or judicial registrar may be reviewed (r 18.08, table 18.6, item 3) but the application for review must be filed within seven days after the order is made. Usually it is easier to apply to remove a case guardian than to appeal. Removal of a case guardian is discussed further below.

In *Forster & Forster* [2012] FamCAFC 47 the Full Court set aside orders by a Federal Magistrate of his own motion for the father to attend upon an appropriately qualified medical practitioner for the purposes of a mental state examination and an order appointing the Public Trustee as his litigation guardian under r 11.11 *FMC Rules*.

The father refused to attend the ordered psychiatric assessment and the Federal Magistrate ordered the appointment of a litigation guardian. The Full Court found that the father's evidence was unusual and perhaps unbelievable, but he was able to cross-examine, make objections (some of which were upheld), argue about the admissibility of evidence and articulate the orders he sought. The father's ideas, persecutory or not, whether he lived in permanent accommodation or not, and his views about attempted break-ins, did not impact on his ability to conduct his case.

The Full Court said in relation to the seriousness of the appointment of a case guardian (at para 135) that:

> to relieve an adult person of the right to conduct his or her own litigation is a serious step and a serious deprivation of a fundamental right. It also requires the rebuttal of the presumption of competence.

The Full Court referred (at para 137) to the decision of the Full Court of the Federal Court in *L v Human Rights & Equal Opportunity Commission* [2006] FCAFC 114 which:

> makes it clear that it is for those asserting “need” to establish it. It is not for the litigant to “prove competence”. The order requiring the father to undergo psychiatric assessment in order to complete his Honour’s already held view that he was not competent reversed that onus and, in our view, was not made on any or any proper grounds.

The Full Court (at para 141) acknowledged that the appointment of a case guardian might be made without the medical evidence as to the party’s capacity but that step nevertheless should be approached with extreme care, especially where, as in this case, there were other less draconian options available to the Court.

Removal of a case guardian

There is no specific procedure set out in the FL Rules for the removal of a case guardian. The general power in r 1.11 of the FL Rules may be used, which provides that the court "may set aside or vary an order made in the exercise of a power under these Rules". Under the FMC Rules the court "may remove a litigation guardian at the request of the litigation guardian" (r 11.11(3)) but other grounds for removal are not set out.

The court appears to have a discretion as to whether a case guardian should be removed, even if a case guardian wanted to retire. The court might, for example, refuse the application if the case is nearly finished, the reason for retirement is not strong and retirement may delay the case.

In *Kight & Kight* [2010] FamCAFC 235 the husband sought the removal of his father as case guardian so that he could "assume ownership of his case" and not pursue the 2 appeals filed by his case guardian. The husband suffered a traumatic brain injury in December 2008 and the Offices of Adult Guardian and Public Trustee were appointed by the Queensland Guardianship and Administration Tribunal ("GAAT") to administer the husband's affairs in January 2009. The husband's father was appointed case guardian in the property proceedings on 8 May 2009. Final property orders were made on 16 September 2010. The case guardian filed appeals in the property proceedings against the husband's wishes. The husband had previously obtained legal advice that there was no basis for an appeal. He consulted the case guardian's solicitors and they had the same view. The appointment of the Public Trustee of Qld as administrator for husband's financial matters was revoked in September 2010. The husband submitted evidence to the Family Court as to his capacity.

May J, sitting as the Full Court, said (at para 22):

> Where the husband does not wish to pursue the appeal, having obtained proper legal advice it would be wrong to place him in the position where an appeal is pursued based on the opinion of his father. The decision of the Case Guardian would be binding on the husband and should the appeal not succeed then the husband's property interests may be affected by orders for costs.

The case guardian order was discharged. Relying on r 6.10 FL Rules and *Kannis,* May J said (at para 21):

> The grounds for removal it seems are at large. In particular, such grounds would include where the "next friend", as it was described in the previous legislation, is damaging the interests of a party.

An appeal from an order appointing the case guardian is an alternative to an application to remove, especially if the appointment was made *ex parte* (see *Cuza & Cuza* (1986) FLC 91-721). A successful appeal against the appointment of the case guardian does not of itself render the substantive proceedings void.

In *Kannis & Kannis* (2003) FLC 93-135 one of the issues before the Full Court was whether the trial Judge should have moved of his own motion, having found that the next friend was an unreliable witness, to abort the trial and have a new next friend appointed. The next friend was the husband's son. The Full Court said (at p 78,263):

> It is almost impossible to see why in this case the Court ought have been of the view that it was appropriate to remove John from the role of being his father's Next Friend. The father was represented by senior counsel, instructed by an experienced firm of solicitors. At issue was the extent to which the large fortune that had been accumulated during the course of the marriage should be divided between the husband and the wife after 42½ years of married life. The fact that the Next Friend for the husband stood to gain if his father obtained a more favourable result [than] that sought by the wife could not be seen as a reason to remove him. Indeed to the contrary. There was some communality of interest between the Next Friend and his father. The fact that the Next Friend proved to be an unreliable witness would not be enough to make it appropriate to remove him.
>
> Further, even if his Honour had considered such a course, there were strong arguments against doing so. It would involve delay and costs for both parties. And it would amount to an interference in the running of the husband's case by those who there was no reason to suggest did not have his interest at heart. There was no allegation that the Next Friend had deliberately acted against his father's interests, merely that in the exercise of his judgment he had made mistakes which have had the effect of damaging those interests. While there may or may not have been bad faith towards the court, there was none towards the husband.

The Full Court considered that while there might have been bad faith towards the Court, there was "none towards the husband".

In *LL & PL & SDP* [2005] FamCA 715, the wife argued that the husband could only apply to remove his case guardian by using another case guardian to bring the application. The Full Court referred to the ingenuity of this argument but rejected it, saying (at para 23):

> Albeit for good reason, the appointment of a Case Guardian represents a substantial infringement of the fundamental legal rights of a citizen. It is not difficult to envisage situations in which the continued appointment of a Case Guardian may become unnecessary or even inconsistent with the legitimate interests or legal rights of the person the subject of an order for Case Guardianship. The Court appoints Case Guardians and must be vigilant to ensure that the appointment and regulation of the duties of Case Guardians are consistent with the underlying purpose of such appointments and the requirements of justice.

In *Starkey & Starkey* [2008] FamCA 962 the wife applied for the removal of the husband's case guardians because they had breached an order. Murphy J refused the application and said (at paras 53-54):

> In respect of the alleged impropriety or illegality, it is clear that the payments were made without notice. That *may* involve sanction in proceedings that seek sanction as their remedy. It *may* involve consequences in the substantive s 79

> proceedings when regard is had to the use of the money. But, in my view, it does not amount to the sort of impropriety that, ipso facto, warrants removal.
>
> Non-compliance with the order to the extent established may be and, as it seems to me probably should be, a factor taken into account in the exercise of a discretion to remove, but no more than that.

In exercising the discretion of the power to remove, Murphy J took into account the following matters (at para 61):

- By its terms, the application concedes that, as a result of the husband's current incapacities, a case guardian is necessary for him;
- The case guardians were appointed about eleven months ago and have acted as such since;
- No specific alternative case guardian is proposed by the wife;
- The court has no evidence as to how long an appointment by the Attorney-General might take. Nor does the court have any evidence as to the process employed by the Attorney-General and the person or persons who may be appointed;
- It is conceded by counsel for the wife that, given the appointment of the case guardians as "financial managers" for the husband pursuant to State legislation, the process leading to that appointment and the continued monitoring of that appointment by the OPC, that the Attorney-General might even re-appoint those same people as case guardians despite their having been removed by this court;
- In any event, there is no evidence to suggest that the appointment of an alternative case guardian is likely to take place before the likely trial date;
- As a result, it is possible to infer that the preparation of the husband's case for trial will almost certainly be delayed and the trial itself will almost certainly be delayed;
- As is effectively conceded by counsel for the wife, it is very likely that additional costs will be incurred by the husband or, more accurately, his estate, as a result of any alternative appointment;
- Significant costs have already been incurred by and on behalf of the current case guardians;
- The husband indicated to the NSW Tribunal that he had faith in the current case guardians as his financial managers;
- There is significant intra-family dispute and the current proceedings have echoes in earlier applications brought by Mr D Starkey in the Tribunal and dismissed by that body.

Costs in proceedings with a case guardian

The general rule with costs is that a case guardian has a right to be indemnified out of the estate of the person with a disability for costs actually incurred, including costs ordered to be paid by the case guardian to the other party. Rule 6.14 FL Rules and r 11.14 FMC Rules give the court a wide discretion to make orders for the costs of a case guardian and the application for a case guardian's appointment.

The legal practitioner acting for a case guardian may agree not to look to the case guardian personally for costs. If there is no such agreement, the case guardian is personally liable for the costs and expenses of the legal practitioner acting on instructions of the case guardian.

An order for costs, including an interim costs order or an interim property order, can be used to fund litigation (*Strahan & Strahan* (Interim property orders [2009] FamCAFC 166). An order against the other party may be appropriate if the estate of the person with a disability does not have sufficient funds to pay the ongoing costs incurred. It may be the only way the case guardian can conduct the case.

In *Richardson & Richardson* [2010] FamCA 275 Watts J rejected the husband's objections on cost grounds to the appointment of a case guardian saying, (at para 9):

> He submits that if the husband is entirely successful in his application, then the wife will not get anything and any application he makes for costs against the wife, at least, would be a meaningless and negatory application. Mr C, however, has indicated that he has his own home and he is prepared, at this point, at least, to take the risk that the wife will not get absolutely nothing out of this litigation and accordingly legal costs will be covered.

Procedures

A person in need of a case guardian can start, continue, respond to or seek to be included as a party only by their litigation guardian or case guardian (r 6.08 FL Rules; r 11.09 FMC Rules).

Special service on a person with a disability is covered by r 7.09 FL Rules. The difficulty for the person serving is assessing an application is whether or not a respondent with a disability needs a case guardian. To serve on a person with a disability by special service, a document can be served in one of three ways:

(a) on the person's case guardian
(b) on the person's guardian appointed under a state or territory law, or
(c) if there is no one under para (a) or (b) — on an adult who has the care of the person.

If the person proposed to be served is a patient in a hospital, nursing home or other care facility, the person in charge of the hospital, nursing home or facility is taken to have the care of the person (r 7.09(2)). However, a patient in a hospital, nursing home, or other care facility is not automatically deemed to be a person with a disability. The FMC Rules has a provision to similar effect (r 11.15).

Who may apply for the appointment of a case guardian?

An application for the appointment of a case guardian may be made by:

- a party (including the opposing party)
- a person seeking to be made a case guardian
- a person authorised to be a case guardian (r 6.10, note FL Rules).

An application may be made by the party in need of the case guardian. In *Palmer & Palmer* [2009] FamCAFC 129, the court found the fact that the wife made the application for a case guardian for herself did not cause a difficulty. Her doctor said:

> Although [the wife] has capacity to understand her legal rights and give verbal instructions, she may benefit from an appointment of a litigation guardian due to physical incapacity and severe mental distress due to the stress of the court case. In her current condition, her stress of giving instructions may jeopardise her rehabilitation and recovery.

There is no specific power in the FL Rules for the court to appoint a case guardian of its own motion. However r 1.10(1) provides that:

> Unless a legislative provision states otherwise, the court may make an order, on application or on its own initiative, in relation to any matter mentioned in these Rules.

The FMC Rules expressly provide that the court can appoint or remove a litigation guardian of its own motion (r 11.11(1)). The Federal Magistrate in *Forster & Forster* [2012] FamCAFC47 appointed one of its own motion, but the order was successfully appealed.

Who may be appointed a case guardian?

Before making an appointment, the court must be satisfied that the person:

(a) is an adult
(b) has no interest in the case adverse to the interest of the person needing the case guardian
(c) is able to fairly and competently conduct the case for the person needing the case guardian, and
(d) has consented to act as the case guardian

(r 6.09 FL Rules and r 11.10 and 11.11(2) FMC Rules save that (c) above does not apply under the FMC Rules).

If a manager of the affairs of a party has been appointed, that person is taken to be appointed as the case guardian if the person has filed a Notice of Address for Service and an affidavit confirming that the person consents to being appointed (r 6.10(2) FL Rules and r 11.12(4) FMC Rules). A manager of the affairs of a party is defined in r 6.08A to include a person who has been appointed in respect of a party, a trustee or guardian under a Commonwealth, State or Territory Law. This is not an exhaustive definition. In *Price & Underwood (Divorce Appeal)* (2009) FLC 93-408, May J said:

> The rules do not define ... the words ‘a manager of the affairs’... There can be no doubt that when a person is given the general power to ‘manage’ the affairs of a person under a disability under relevant state protective legislation that person is a ‘manager of the affairs’ of a person. (See also s 24 of the *Guardianship and*

> *Administration Act 1986* (Vic) under which a guardian can be vested with an enduring power of guardianship 'in respect of any matters relating to [the appointor's] person or circumstances'.)

The Full Court accepted (at para 150):

> that the Enduring Power of Attorney (Financial) made under the provision of the *Instruments Act 1958* (Vic), which was expressed to be enduring and unlimited in terms, held by Ms U was sufficient to satisfy the provision in the rules that she had been appointed a 'manager of the affairs' of the husband, and the application for her appointment could be made under r 6.10(2).

Danine & Drew [2008] FamCA1169 involved similar facts to *Price & Underwood*.

Murphy J said (at paras 32-3),

> It will be recalled that in order to satisfy the definition of "manager of affairs of a party" a person needs to have been appointed a "trustee or guardian" under a Commonwealth, State or Territory Law.
>
> The wife's sister has not been appointed as such, in terms, under any such law. However, it is submitted ... that the fact that Ms K is the wife's attorney pursuant to an enduring power of attorney duly executed by the wife, brings her within the definition of a "manager of the affairs of a party...

Murphy J looked at the Queensland legislation and concluded (at para 43):

> it seems to me that is the intention of the definition of "manager of the affairs of a party" within the rules and, specifically, the intention of a r 6.10 which, by reason of being a deeming provision, ensures that such a process can occur without undue formality, technicality, delay or expense in the sad circumstances necessarily there contemplated.

Under the FL Rules the requirement of being able to "fairly and competently conduct the case" may have a similar meaning to "fit and proper person" under the previous 1984 Rules but there is little judicial authority to confirm the meaning of the phrase. Cronin J said in *White & Green and Ors* [2009] FamCA 237 (at para 35) about the words "fairly and competently":

> However, those words relate to the conduct of the case for the wife not for the Court nor for the husband and wife generally. "Fairly" means acting in a way which is free from bias, dishonesty or injustice. There is little doubt that the case guardian has a poor view of the conduct of the husband. Whether that is justified is a matter for a trial judge to determine when the evidence is properly tested. A significant dispute which I cannot determine is whether the husband still has a significant drug problem which in the normal course of events may militate against him having the responsibilities of parenthood. The husband's view is that any drug problem that he has had had in the past is now gone and he has a responsible employment position in Singapore. In my view, the responsibility of the case guardian is to act fairly towards the wife and in a competent way. That must mean the case guardian takes into account what is best for the wife from a subjective point of view knowing all of the facts. It would be absurd for example, if a litigant without a case guardian was required to act without bias because each litigant sees their case through their own subjective eyes.

The court generally seeks the requirements of honesty, knowledge and ability. The person must be legally eligible. A case guardian must have the necessary understanding and capacity to conduct the litigation.

A case guardian cannot have an interest in the proceedings adverse to the interests of the person with a disability (r 6.13 FL Rules and r 11.10 FMC Rules). In *Grace & Grace* (1990) FLC 92-170 the court was not sufficiently confident that the husband's next friend (his mother) could act impartially. The mother bore malice and ill-will towards the wife. She may have had something personally to gain from the litigation between the husband and the wife. The court found that she may have been unable to control her feelings which might distort or intrude on her judgement of the husband's best interests. However, where a case guardian may benefit from the estate of the person, this does not make their interests adverse (e.g. *Kannis & Kannis* (2003) FLC 93-135, *Stanford & Stanford* [2011] FamCAFC 208) and in *Kapilla & Kapilla* [2008] FamCA 210) Johnson JR said (at paras 34-36):

> *It was submitted on behalf of the respondent that the interests of the applicant are adverse to the interest of Mr Kapilla (snr). This was submitted to be on the basis that the proceedings for a decree of nullity of the marriage between the respondent and Mr Kapilla (snr) could have the effect of disturbing a testamentary set of circumstances that is, disturbing the consequences which would flow from Mr Kapilla (snr) dying intestate. These consequences would be that the respondent would inherit the whole of Mr Kapilla (snr)'s estate rather than share such estate equally with the applicant under the will if the marriage was declared to be void. This is because the effect of a valid marriage on the will, as a matter of law, would be to revoke it. It is said that to disturb the consequences of Mr Kapilla (snr) dying intestate would be adverse to Mr Kapilla (snr)'s interest.*
>
> *With respect ... this is a creative submission. But in my view it confuses the interests of the respondent with those of the applicant. Disturbing the consequences which would flow from Mr Kapilla (snr) dying intestate would appear to be adverse to the respondent's interest. But I am at a loss to see how such could be adverse to Mr Kapilla (snr)'s interest.*
>
> *In my view, to take action to ensure the proper status of Mr Kapilla (snr) and to endeavour to achieve his wishes concerning the distribution of his estate would be consistent with, not adverse to, his interest.*

Cronin J in *Anton & Malitsa* (No 6) [2009] FamCA 623 said (at para 2):

> The role of the case guardian is an invidious one in the sense that the person in taking on the decision-making responsibilities of the litigant whilst having to ensure that their own interests do not conflict with those of the litigant. That means that the case guardian has to make decisions which, are often unpalatable to the individual litigant.

A friend or nominee of the other party should not be appointed. Preferably, the case guardian is a relative or friend of the party needing the case guardian. In *Stellard & Dresdon-Stellard* [2010] FamCA 971 the wife wanted her friend of 25 years. The husband opposed appointment of the friend. O'Reilly J said (at para 26) that it was:

> important... that the wife enjoy the trust and confidence in any person who is to have the role of giving instructions on her behalf to a lawyer...the circumstance that the wife does not have the capacity to give instructions in the case to a lawyer does not mean that she does not have capacity to nominate her choice of guardian.

In *Winch & Winch (No 2)* [2010] FamCA 461, the applicant was the Public Trustee of Queensland. It was appointed as the guardian for the 90 year old husband by the Guardianship and Administration Tribunal of Queensland ("GAAT") on 4 April 2006. The Public Trustee sought legal advice as to whether consent orders made in the Family Court on 12 January 2006 (the husband then had his daughter as his case guardian) protected the husband's interests. On 24 March 2010, the consent orders were set aside by consent pursuant to s 79A(1A). Adult children intervened in proceedings (including the child that was previously the husband's case guardian). The wife was 89 years old and had capacity. The parties agreed in principle to a 50/50 division.

The husband instituted property proceedings in September 2005 at a time when the GAAT later found he lacked capacity to revoke a power of attorney. The decision to appoint the adult daughter as case guardian ignored whether she was an appropriate person. Murphy J said (at para 56):

> Given the history of conflict within this family and its dysfunction, and the potential for one or more of the adult children, including R, to benefit (indirectly) from any s 79 orders being made, the point is, with respect, well made.

The legal representative acting for a person with a disability may be appointed if there is no one else (e.g. *Ex parte Shearer* [1949] QWN 41; *Hines* v *Phillips* [1906] VLR 417 at p 420). This is undesirable as the case guardian has the responsibility to accept or tax the solicitor's itemised costs account.

In *Willshire & Willshire* [2009] FamCAFC 130, the Full Court was concerned that the husband's solicitor had been appointed as the husband's case guardian in the absence of availability of a private person or government appointment saying (at paras 13–15):

> We cannot leave this appeal without commenting on the circumstance of the husband's own solicitor being appointed as the case guardian. That is highly unusual and indeed concerning, but it was brought about by the absence of any other person or any relevant entity or authority to take up the appointment. A request had been made by the registrar to the Attorney-General pursuant to r 6.11 of the *Family Law Rules* but no nomination had been made.
>
> Unfortunately it is a common occurrence for there to be no person, entity or authority available to take such an appointment. Presumably for State entities such as Public Trustees or Public Advocates it is a question of costs, but they are the obvious choice to take up such an appointment where there is no available alternative.
>
> It would be highly desirable, in our view, if the Attorney-General was able to initiate discussions for arrangements between the Commonwealth and State

> Governments which provide for a suitable case guardian to be appointed for a person in the position of the husband here where there is no alternative available. It is entirely unsatisfactory that the husband's own solicitor should be placed in the position where he is appointed as the husband's case guardian. They have entirely different roles in the conduct of litigation.

It is usually preferable that any person already appointed as the manager of the affairs of a party takes on the role of case guardian. This person has an advantage over another potential case guardian because they directly control the assets of the person with a disability and can give a receipt or a discharge without reference to another person. The position and powers of state and territory public trustees were discussed in *Myers & Myers* (1984) FLC 91-506 and *Public Trustee (SA) and Keays* (1985) FLC 91-651.

Powers and duties of a case guardian

A case guardian may apply for a divorce on behalf of a person with a disability, but the circumstances in which a court is satisfied on evidence presented by a case guardian that a marriage has irretrievably broken down are likely to be rare (*Price & Underwood (Divorce Appeal)* (2009) FLC 93-408).

In *Nabers & Nabers* [2010] FMCAfam 69 a litigation guardian appeared on behalf of the husband at a Conciliation Conference and at a hearing, before being removed some months later. The husband had a number of complaints about the manner in which the litigation guardian represented him. At the final hearing the husband sought that a different value be ascribed to a property the value of which had been agreed by his case guardian. Demack FM found that the husband was bound by the contents of the notation as to the property value. The litigation guardian, having been properly appointed and having briefed Counsel, was able to compromise the issue.

The duties of a case guardian were discussed in *Read* v *Read* [1944] SASR 26 at pp 28–29. This passage was quoted favourably by the Full Court of the Family Court in *Kannis & Kannis* (2003) FLC 93-135 (at p 78,261):

> [A] person who accepts the duties of guardian ad litem does not do so ... as a matter of form. A guardian ad litem...represents that person before the Court, and it is his duty to see that every proper and legitimate step for that person's representation is taken. He has got to give his mind to it, and decide for himself upon the material put before him what course of action to take ...

Despite the case guardian's functions and powers, the person with a disability is still the party to the proceedings, not the case guardian. If the case guardian becomes a significant witness about facts in dispute, there may be a conflict between the interests of the case guardian and the person with a disability. The appointment of a different case guardian may be appropriate.

The FL Rules provide some guidance as to how a case guardian or litigation guardian should conduct themselves. A case guardian:

(a) is bound by the FL Rules
(b) must do anything required by the FL Rules to be done by the party
(c) may, for the benefit of the party, do anything permitted by the FL Rules to be done by a party
(d) if seeking a consent order (other than an order relating to practice or procedure), must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party's best interests (r 6.13(1)).

In addition, both the case guardian and the person with a disability are bound by the duty of disclosure (r 6.13(2)). The Full Court in *Kannis & Kannis* confirmed that the case guardian's obligations included that duty. This was cited in *Abbott & Langton* [2010] FamCA 1128.

Under the FMC Rules a litigation guardian:

(a) must do anything required by the FMC Rules to be done by the party; and
(b) may do anything permitted by those Rules to be done by the party (r 11.09(2)).

In *Keyes & Keyes* [2009] FMCAfam 347 a litigation guardian was appointed by consent for the husband, on the basis of evidence provided by the husband's treating doctor. The case guardian was an adult daughter of the marriage. The doctor stated that the husband suffered from alcohol abuse and alcohol dementia. The husband was unable to give any evidence.

One of the issues was the nature and extent of the litigation guardian's obligation to ascertain the husband's financial affairs, and then to properly disclose them. A significant difficulty was the litigation guardian's limited knowledge.

Altobelli FM found that a litigation guardian is under the same duty of disclosure as any other litigant and must take an active rather than a passive role. Otherwise, the court may be asked to infer or find that there has been non-disclosure by the party represented by the litigation guardian. He cited with approval paras 23 - 27, and 32 - 33 of the Full Court of the Federal Court in *L v Human Rights & Equal Opportunity Commission* [2006] FCAFC 114 about the operation of the relevant FMC Rules. The Full Court said (at paras 32-33):

> For the future, some general comments ... may be of assistance. In proceedings in which the need for a litigation guardian is a potential issue and the party whose capacity is in question is represented by a legal practitioner, the discharge of that practitioner's duties to their client and to the Court should ordinarily mean that a litigation guardian will be appointed if, within the meaning of r 11.08(1) the client in fact 'needs' one. If the concern arises on the part of a represented party in an opposing interest, that party may be expected to raise the issue before the Court. In either case, it may be expected that, as a practical matter, medical evidence bearing upon the issue of 'need' will be placed before the Court.
>
> Where, as here, the applicant is unrepresented and the respondent does not wish to raise any point about competence but the court nevertheless has serious doubts about

> the applicant's capacity, the court should consider of its own motion the factual issue of 'need'. In such a case the court should, of course, raise the issue squarely and should give the applicant and any other affected party a proper opportunity to be heard and to place relevant material before the court. Whether, in the absence of medical evidence as to capacity, the court could be satisfied of the 'need' such that it should act on its own motion ... to appoint a litigation guardian will of course depend upon the circumstances of a particular case.

Altobelli FM was not satisfied that the litigation guardian had undertaken the enquiries that were reasonable and necessary. She held a Power of Attorney, had seen her father's accountants and solicitors and was aware of the liquidators. He said (at paras 29-31):

> the litigation guardian's cross-examination revealed that she made no enquiries about the correctness of the Report as to Affairs ...even though she personally signed it as the husband's attorney pursuant to a Power of Attorney. She made no enquiries about the state of affairs of the business. Even though she had a power of attorney from her father she did not consider her role to be involved in the management of her father's affairs, even though she knew him to be an alcoholic at the time. She believed that the responsibility for management was on her father's solicitors and accountants. In her evidence she indicated that she did have knowledge about some of the issues confronted by her father, the husband in these proceedings...
>
> The relevance of this evidence is this. By the time the litigation guardian was appointed she was certainly no total stranger to her father's financial affairs. At the very least she knew who his major advisers were. Thus she was cross-examined about what enquiries she had made with the accountants, liquidators and even her father, after she was appointed litigation guardian. The answer was none with accountants and liquidators, and nothing relevant as to disclosure with her father... She had made no enquiries at all prior to the week immediately before the hearing because she didn't think it was necessary to do so. The litigation guardian thought that "on liquidation it was all over". She didn't ask her father whether he received anything from the liquidation. All she knows about her father's financial circumstances is that he had a bank account into which his pension is deposited. In cross examination she agreed that she did not ask her father about his bank accounts. She agreed that she did not talk to her sister or her sister's husband...about their involvement in the business...
>
> From the litigation guardian's evidence I conclude that she perceived herself as playing an entirely passive role as litigation guardian. If she had a duty of disclosure, she seemed very much oblivious to what this meant. The court is far from satisfied that she had undertaken the enquiries that were reasonable let alone necessary in the context of a case where non-disclosure seems to have been an issue from well before the hearing date itself.

Despite the finding that the case guardian had not complied with the duty of disclosure, the Court said (at para 69):

> I do not accept the wife's claims that there has been non-disclosure in all the circumstances of this case. A much more likely scenario is the one portrayed in the documents, many of which the wife herself produced to the court. I am left with a lingering impression that the wife knew far more about the issues in this case than she let on. The wife also sought to argue that an adverse inference could be made by the husband's failure to give evidence in the proceedings. His Honour rejected this argument. He noted that the court cannot appoint a litigation guardian unless it is reasonably satisfied that a person lacks capacity. Therefore, by virtue of a litigation

> guardian being appointed, no adverse inference could be drawn about the fact that the husband did not give evidence personally.

In *Starkey & Starkey* [2008] FamCA 962, Murphy J said (at paras 49-50):

> In particular, the case guardians act in the stead of the husband and conduct the proceedings. When bound by orders they incur personal obligations, but they do so as, in effect, the husband. So when, as here, orders permit and proscribe behaviour in and about the running of a business previously run by the husband and wife, they stand in the shoes of the husband in and about the performance of the orders although they are personally bound by the orders.
>
> The primary obligation of the case guardians is to act in the interests of the husband. That being so, it may be that, in doing so, they may, from time to time, act in ways contrary to the interests of the wife. No doubt any such actions taken on behalf of the husband may, as it were, count against the husband (through the case guardians) in terms of any ultimate findings or orders in the substantive proceedings.

This paper primarily deals with case guardians seeking maintenance and property orders. However, a case guardian can seek parenting orders. In *Lambman & Lambman* (No 2) [2011] FMCAfam 496 the mother's sister was appointed as the mother's case guardian. The mother only had a short time to live and the sister applied (in her role as case guardian or as a party in her own right) for orders to facilitate time between the mother and 2 boys aged 10 and 11. The boys and the father opposed the orders for spending time but the Federal Magistrate made orders regardless. A case guardian can also apply for a marriage to be annulled. Such as in *Kapilla & Kapilla* [2008] FamCA 210 the husband remarried his divorced wife secretly when the medical evidence was that he lacked capacity to have been an active, informed participant to marriage. A case guardian can also apply for a divorce in circumstances where prior to the period when the husband became unable to manage his affairs he had communicated to the wife his desire to separate and unsuccessfully applied for a divorce (*Price & Underwood* (*Divorce Appeal*) (2009) FLC 93-408)).

Outcomes of some recent cases

In *Richardson & Richardson* [2010] FMCAfam 829 the husband was involved in a motor vehicle accident and sustained a brain injury, leaving him a non-verbal quadriplegic. A professional administrator was appointed as litigation guardian. The accident occurred about 15 years previously, whilst two of the children of the marriage were young and the wife was pregnant with a third. The Federal Magistrate found that the wife's contribution as a parent was significant, and she received a 10% adjustment in her favour for this.

The husband's needs were relatively few and simple, and he was able to save from his income. He had been in a nursing home for 5 years but for the past 9 years had been living with his parents. The wife received a further 10% adjustment for s 75(2) factors. The asset pool of about $350,000 was divided 70/30 in favour of the wife.

In *H & H* [2002] FMCAfam 237 the wife applied through her litigation guardian (her sister) for a property settlement. The wife's medical condition confined her to a wheelchair and required full-time nursing care. She was in a nursing home. She had speech difficulties, loss of memory, and was paralysed on the right side of her body. This illness came on suddenly, approximately 6 years into a 10 year marriage. The child of the marriage was 6 months old at the time of onset.

The wife received a disability payout of $83,995. The Federal Magistrate considered that the husband's care of the child since the wife's illness should be given considerable weight, and assessed contributions as 60/40 in favour of the wife. As to s 75(2) factors, the husband received an adjustment of 2.5% in his favour. This was mostly due to the husband's ongoing obligations for the care of the child of the marriage and his other children.

In *Palmer & Palmer* [2009] FMCAfam 987 the parties separated in 1997 and were divorced in 2005. Final orders were made in February 2008, however they were successfully appealed by the husband and the matter was remitted for re-hearing.

In November 2008 the wife suffered a stroke, and a litigation guardian was appointed. As a result of her incapacity the wife was unable to give evidence at the final hearing. It was agreed that the final hearing take place on the papers, with no oral testimony. In the 12 years post separation the wife made all the mortgage payments. Howard FM assessed contributions as 65/35 in the wife's favour.

As to s 75(2) factors, notwithstanding the wife's stroke, the husband argued that there should be no adjustment as both parties were elderly and it was foreseeable that the husband would also require care and assistance in the not too distant future. The wife sought 10-15%. The Federal Magistrate found that as the wife was currently in need of assistance, an adjustment of 5% should be made in her favour.

In *March & March* [2012] FMCAfam 18 a litigation guardian was appointed for the respondent husband, being a family friend. The husband had a congenital intellectual disability, and it was accepted, among other things, that he was just short of being retarded, had a personality disorder, had difficulty expressing disagreement with others, was very easily manipulated, was unaware of financial matters, and was unable to live alone.

During the marriage and after separation the wife sent approximately $104,000 to the Philippines. The wife argued that these funds were sent to her family members with the husband's full consent, and therefore should not be added back to the pool. The husband's litigation guardian argued that the husband did not have the capacity to understand financial matters and was unable to give informed consent. This was supported by the husband's evidence such as that 500 cents is more than $5, there are 7 weeks in a month and that he

could not tell the time. FM Riley accepted that the husband did not have the capacity to give consent. The husband worked and there was no adjustment for his future needs

Does there need to be a separation?

It has generally been accepted that under the FLA there is power for the Court to make orders in relation to married couples for property and spousal maintenance even if the parties are not separated. The leading case is *Sterling & Sterling* [2000] FamCA 1150. However, Kay J gave a strong dissenting judgment in which he referred to the Court's obligation to protect the institution of marriage under s 43 of the FLA.

The same principle does not apply to de facto relationships where the primary "de facto financial cause" in s 4(1) refers to "proceedings between the parties to a de facto relationship with respect to the maintenance of one of them after the breakdown of their de facto relationship". Orders for property or maintenance cannot be made unless a de facto couple is separated.

Section 79(8) gives the court the power to continue proceedings if before property settlement proceedings are completed one party dies if it is still appropriate to do so. Proceedings cannot, however be commenced. If both parties die, the proceedings cannot continue (*Whitehouse & Whitehouse* (2009) FLC 93-415).

A good example of the blurring of a physical separation due to illness or injury and a legal separation occurred in *Stefanovski & Stefanovski* [2012] FamCA 284. The parties physically separated in April 2004 following the wife suffering an intracerebral haemorrhage requiring surgery and a prolonged stay in ICU. She was comatose for 8 weeks. The marriage did not break down until early 2006 when the wife's family and husband had a dispute about the management of the wife's affairs. The husband held the wife's power of attorney. The wife's family instituted proceedings in the Guardianship Tribunal and her affairs were placed in the hands of the Office of the Protection Commission. Kent J found (at para 24) that it was "at that point, in early 2006, that it can be said that the marriage broke down irretrievably". An interesting finding in the light of *Stanford*.

The guardianship order was revoked in May 2008 and after that her financial affairs were managed by the wife with family assistance. She had a hospital bed, a wheelchair and other physical aids. She also had respite care of approximately 25 hours each week which gave her 2 hours of assistance each morning and each night. The wife's needs were summarised (at paras 164, 166-7):

> The medical evidence...leads to the conclusion that at the age of 53 years, as she now is, there is no prospect for the Wife of ever returning to any remunerative employment. She is currently reliant upon the support of her family and a part disability pension.

> She will require aids and equipment and daily assistance for the rest of her life... The medical evidence is that treatment for that condition is likely to be funded in the public system, but it seems to me that some regard must be had to the prospect of the Wife having to fund some of her needs in the event that her condition reaches the position that she requires more substantial nursing or quasi-nursing assistance. ... the Wife is already in the position of having to fund a total of approximately $275.00 per week...
>
> Whilst it is to be hoped that publicly-funded schemes remain accessible to the Wife to provide the assistance referred to, it cannot, in my view, be assumed that the Wife will always have access to such assistance or provisioning or that her needs will remain static given the evidence as to the progression of her illness.
>
> Whilst it may be assumed that the Wife is more likely than not destined not to enjoy a life expectancy normal for a female of her age, part of the medical evidence refers to her requiring "lifelong" treatment and assistance and does not positively assert a significant or any reduction in the Wife's normal expectation of life.

After finding that contributions favoured the husband 60/40, Kent J made a $30,000 adjustment in favour of the wife for s 75(2) factors. An order was made for periodic spousal maintenance of $375 per week.

In *Stanford & Stanford* [2011] FamCAFC 208 the Full Court had to determine whether or not an order for property settlement could be made where the marriage was still intact but there had been a physical separation.

The husband, through his case guardian, appealed to the High Court. Attorneys-General for the Commonwealth, New South Wales and Western Australia intervened. The hearing was held last Tuesday, 4 September 2012. A detailed chronology adapted from the chronologies filed on behalf of the husband's case guardian and the wife's legal personal representatives is at pages 40-44 of this paper. Slabs of the submissions and a summary of the High Court transcript are at the end of the paper.

At the first hearing in the Full Court the wife was 89 years of age and the husband was 87 years of age. The parties were married in 1971 and had therefore been married for 40 years. They had both been married before and each had adult children from their first marriages. For 37 years they lived in the husband's home. The wife suffered a stroke, was later admitted into full time residential care and could not return to reside in the home with the husband. She also suffered from dementia. The husband continued to reside in the home and wanted to continue to do so. Although a physical separation was forced upon them, the husband said that they were still in a marital relationship. He said he continued to provide for the wife and had placed $40,000 into an account for her use. He visited her 3 times a week at the care facility.

The application for property settlement was initiated by the wife's case guardians agreed that the wife needed funds. The Magistrate ordered that the husband pay to the wife the sum of

$612,931, accepting this order was likely to result in the husband having to sell the home. The order was made under s 79 using the four step process set out earlier in this paper.

The Full Court allowed the husband's appeal. Although the Magistrate clearly had the power to make a final property order, she failed to consider the alternatives and had wrongly exercised her discretion. The Full Court concluded (at para 122) that in such cases it is important for the Court:

> to be clear that there is no requirement that the Court make a final order for property settlement that would alter the interests of parties in property on a final basis especially when the marriage itself is not at an end.

The Full Court found that, in determining what was just and equitable in the circumstances, the Magistrate did not give sufficient regard to:

- The effect on the husband of requiring him to sell his home of 48 years
- The potential effect on the husband of the wife predeceasing him
- Why the financial issues of the parties needed to be finally determined when the proceedings could be adjourned without prejudice and continued later
- Why an order for periodic maintenance was not appropriate

Later events were reported in *Stanford & Stanford* [2012] FamCAFC 1. The wife died and the proceedings were continued by the wife's daughters under s 79(8)(a). The husband wanted either the wife's application for property settlement to be dismissed under s 79(8) or that the application be stayed permanently. He argued that an order for property settlement was not just and equitable because (at para 26):

> (a) The wife did not take any step to end her marriage.
>
> (b) The wife took no step to assert a desire to pursue a “property based entitlement”.
>
> (c) The wife took no step to initiate proceedings for property settlement (or seek any other orders under Part VIII of the Act) herself in the Family Court.
>
> (d) The evidence presented at trial was that both parties kept their finances separately from the other. There is no evidence that the wife would ever have sought to recover any “contribution based entitlement” to the assets of the parties’ marriage.
>
> (e) The manner in which the parties chose to manage their finances and property during their lengthy marriage should be respected and each should be entitled to devise it in the manner which they deem appropriate.
>
> (f) Given the Full Court’s finding ... that “*the evidence revealed that a capital sum was no longer required to place the wife in an aged care facility suitable for her needs*”, the proceedings for property settlement were not related to anything but a desire by the beneficiaries of the wife’s Will to ensure the estate was enlarged.
>
> (g) If obtaining funds to improve the wife’s care was the wife’s Case Guardian’s motivation, as was suggested by them at trial, an order for property settlement is no longer required because the wife has died.

> (h) Given that the Court is exercising jurisdiction under the Marriage Power, a claim under the Act for property settlement ought to be initiated by a party to a marriage, or for their benefit and not simply for the benefit of a potential beneficiary.
>
> (i) In circumstances where it is common ground that the consortium vitae has not broken down, the Court should be very reluctant to make any order under Part VIII (expect for an order for spousal maintenance in an appropriate case) unless there are compelling reasons to do so.

Referring to Kay J in *Sterling* the husband's case guardian submitted that it was not appropriate to make a property settlement order as at para 20 of the earlier judgment cited at para 31 of the 2012 judgment):

> (a) The parties had an intact marriage.
>
> (b) There is no evidence that the wife took any steps to determine the marriage relationship.
>
> (c) There is no evidence that the wife ever made any attempt during the marriage to alter the parties' financial arrangements, so as to increase her estate for the benefit of her heirs in the event she predeceased the [husband] (for example by becoming a co-owner of the former matrimonial home). The [husband's] evidence was that the wife advised him in 1994 that she would make a will leaving her worldly goods to her daughters, which was a matter be [sic] accepted ... The evidence of the [husband] in light of the wife's intention regarding her estate was, that at best, his wife should only ever be entitled to a life tenancy in the former matrimonial home, together with payment for her expenses ...
>
> (d) On 23 April 1974 (i.e. during the marriage) the wife gifted her former matrimonial home from her first marriage, to one of daughters (sic). The evidence at trial was that the daughter subsequently sold the property and applied the sale proceeds for her own purposes ... The residue of the wife's estate (i.e. her savings) has been utilised by her daughters to fund this litigation. In one sense, the transfer of the wife's property to her daughter could be seen as a payment of an inheritance before the death of the donor.
>
> (e) The wife herself did not seek an alteration of property interest in the Family Court. It is however, conceded that the Case Guardians sought orders for property settlement on her behalf.
>
> (f) The wife will not now benefit from an order for property settlement.
>
> (g) The people who stand to benefit are the same people who decided that the parties' marriage was at an end, commenced proceedings for property settlement and are continuing to pursue them after her death, notwithstanding their evidence as to their apparent motives to commence and pursue the proceedings.

The wife's legal representatives asked the Full Court to make orders that the husband pay to the wife's legal representatives the sum of $612,931 being 42.5% of the agreed asset pool, with payment due on the first of either the sale and settlement of the former matrimonial home or the death of the husband. The Full Court made this order.

The Full Court relied on the High Court in *Fisher v Fisher* (1986) 161 CLR 438 saying (at paras 53-4, 60):

> We are mindful of the fact that this is a case in which the marriage of the parties had not broken down when the proceedings were commenced and that the wife's claims were brought in order to provide her with access to funds which it was asserted she required for her support. Her death now removes the need for those funds. But in the course of the proceedings, the wife established that she had made contributions to the assets enjoyed by the parties during their long marriage, particularly the former matrimonial home, and in our view it continues to be appropriate to allow the wife's estate the benefit of a share of the property in which she has established an interest...
>
> In the circumstances of this case we are of the view that although an order for property settlement requiring a payment to the wife's estate should be made, the timing of such disposition is important in order to do justice and equity to the husband under s 79(2) of the Act...
>
> It is then a matter for the husband and his family to decide whether they wish to retain the home after his death, sell it earlier or at any other time pay the sum ordered to the personal representatives for the wife. Obviously, this order protects the husband from a need to move from his home earlier than he would wish, would allow for a capital sum to be provided should it become necessary for his care and avoids an incorrect assessment of the husband's current and future needs. The fixed sum order avoids any further arguments in relation to the value of the home.

However, *Fisher V Fisher* involved the continuation of proceedings commenced following separation and examined the validity of s 79(8).

The husband was granted leave to appeal to the High Court. This was heard on 4 September 2012. The Attorneys-General for the Commonwealth, Western Australia and New South Wales were given leave to intervene but did not make oral submissions. In the absence of the judgment of the High Court and in the limited time available to the matter since the parties' submissions were filed, excerpts from the written submissions are set out below. A summary of the oral submissions follows.

Except from written submissions to the High Court in Stanford.

Appellant's submissions in the High Court

The central issues according to the Appellant are (para 1 of Appellant's submissions):

a) The proper construction of the definition of "matrimonial cause" in s 4(1)(ca).
b) The proper construction of s 79 of the FLA and its limits regarding making property orders in favour of strangers to the marriage.
c) The extent to which the discretion available to the Full Court under ss 79(4) and 79(8) is circumscribed and not an unlimited discretion.
d) The constitutional limits on the ambit of s 79 as they affect the construction of that provision.
e) Whether the Full Court interpreted s 79 too broadly, in particular, in ordering the continuance of prior proceedings.
f) The encroachment into the State jurisdiction for inheritance by the Full Court's interpretation of s 79(8).
g) The proper interpretation of s 43(a) of the *FLA* as a statement of policy guiding the exercise of jurisdiction.
h) The validity of the general principles created by the FLA by the Full Court in this case where there was an intact marriage:
    i. That the Court may be utilized to make orders for final property settlement.

ii. That the Family Court may be utilised by beneficiaries of an estate, who are guardians of an incompetent person to seek orders for property settlement to enrich the estate, where there was an intact marriage and the incompetent spouse did not provide instructions to commence proceedings during their competency.

The Appellant also relied on:

28. Marriage as an institution cannot be maintained as an exclusive union by court order. But, the obligation to recognise the importance of the institution is contained in s 43 of the Act and it is submitted that entering into the relationship in order to alter the property interests of the parties whilst the relationship was subsisting is a complete anathema to the institution of marriage.

33. The Appellant first submits that unless there is a breakdown of the marriage and a genuine dispute between the spouses, it is beyond the power of the Court to make orders pursuant to s 79 of the Act. For the Court to make orders otherwise is the antithesis of protecting marriage as a basic social institution of society and constitutes an intrusion into a unique relationship incapable of precise evaluation but clearly contrary to s 43 of the Act.

35. Section 43 of the Act gives primacy to the need to preserve the institution of marriage and the need to give the widest possible protection and assistance to the family as the natural and fundamental unit of society. This construct informs the proper interpretation of s 79.

37. …The importance of the breakdown of the marriage was emphasized in *Doyle & Doyle (deceased)* (1989) FLC 92-027 (Lindenmayer J) at p 77,398:

> It must be presumed, from the enactment of s 79(8) that the legislature intended that one party to *a marriage which has broken down* to the point that proceedings have been commenced for orders altering the interests of the parties in property … (Emphasis added)

46. ...The Appellant contends the proper answer is *"no"* to each sub-issue, except c) and f):

a) On its proper construction, does s 79(1) confer on the Family Court power to make orders that the Appellant provide a substantial capital fund to his late wife's estate where:
   i. There was no dispute or controversy between the husband and wife relating to property while the marital relationship was still subsisting; and
   ii. the wife's daughter, as the case guardian, had initiated and prosecuted a claim on behalf of the wife for monetary support said to arise from the wife's "need"?
b) Can s 79, read with s 39 of the Act, on their proper construction be read as authorising the Family Court to make such an order?
c) If the Magistrate lacked jurisdiction to make an order pursuant to s 79 on its proper construction, was the absence of the same fatal to the capacity of the Full Court to make such orders.
d) Was the Full Court empowered by s 79 to make orders of the kind dated 19 January 2012 when the marriage was at an end, due to the death of the wife?
e) Were the proceedings before the Full Court a true "continuation" of the proceedings that had been commenced before the Magistrate, on behalf of the wife for her benefit, given that the true nature of the latter proceedings was for the enrichment of the wife's estate and to encumber the husband's assets in which he had a legal interest?

f) Upon its proper characterisation was the manner in which the Full Court proceeded, by making orders intervening in an intact marriage to readjust the financial relationship maintained by the parties without complaint, acting beyond power?

49. Even if the wife's interest in the estate can be cast in terms of a moral obligation owed to the mother, that obligation terminated upon her death. The entitlement of the daughters as beneficiaries of the mother is a completely fortuitous matter. They have no moral entitlement themselves under the Act; rather, to the extent that they have inheritance expectations the appropriate medium to pursue them is by way of an application under the *Inheritance (Family & Dependents Provision) Act 1972* (WA) ("Inheritance Act").

52. It is submitted that having regard to the changed circumstances consequent upon the death of the wife, the proceedings when undertaken under s 79 *by the Full Court* could no longer be described as "proceedings *between the parties to a marriage*." This is even if the proceedings might have been so characterised prior to that point. The marital relationship having ended upon the wife's death, the fundamental pre-condition underpinning those proceedings, in so far as they were directed to benefitting the wife, lapsed and they became defunct.

57. S 79(1) is deficient in authorising proceedings of the kind presently entertained by the Full Court, since it is confined to making property orders for the benefit of *either or both of the parties* to the marriage *or a child of the marriage*. Given the Appellant's wife's death, she cannot benefit from any order in the present application, nor can the applicants, since they are not children of the marriage. ...

61. Given the *different character* of the application after the wife's death, it cannot be said that the current proceedings were a "continuation" of those originally instituted on behalf of the mother. *Seems a weak argument*.

62. Although the Full Court purported to continue those pre-existing proceedings the nature of those proceedings had changed. After the wife's death they were pursued effectively as a distinctly disparate matter in the nature of an inheritance claim. *Relevant only in terms of order under s 79(8)*.

69. Analysed in terms of proximity of the interests of the wife's children in the marital property vested in the Appellant, there is an *insufficiently close connection* with the marriage or a matrimonial cause involving that marriage. The lack of a sufficient connection can be exemplified by the *disproportionate* interference that the orders of the Full Court have upon the Appellant's rights to dispose of his property upon his death as he sees fit.

71. It has previously been submitted that a *categorical distinction* can also be drawn between the original and the current proceedings. While the former had a direct connection with one of the parties to the marriage the latter proceedings are not concerned with any antecedent rights *of the actual applicants* arising from the marital relationship that continued after the wife's death. The change in status, from a daughter acting as case guardian to an applicant in her own right is *more than a mere procedural adjustment* allowing her to continue to vindicate her mother's interest in the husband's estate. It is *substantively* significant. This is obscured by the fact that, ostensibly, she is acting in both instances as the personal representative *of her mother*. *Not sure how the High Court reacted to this argument*.

72. These qualitative differences in the *nature* of the respective actions, the *property interests* entailed and the *status* of the parties to the initial and subsequent proceedings represent a difference in the correct *characterisation* of the current matter that removes it from support under s 51(xxi) and (xxii). It is not a proceeding arising

from the marital relationship, nor one involving divorce or a matrimonial cause, in their constitutional sense.

The appellant distinguished the High Court authority of *Fisher v Fisher*.

80. The factual context of *Fisher* evinces the following differences with the current appeal. (*These seem to have been accepted by the High Court or in any event, seem to be arguable*).

(a) The parties were separated and the marriage irretrievably broken down.
(b) The wife gave instructions to commence proceedings for property settlement.
(c) The application of the wife was from the start one aimed at a permanent property division to last beyond the dissolution of the marriage.
(d) The legal personal representative of the wife who was substituted as a party (respondent) to the application upon the wife's death was a son of the marriage.

81. Gibbs CJ held (520-521) that s 79(8) was valid because the Court was concerned only with proceedings which arose out of the marital relationship. Importantly, he recognized that a limiting constraint on the making of an order was the precondition that the Family Court had to be of the opinion it was appropriate to make an order with respect to property. Approaching the matter as one of *closeness of connection*, he held in the circumstances that there was a *sufficient connection* to make the provision a law with respect to marriage, even if strangers to the marriage might benefit. He qualified this with the observation that the proceedings were apparently well founded in that they would have resulted in the making of an order *if the deceased party had not died*. That would be true in the current proceedings if it were the husband had died and the wife survived.

82. Three things are pertinent regarding the holding of Gibbs CJ; first, that it concerned a situation where, as a matter of proximity, a son of the marriage stood in his mother's shoes, secondly, the requirement of 'appropriateness' circumscribed the power, and thirdly, there was a common substratum of factual issues between the interests pursued by the wife at first instance and her personal legal representative subsequently. Translated into his Honour's language, the Appellant submits these proceedings were not "well founded" insofar as they were originally based on the wife's supposed need for property settlement, which of necessity could not survive her death.

83. Mason and Deane JJ held 523-524 that read with the qualification in s 79(8)(b) the provision was valid. Their Honours expressed reservations if the proceedings by the legal personal representative in some way gave the proceedings *a different character*. They found the instant proceedings continued to have their initial character as 'arising out of the marital relationship'. They saw it as also relevant that the *purpose* of s 79 as defined in that case was directed to altering interests in matrimonial property with a view to finally determining the financial relationships between the parties to the marriage and *avoiding further proceedings between them*. The alterations to property were *to endure beyond the determination of the marriage relationship*; indeed, they are generally made after the relationship has ended. Those observations are particularly pertinent in relation to divorce proceedings.

84. Brennan J (526-528) observed that while the language of s 79(1) confined the Court's discretion to the lifetime of the parties s 79(8) permitted orders to be made after the death of one of them provided the proceedings had commenced before the death. Proceedings could not be "commenced" by an original applicant's legal personal representative after the death. In the circumstances, it can be argued that the nature of the 'continuance' disguises the fact that the application for the Full Court is substantively one brought *de novo*.

86. It must be conceded that on the face of the reasons of Dawson J, expressing his view broadly, they are, in terms, against the Appellant. (528-531, Dawson J). However, even his judgment proceeds on the basis that there is a continuum of the subject matter of the proceedings so that the death of an applicant does not cause the application to abate. His judgment does not contemplate an alteration in the character of the original proceedings.

87. No decision of the High Court, including *Fisher*, has therefore authoritatively determined, otherwise, that Parliament can validly make a law directed to altering property rights of a party to the marriage in favour of persons who are not children of the marriage.

89. Given the comparatively drastic outcome of the Full Court's orders of 19 January 2012 in depriving the Appellant of his right to use or dispose of his property as he sees fit, in favour of persons whose only connection with the marriage is indirectly and remotely by virtue of their relationship with the deceased wife of the Appellant, it is submitted that, while s 79(8) is well within constitutional power, the exercise of discretion by the Full Court has transgressed the statutory limits of that provision, as construed *Respondent's submissions* by reference to the constitutional power under s 51(xxi).

Respondent's submissions

The central issues according to the respondent are:

1. Should s 79 of the *Family Law Act 1975* (Cth) (the Act) be construed to apply:

    (a) Only to spouses who have 'separated' within the meaning of Part VI of the Act; or

    (b) In at least some circumstances where the parties have not 'separated' but there is a dispute with respect to the property of the parties to the marriage or either of them, arising out of the marital relationship?

2. If the answers to question 1(a) is no and to 1(b) is yes, then did the Full Court of the Family Court of Australia (the Full Court) err in its orders made on 19 January 2012 altering the property interests of the parties?

11. ...In the definition of 'matrimonial cause' in s 4(1) of the Act neither paragraph (c), in the case of maintenance, nor paragraph (ca)(i), in the case of property settlement, imposes a requirement that spouses be separated before an order is made.

14. Having regard to the principle in s 43(1(a), relevant matters are:

    (a) the unintentional but material alteration in the marital relationship at the time of the commencement of the proceedings;

    (b) the involvement of the guardian of the wife and then the guardian of the husband into the relationship between the husband and wife; and

    (c) the death of the wife before the making of orders on 19 January 2012.

15. If the Court is attracted to the contention of the Appellant that a controversy requiring judicial resolution is essential for s 79 of the Act to be engaged, a controversy had developed before the case guardian for the wife, acting in her role as agent of the wife, commenced these proceedings on 17 August 2009. That controversy was sufficient to justify the proceedings being commenced and being pursued through the various stages they have, to reach this point.

17. The proceedings commenced on behalf of the wife sought to engage s 79(1) of the Act. Prior to making final orders under s 79, the Court may also make a number of partial or interim orders before its jurisdiction is 'spent' or 'exhausted' at a final hearing, at which the partial or interim orders may be varied. *Gabel & Yardley* (2009) FLC 93-386; *Strahan & Strahan (Interim Property Orders)* (2011) FLC 93-466 at [113], [132] - [139] and [224] - [226]. The final orders of the Full Court were a 'continuation' of the proceedings of the kind contemplated by s 79(8) of the Act in circumstances where the wife has died.

18. The jurisdiction to make the orders made is perfectly grounded in s 51(xxi) of the *Constitution* and s 79(1)(a) and (8) provides for a power which arises out of the marriage and s 79(8) inevitably operates, and so was clearly intended to operate, beyond the end of the marital relationship occasioned by death. ...

19. There is no pre-requisite for the operation of s 79(8) that the Court identify the beneficiaries of the wife's estate as children of the marriage between the husband and wife. As Mason and Deane JJ said in *Fisher v Fisher* (1986) 161 CLR 438 at 454; [1986] HCA 61, at [8], "It is therefore immaterial that a person other than a party to the marriage may benefit from an order made in proceedings commenced by a party to a marriage who dies before the completion f the proceedings". The proceeding before the Court is not grounded in a claim by a person other than a party to the marriage, even as in *Dougherty v Dougherty* (1987) 163 CLR 278; [1987] HCA 33 the claim by the adult child was not grounded in a different proceeding or matrimonial cause. It makes no difference where, as in this case, the proceedings were commenced by the party's agent, an appointed case guardian, and later continued by that party's legal representatives.

21. An exercise of the discretion of the Court to make an order pursuant to s 79(8) cannot reasonably be said to transgress the limits of that provision found within s 51(xxi) of the *Constitution* merely because property of the parties to the marriage will be transferred to the wife's estate and devolve to her beneficiaries. In this case the s 79(8)(b) order was grounded in the wife's undisputed contribution-based entitlements, assessed under s 79(4)(a, (b) and (c) of the Act, to an agreed asset pool... Such an entitlement was intimately connected to and arose out of the marital relationship.

Submissions of Attorney-General of the Commonwealth

5. The Commonwealth makes the following three principal submissions

concerning the constitutional validity of the property settlement jurisdiction

conferred by the *Family Law Act.*

5.1 First, the marriage power in s 51 (xxi) of the Constitution supports the 20 conferral of jurisdiction to make orders in property settlement proceedings "arising out of the marital relationship", even where that marriage is ongoing. As proceedings "arising out of the marital relationship", they possess a sufficient connection to that head of Commonwealth legislative power:..

5.2 Second, the interposition of a case guardian on the commencement of property settlement proceedings does not take those proceedings outside the validly conferred jurisdiction...

5.3 Third, the substitution of a legal personal representative on the continuation of property settlement proceedings also does not take those proceedings outside the validly conferred jurisdiction; that is, the continuation of property settlement proceedings under the *Family Law Act* and orders made in the continued proceedings are supported by the marriage

power, where the claim arises out of, and therefore has a sufficient connection with, the relationship of marriage...

6. On the construction of the *Family Law Act*, the Commonwealth submits that the principle in s 43 concerning "the need to preserve and protect the institution of marriage" is relevant to the exercise of the property settlement jurisdiction under s 79; however, the principle does not confine the scope of that jurisdiction...

7. Further, the provisions of the *Family Law Act* conferring jurisdiction with respect to property settlement proceedings are not to be read down by reference to the State Inheritance Act, nor are they inconsistent with that Act in the circumstances of the present case...

28. Although s 43(1) (including the reference in paragraph (a) to the need to preserve and protect the institution of marriage) is relevant to the exercise of the discretion in s 79, it does not have the effect of constraining the scope of that power. That is, the subsection does not confine a court's jurisdiction under the *Family Law Act* but sets out principles to which a court must have regard when it exercises jurisdiction under the Act, including under s 79...

28.2 In any event, the mere making of a property settlement order is not, without more, necessarily inconsistent with the preservation of the marital relationship. (The point was made by Gleeson CJ, during the special leave application in *Sterling v Sterling,* that "one way of preserving the institution of the marriage is to make it work fairly to both parties in difficult circumstances"...). The present case, in which the husband and wife remained married until the wife died, notwithstanding the Magistrate's property settlement order, demonstrates that a property settlement between parties to an ongoing marriage need not be inconsistent with the preservation of the marriage

29. The Family Law Act should not be read down to avoid inconsistency with the State Inheritance Act. Where an order made in exercise of the property settlement jurisdiction is within constitutional limits, "there can be no limitation on the Court's powers emanating from the need to preserve the scope of State legislative powers".

32. The State Inheritance Act confers jurisdiction to vary the disposition of a deceased's estate on application by or on behalf of eligible claimants, based on legitimate claims upon the deceased person's bounty, to be satisfied from the estate. It involves a two-stage process of determining whether adequate provision has been made for the claimant and, if not, whether the discretion should be exercised to order that such

provision as the court thinks fit be made out of the deceased's estate. The jurisdiction under the State Inheritance Act arises "upon the death of a testator".

33. The Commonwealth and the State jurisdictions deal with "entirely different problems". While continued property settlement proceedings under the *Family Law Act*, on the death of a party to a marriage, may in truth have a close temporal connection to the disposition of the deceased's estate, that disposition is separate from the alteration of property rights that may reduce or enlarge that estate. That is, "provisions governing the continuation of proceedings ... merely lead to the creation and enforcement of liabilities and obligations binding on the estate, the effect of which is to diminish the value of the estate. There is no inconsistency in the co-existence with these provisions of testator's family maintenance legislation".

34. This Court has, in analogous cases, held that Commonwealth legislation conferring jurisdiction to adjust property interests founded on the marriage relationship is not inconsistent with State legislation enabling persons (including spouses and former spouses) asserting a claim against a testator or an intestate to enforce a claim against his or her estate after his or her death. Matrimonial causes (in the statutory sense of the *Family Law Act*) and testator's family maintenance are "separate and independent legal topics" (*Smith v Smith* (1986) 161 CLR 217 at 242.9)

35. In *Johnston v Krakowski* ((1965) 113 CLR 552). this Court found that the jurisdiction to make orders as to maintenance in a matrimonial cause under the *Matrimonial Causes Act* and the jurisdiction to award maintenance out of an estate under the *Administration & Probate Act 1958* (Vic) were not inconsistent. Rather, the maintenance that could be awarded under each jurisdiction was made:

> "against a different person, in different circumstances, and by reference to different criteria". The fact that one action could only be commenced during the lifetime of a spouse, and the other only upon the death of a spouse was also significant in determining that the provisions were "entirely different".

36. In *Smith v Smith* members of this Court emphasised the distinction between the *Family Law Act's* operation with respect to maintenance agreements and the *Family Provision Act 1982* (NSW), the latter operating "only after the death of a person whose estate ... is sought to be made liable for the maintenance, education or advancement in life of an 'eligible person'

> ..."Justices acknowledged that, in contrast, the *Family Law Act* did not authorise the making of a maintenance order against the legal personal representative of a party, or former party, to a marriage. Members of the Court observed that provisions allowing the continuation of proceedings and enforcement of orders against the estate of a deceased person "merely lead to the creation and enforcement of liabilities and obligations binding on the estate, the effect of which is to diminish the

value of the estate"; and those provisions could co-exist with, and were therefore not inconsistent with, testators' family maintenance legislation of the kind then in issue.

37. On its proper construction, s 79(8) of the *Family Law Act* is in no way inconsistent with the State Inheritance Act. Unlike proceedings under the State Inheritance Act, proceedings under s 79(8) must (relevantly) be proceedings "arising from the marital relationship". The fact that as a result of property settlement proceedings a person other than a party to the marriage may ultimately benefit (through the disposition of the deceased's estate) from an order under s 79(8) is immaterial to the characterisation and validity of s 79(8). This serves to emphasise that s 79(8) and the State Inheritance Act deal with entirely different problems. There is no "direct inconsistency or actual contrariety" between the two statutes, at the very least in the way they apply to the present case. The same reasoning led to the conclusion that there is nothing in the provisions of Part VIII of the *Family Law Act* to suggest that the Commonwealth Parliament intended to mark out and exhaustively "cover" any "field" concerning the provision of maintenance or other benefits for one spouse, or other eligible claimants, out of the deceased estate of the other spouse.

47. The involvement of a case guardian in commencing proceedings does not alter the character of the application for property settlement orders as "proceedings ... arising out of the marital relationship": it does not sever the connection of the proceedings to the marital relationship.

48.3 In conducting the case, the case guardian must, among other things, "do anything required by these Rules to be done by the party" and "may, for the benefit of the party, do anything permitted by these Rules to be done by the party": r 6.13(1)(b) and (c). The involvement of the case guardian, who conducts the proceedings in the interest of the party, does not alter the character of the proceedings so as to take them out of the validly conferred jurisdiction, supported by s 51 (xxi). The property settlement proceedings are still to be characterised as proceedings "arising out of the marital relationship".

48.4 The mechanism of a case guardian is procedural, not substantive; and the person, on whose behalf the case guardian acts, remains a party to the proceedings. The mere involvement of a case guardian does not alter the nature of the proceedings, so as to take the proceedings outside the validly conferred jurisdiction.

53. The validity of s 79(8) has already been determined by this Court. Validity was assumed in *Smith v Smith,* where it was noted that the *Family Law Act* does "not authorise the making of a maintenance order against the legal personal representative of a party or former party to a marriage", but "[p]roceedings with

respect to the property of parties to a marriage or either of them, pending at the death of a party, may be continued by or against his or her legal personal representative".

In *Fisher v Fisher,* the validity of s 79(8) was upheld as a law with respect to marriage within s 51 (xxi).

Submissions of Attorney-General of New South Wales

8. The appellant appears to contend... that there was no *"matrimonial cause"* as defined because, in substance, there was no dispute between the husband and wife relating to property, and the s 78B notice suggests that there was, accordingly, no *"matter".*

9. That contention mischaracterises the nature of the proceedings before the Magistrates Court of Western Australia. Those proceedings were commenced on behalf of the wife against the husband and sought orders under s 79 of the Act regarding the property of the husband and in favour of the wife. The fact that, as a matter of procedure, the proceedings were instituted by a case guardian on behalf of the wife does not affect the fact that, as a matter of substance, the proceedings were commenced on behalf of the wife against the husband.

10. It follows that the proceeding before the Magistrates Court fell within the chapeau of paragraph (ca) of the definition of *"matrimonial cause"* as being *"proceedings between the parties to a marriage"* of the identified kind. The institution of that matrimonial cause gave rise to a *"matter"* under a law of the Commonwealth: *Hooper v Hooper* (1955) 91 CLR 529 at 536.

11. The wording of that chapeau to the present paragraph (ca) of the definition of *"matrimonial cause"* is relevantly identical to the wording considered in *Russell v Russell* (1976) 134 CLR 495, namely *"proceedings with respect to ... the property of the parties to a marriage or of either of them"*

12. In *Russell v Russell,* a majority of this Court held that the then current wording of the definition of *"matrimonial cause"* was invalid insofar as it purported to confer jurisdiction with respect to property matters not ancillary to a proceeding for divorce or for nullity of marriage.

13. As Mason and Deane JJ later explained in *Fisher v Fisher* (1986) 161 CLR 439 at 451.8 (emphasis added):

> The problem with para (c)(ii) of the definition of "matrimonial cause", as it then stood, was that it referred to proceedings with respect to the property of the parties to a marriage or either of them, **without any limitation of any kind.**

14. The Act has since been amended to add the limitations in subparagraphs (ca) (i), (ii) and (iii) of the definition.

15. The limitation which is relevant for present purposes appears in subparagraph (i): proceedings *"arising out of the marital relationship".*

16. It is clear from the wording of that subparagraph and by contrasting it with the wording of subparagraphs (ii) and (iii) (divorce, validity of marriage and annulment) that subparagraph (i) is intended to generally confer jurisdiction with respect to marital property settlement proceedings, subject only to a requirement that those proceedings are capable of being seen as *"arising out of"* the marital relationship (as opposed to, for example, arising solely from contract, tort, equity or the law of partnership: see, e.g. *Dougherty v Dougherty* (1987) 163 CLR 278 at 286.7).

18. In this way, New South Wales does not contend that the jurisdiction conferred by the Act is limited to circumstances which can be described as *"marital breakdown"* but

    (for the reasons discussed below) submits that the existence or otherwise of a *"marital breakdown"* is a matter which bears significance when considering whether and how that jurisdiction should be exercised.

26. Importantly, the relevant statutory context also includes s 81 of the Act....

27. In this way, the evident purpose of s 79 of the Act (which is in Part VIII) 1s, appropriate circumstances, to effect (as far as practicable) a final determination of the financial relationships between the parties to a marriage. That purpose is confirmed by the scheme of the Act generally including ss 79(1B), (!C), (5) and 79A all of which contemplate that making an order under s 79 is a serious and, subject to adjournment, a final course. Equally, once an order is made under s 79, the power of the court to make such an order is *"exhausted"* so that there is no power to make a further s 79 order in subsequent proceedings between the same parties: *Mullane v Mullane* (1983)158 CLR 436 at ...

28. It would be inconsistent with the statutory purpose and previous interpretation of s 79 to construe that section as if it provided the Family Court and other courts with jurisdiction under the Act as general courts of appeal with respect to property related disputes which might arise from time to time within *"happily married"* couples ...

29. Rather, the correct view is that s 79 is ordinarily only exercisable where a marital relationship has come to an end such as where divorce proceedings are pending, completed or contemplated, or where the parties are legally separated in

circumstances where it is appropriate for the parties' financial relationships to be finally determined before divorce proceedings have been completed.

31. But there may be circumstances m which it may be appropriate for the financial relationships between the parties to a marriage to be finally determined even though the legal relationship has not (or is not anticipated to) come to an end.

33. Thus, while it may be accepted that a power is conferred by s 79 to finally determine the financial relationships, arising out of the marital relationship, of parties to a marriage who are physically but not legally separated, mere physical separation will not (without more) ordinarily be enough to justify the exercise of a power under s 79.

34. As Kay J (in dissent) observed in *Sterling & Sterling* [2000] FAMCA 1150 (FamCAFC) at [23] (paragraph break added):

> The attributes of a "normal married life" can still exist even though parties are physically separated in circumstance sometimes within their control and sometimes beyond their control.
>
> Scientists spend years in isolation in Antarctica. Sailors spend months at sea. Prisoners spend years in gaol. Some persons are kidnapped and held as hostage. Some are prohibited from travel due to immigration restrictions or economic circumstances. Yet many of those parties would no doubt still consider that their marriages are subsisting. The attributes of normality in those married relationships have to be measured by different standards to the attributes where the parties are free and able to spend time with each other but chose to go separate ways.

35. Consistent with this, and as Hayne J observed in argument on the successful special leave application in *Sterling v Sterling* ([2001] HCA Trans 445), the existing Family Court authorities supporting the existence of power to make orders in case of physical separation (including the decisions below in the present matter) should not be permitted to: take on a life of its own where it is enough to demonstrate physical separation, ergo property division ...

36. Rather, s 79 should be understood as conferring power to finally determine the financial relationships between the parties to a marriage, but only where doing so is appropriate in the circumstances of the particular case, which cases can be expected to be unusual, even rare.

44. Despite the wife's death, the proceedings continued to be proceedings to create and 20 enforce the wife's rights (if any) under the Act: see, e.g. *Fisher v Fisher* (1986) 161 CLR 438 at 453.9 where Mason and Deane JJ note that s 79 performs *"a dual function by creating and enforcing rights in one blow".*

45. Although the wife's potential rights under the Act effectively devolved to her estate on her death, the proceedings remained proceedings to vindicate those rights (if any). In this regard, it is *"immaterial that a person other than a party to the marriage may benefit from an order ... ": Fisher v Fisher* (1986) 161 CLR 438 at 454.2.

46. Thus, while (as s 79(8)(b)(ii) itself recognises), the wife's death was plainly relevant to the question of what orders (if any) should have been made, the death did not (subject to s 79(8) itself) affect the power to make such orders for the benefit of the wife's estate.

Submissions of Attorney-General for Western Australia

54. The Second Reading Speech refers to "marital breakdown" and "separation". Separation is to be understood having regard to Part VI of the *Family Law Act 1975,* and in particular s 49. It is not understood to be controversial that separation involves a breakdown of the marital relationship and an intention of at least one of the parties to end the marital relationship and some consequential act.

56. Were the conferral of jurisdiction in s 39 of the *Family Law Act 1975,* and the grant of power in s 79, not confined in the manner contemplated in the Second Reading Speech, the breadth of jurisdiction and power would be considerable.

57. The breadth of this scope of operation can be illustrated. If not confined in the manner contemplated in the Second Reading Speech the conferral of jurisdiction in s.39 and the grant of power in s.79 would extend to confer jurisdiction to hear a suit brought by one party to a marriage who wished to (say) sell the family home where the other party did not, but where otherwise the parties were happily married. It would confer jurisdiction to hear a suit brought by one party to a marriage who wished the other to sell property owned by the second party who did not wish to sell it, but where otherwise the parties were happily married. Following *Dougherty v Dougherty Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278 at [7]; see also *Kapoor & Kapoor* [2010] FamCAFC 113 at [60]-[67] (per Finn J). it would confer jurisdiction to hear a claim by a child of a marriage who wished the parents to make provision for him/her out of the assets of the family in a proceeding brought by one party to a marriage who wished the other spouse to sell property, but where otherwise the parents were happily married.

66. It is uncertain whether the *ratio* of *Russell v Russell* is that s.5l(xxi) empowers the Commonwealth to enact legislation conferring jurisdiction on a court to hear proceedings between the parties to a marriage with respect to the property of the

parties to a marriage or of either of them. This question need not be determined in this matter.

67. This matter can be resolved by way of construction of (ca)(i).

68. As a matter of construction of (ca), (i) (like (ii) and (iii)) are words of limitation. Paragraph (i) confines the breadth of "proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them". Paragraph (i) confines (ca) differently to (ii), but the meaning of (i) emerges from the fact of its difference to (ii) (and (iii)). Although (i) does not relate to "divorce or validity of marriage proceedings", its purpose is to confer jurisdiction in a like circumstance; rather than strictly in divorce of validity proceedings, in a circumstance of "marital breakdown".

69. As a matter of the power of the Commonwealth under s 51(xxi) and/or (xxii), it is not disputed that legislation conferring jurisdiction on a court to hear proceedings between the parties to a marriage with respect to the property of the parties to a marriage or of either of them, where the marriage has broken down, is within the marriage power. Because the *ratio* of *Russell v Russell* is difficult to identify, even if such a proposition may be thought difficult to reconcile with the decision in *Russell v Russell,* the proposition, is clearly consistent with *Fisher v Fisher* and *Dougherty v Dougherty.*

70. Marital breakdown is not logically confined to circumstances of separation in terms of s 49 *of the Family Law Act 1975.*

71. In a circumstance where a guardian or attorney of a spouse, who is incapable, brings proceedings (for the spouse) with respect to the property of the parties to the marriage or the other spouse, seeking a settlement of such property for the benefit of, and to ensure the welfare of the incapable spouse, *ipso facto,* there is a marital breakdown, even if not a separation.

72. Understood in this way, neither s 39(2) or s 79 of the *Family Law Act 1975* are invalid.

73. Whether the actual exercise of power, and the making of the order under s 79 after the death of the wife, disclosed error is not addressed in this submission.

Additional legislation referred to in *Stanford*

The Constitution

S 51 Legislative powers of the Parliament

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...

(xxi) marriage;

(xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants …

S109 Inconsistency of laws. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

SEC 4

"matrimonial cause" means:

(a) proceedings between the parties to a marriage, or by the parties to a marriage, for:

(i) a divorce order in relation to the marriage; or

(ii) a decree of nullity of marriage; or

(b) proceedings for a declaration as to the validity of:

(i) a marriage; or

(ii) a divorce; or

(iii) the annulment of a marriage; By decree or otherwise; or

(c) proceedings between the parties to a marriage with respect to the maintenance of one of the parties to the marriage; or

(caa) proceedings between:

(i) a party to a marriage; and

(ii) the bankruptcy trustee of a bankrupt party to the marriage;

with respect to the maintenance of the first-mentioned party; or

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

(i) arising out of the marital relationship;

(ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or

(iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104.

SEC 43

Principles to be applied by courts

(1) The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:

(a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children;

(c) the need to protect the rights of children and to promote their welfare;

(ca) the need to ensure protection from family violence; and

(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children. s 79(8) Where, before property settlement proceedings are completed, a party to the marriage dies:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;

(b) if the court is of the opinion:

(i) that it would have made an order with respect to property if the deceased party had not died; and

(ii) that it is still appropriate to make an order with respect to property; the court may make such order as it considers appropriate with respect to:

(iii) any of the property of the parties to the marriage or either of them; or

(iv) any of the vested bankruptcy property in relation to a bankrupt party to the marriage; and

(c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

The Acts Interpretation Act 1901 **(Cth)**

SEC 15A

Construction of Acts to be subject to Constitution

Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

Stanford Chronology - excerpts from dates in chronologies filed on behalf of the husband and the wife in the High Court proceedings.

05.09.1922	Wife born
20.03.1924	Husband born
09.10.1971	Parties were married and lived together in the husband's home.
23.04.1974	Wife sold her home to her daughter, Rafter and her husband, for $13,000
1974	The wife applied the proceeds of sale of her home to the marriage in 1974.
16.05.1979	Rafter subsequently sold that property for a price of $64,000. She carried out renovations to the property before it was sold.
1989	Husband and Wife retired.
15.03.1995	Husband writes a Will. Wife says he does not discuss contents of Will with Wife and hid it from her. Husband says he granted the wife a life tenancy in the matrimonial home and left his estate equally to his sons or their children.
27.03.1995	Husband writes a letter to wife (who did not see it at the time) claiming wife has written a Will that excludes him. Husband says he wrote a letter explaining that the wife had told him that she intended to leave her estate to her daughters excluding him and he respected that.
10.01.2002	Husband discharges mortgage over the matrimonial property (the war service loan).
01.03.2002	Wife appointed carer for husband.
2003	Husband has a stroke, but made good recovery.
01.02.2004	Husband has another stroke, wife remained his carer.
01.09.2005	Wife executes an Enduring Power of Attorney in favour of her daughters Rafter and Brims. Wife executes a Will with Rafter and Brims as joint beneficiaries.
31.12.2008	Wife suffered severe stroke and was admitted to hospital and subsequently to a care facility and diagnosed with dementia.
09.01.2009	Wife transferred to rehabilitation hospital.

Jan to May 2009	Various meetings take place regarding wife's arrangements including discussion with husband regarding nursing home and bond requirements.
28.02.2009	Husband has a fall and admitted to hospital for eight days.
08.03.2009	Husband having been unwell signed enduring power of attorney appointing his son and daughter in law jointly and severally his attorneys.
10.03.2009	Wife's First Aged Care Assessment Team (ACAT) Assessment. Recommendation is for high residential care for wife.
16.03.2009	Wife is transferred to a Transitional Care Program for further rehabilitation.
29.04.2009	Second ACAT for wife assessed as requiring low level residential care. Rafter makes enquiries with three low residential care facilities and ascertains they require payment of an entrance fee or bond.
April 2009	Husband refuses to sign interim care client agreement accepting responsibility for payment of all account in respect of wife's admission. Husband subsequently says he will pay accounts however Rafter continues to receive bills for the wife's care.
17.05.2009	Rafter, Brims, the husband and step daughter-in-law meet to discuss wife's care. Step daughter-in-law told Brims and Rafter that costs associated with wife's care should be met by her pension and government benefits.
19.05.2009	Wife has an unsuccessful home assessment. It is identified that the wife will never to able to return to the home to live.
25.05.2009	Rafter executes interim care client agreement using the enduring power of attorney. Accounts for residential care met from wife's pension.
06.2009	Husband executed a new Will in more or less the same terms as his previous Will.
11.06.2009	Letter from solicitors for wife to husband seeking he raise a bond for $300,000 for low care placement for the wife.
30.06.2009	Letter from husband's solicitors raising the concept of a reverse mortgage to fund a bond for the wife but allow the husband to remain in the home.
10.07.2009	Third ACAT Assessment conducted. Wife has deteriorated and

requires High Residential care.

16.07.2009 The wife is moved by husband and daughter in law to another nursing home not requiring payment of a bond. Move is made without reference to Rafter or Brims.

23.07.2009 Assisted by his daughter-in-law, the husband opens a trust account with himself as trustee and with the wife as the sole beneficiary for the purpose of providing additional funds for any additional medical accommodation, outgoings or expenses she may require, but does not inform Rafter of the account until September 2009.

05.08.2009 Daughter in law of the husband, stopped payments from Husband's account for Wife's Health Cover. Rafter subsequently re-instates cover.

August 2009 Social worker at the care facility makes application for an administration order at State Administrative Tribunal.

17.08.2009 Wife's daughter Rafter (as her case guardian commenced proceedings in the Family Court of Western Australia seeking orders for an equal division of the property of the husband and wife.

25.09.2009 Brims and Rafter continue to seek accommodation for wife at an alternative nursing home which required a deeming fund consisting of deposits from the family, refundable when the placement is no longer required. Offer accepted by Rafter, Brims and husband upon inspection of facilities. That same day acceptance of offer was withdrawn by the husband to transferring the wife, as a result of daughter in law and son of husband deeming the care facility to be unacceptable for the wife.

20.10.2009 Husband files response documents in Family Court of Western Australia seeking no property settlement orders be made and that he pay spousal maintenance to the extent that wife demonstrates a need.

26.10.2009 Rafter appointed as case guardian for her mother in Family Court of Western Australia.

05.11.09 The wife's daughters applied to the WA State Administrative Tribunal ("SAT") to be appointed the wife's joint guardians.

11.11.2009 Husband offers to pay wife $100 per week in the event of any shortfall in her care. Payment never requested or received.

08.01.2010 Orders made by SAT appointing the wife's daughters as her joint plenary administrators of her estate and guardians.

17.02.2010 Husband's son was appointed his case guardian in the Family

	Court of Western Australia ("FCWA") proceedings.
07-15.07.2010	Defended hearing before held before Magistrate Duncanson in FCWA.
09.07.2010	Magistrate determines that the court has jurisdiction to determine the matter.
09.07.2010	Magistrate delivered preliminary reasons for judgment in relation to whether the Family Court has jurisdiction to determine the matter and whether the Court should exercise that jurisdiction.
30.09.2010	Magistrate delivered reasons for decision and made final property settlement orders pursuant to s 79 *Family Law Act 1975* that the husband pay a fixed sum of money to the wife within 60 days ($612,931, which was 57.5% of the property to the husband and 42.5% for the wife) on the basis of her contributions during the marriage. No adjustment made in relation to s 75(2).
21.10.2010	Husband filed notice of appeal in the Full Court of the Family Court of Australia.
08.11.2010	Husband obtained a stay of the Magistrates orders pending the determination of his appeal.
06.12.2010	Order made that wife be restrained from enforcing order made on 30 September 2010 requiring payment of $612,931 within 60 days, on condition that wife receive $433 per month with effect from 13 December 2010 and monthly thereafter.
13.04.2011	Full Court comprising Bryant CJ, May & Moncrieff JJ heard appeal at Perth.
14.09.2011	Wife suffered a stroke and died.
06.10.2011	Parties advised the Full Court by joint letter of the wife's death and sought leave to file submissions addressing any issue the wife's death may have had on the outcome of the appeal.
21.10.2011	Full Court delivered reasons for decision, upheld the husband's appeal and set aside orders 1, 2 and 76 made by the Magistrate.
30.11.2011	Wife' daughters were substituted as legal personal representatives to the Family Court proceedings by order of a Registrar.
19.01.2012	The Full Court delivered reasons for decision, re-exercised the discretion of the Magistrates and made orders for property settlement pursuant to s 79(8) of the Act in favour of the wife's

	legal representatives.
17.02.2012	Husband filed application for special leave to the High Court of Australia granted on 22 June 2012.
05.07.2012	Husband filed notice of appeal.
14.10.2011	Order made on 6 December 2010 for wife to receive $433 per month is discharged by consent with effect from 15 September 2011.

Summary of Stanford - High Court transcript 4 September 2012

Appellant's oral arguments

1. The parties had arranged their affairs in a certain way during the marriage, including arrangements for after their respective deaths, and their wishes should be respected.
2. Section 43 is clear about the role of the court and it confines the operation of s 79. In the exercise of its jurisdiction the Court must have regard to, *inter alia*, the preservation of the institution of marriage and giving the widest possible protection and assistance to the family.
3. An exercise under s 79 which focuses upon the moral claim or right of the wife ignores the existence of the freedom of those parties to set up their financial affairs as they see fit.
4. If the parties are living separately without it being their wish, for example, when one of them is hospitalised, it is not open to the court to make a property order. If there are unmet needs of a party to a marriage these can be met by a maintenance order under s 72.
5. The court expressly has jurisdiction to make a maintenance order during a marriage. Section 72 commences "A party to a marriage is liable to maintain the other party..." This is an absolute entitlement of a party to a marriage. It does not depend upon the breakdown of a marriage. *Interestingly though, neither the "matrimonial cause" nor s 79 requires a breakdown of the marriage.*
6. The Full Court was satisfied that all the wife's needs had been met so there was no need for a maintenance order.
7. The Full Court did not properly address the two-step process under s 79(8). The first question is would the court have made an order with respect to property if the deceased party had not died and the second question is whether it is still appropriate to make that order. *The Full Court appeared to accept this argument. My view is that it is the most likely ground upon which the appeal will succeed.*

8. At best, prior to the wife's death, the Full Court was only inclined to make an order for maintenance and after the wife's death jumped to making a property order without going through the two-step process. The Full Court said in the first case "In our view there are many aspects of this application which do not require any immediate order finally altering the interests of the parties in their property and particularly so where it would require the husband to leave his home of 48 years in which he is still residing." Although the final order made did not require the husband to leave his home, the Full Court did not do what s 79(8) requires.
9. There is no community of property in Australia. The marriage law is used to require people to support each other in a marriage but not to arrange their financial affairs in any particular way during their marriage.
10. Because it was a truly intact marriage, it was not enough to enliven the proper exercise of jurisdiction under s 79 that somebody agitated for a property settlement order. The jurisdiction had not been enlivened by a complaint of the wife. It was not an exercise of the power to meet her needs or her maintenance. It was not even an exercise to benefit her. There was no matrimonial cause. In cases such as *Konitza*, proceedings were able to be carried on after death under s 79(8), but the matrimonial cause arose before death as the wife made a property claim. *Konitza* is very different from *Stanford* as the parties were separated in *Konitza* and she made her claim before her death.
11. This was nothing more than re-arranging the testamentary rights and interests of the parties. The wife, being deceased, had no interest or involvement in the proceeding and never requested it. The only issue was the creation of an interest by the people who were seeking it, namely the people to whom she had left her estate.
12. A property order is very different from a maintenance order in that it is a final order. This is important in extending the issue beyond the facts of the case. Imagine an intact marriage where for some reason one of the parties has a Case Guardian and an order for a property settlement is made. From that time on there is no longer an assessment of contribution at all. If you apply that argument to this case, if the husband painted the house before his death, or kept the garden or took the wife food so that she would enjoy a different menu, none of those things which, in ordinary circumstances, would be counting up in the contribution bank account, all of those are no longer relevant because of the finality of the property order. This in itself demonstrates the inconsistency of having a jurisdiction which deals with property in an intact marriage.
13. In de facto proceedings it is absolutely clear that the property rights and interests of the parties cannot be enlivened until there is the breakdown of the relationship. This shows what the proper understanding of the *Family Law Act* is. *I find this argument interesting as I expected it to be used to support the respondent's case. The de facto legislation is absolutely clear that a breakdown of the relationship is required before a property settlement can be made, this may suggest that where the parties are legally married, as*

the legislation does not expressly require a separation, a separation may not be required for a s 79 order.

14. It would be a perverse proposition that an administrator, for a person who, through a disability is unable to organise his or her own affairs, could reach a decision that the marriage has ended. See *Jennings*.
15. It was not a matter of choice that the parties were living separately.
16. The s 43/79 interface is expressed in *Sterling* by Justice Kay in a dissenting judgment: "An order made in the course of a subsisting marriage may be a clear indication that the court is not willing to protect the institution of a marriage of the union entered into for life."

Respondent's oral arguments

1. *In my view, the respondent's oral submissions started in a strange place,* by referring to *Price & Underwood* where it was shown that the husband had intended to end the marriage and this enabled the Case Guardian to make the divorce application on his behalf. If this is true, a disabled spouse is essentially locked out of s 79 even in circumstances where in truth a marriage has broken down but it is beyond the control of the disabled spouse to adduce evidence. The disabled spouse will be dependent upon the able spouse saying that the marriage has ended. That is a highly unjust consequence.
2. The Full Court's reference to and reliance on a "moral claim" comes from Justice Brennan in *Fisher*. The respondent conceded that a moral claim is not within s 79(8) but said that the Full Court did not rely solely on the wife's moral claim but had regard to the requirements of s 79(8).
3. It was just and equitable within s 79(2) for the court to make an order as the wife had unrecognized entitlements based on 37 years worth of contributions to a marriage, albeit an intact marriage. The court found that the legal entitlements of the parties did not reflect their contributions to the marriage. That was the dominant consideration in the Full Court's assessment. But for the making of an order the wife would not have an estate. After a lengthy marriage, where there have been contributions accrued by spouses which are not reflected in the legal title, it is just and equitable to make an alteration of those legal interests to more closely reflect, in a party's estate, what they would have accrued in their lifetime. The Full Court took the view that justice and equity within s 79(2) extends to a benefit received by a spouse's estate based on matters arising out of a marital relationship which hinged substantially on contributions over a 37 year marriage.
4. It was enough for the Full Court to comply with s 79(8) when in the first judgment it identified a spectrum of possibilities as to the orders it might make, referred to an adjournment of the property proceedings or maybe orders which took effect at a future

date or event. It then invited submissions from the parties about how the matter should proceed. *The husband was pushing for a maintenance order (that was not the wife's preferred position although it was an alternative in her application).*

5. The reason why a property settlement is generally not made in an intact marriage is that it is a once and for all proposition and that once the final order is made it cannot be revisited except in the narrow set of circumstances of s 79A. Ordinarily, the court will not be able to correct a final property order if at a later time the spouses separate. When the wife died in this case a property order could be made under s 79(8) because there was no concern that a property order was unable to be amended or revised because the parties had reached the point where either a property order was made at that point or not at all.
6. The Full Court took the view that having regard to s 79(4) it was appropriate for the wife's estate to receive the benefit of the contributions accrued over the marriage. The facts were agreed - the asset pool was agreed as were the contributions. The parties asked the Full Court to re-exercise its discretion and the court drew its conclusions based on the material before it.

Conclusion

There can be no conclusion to this paper. The High Court will decide, hopefully soon, whether parties who are not separated can use the *Family Law Act* to separate their financial affairs. If it decides that these parties cannot do so, then a useful way for parties separated by ill health or incapacity to have financial security will be unavailable unless they legally separate.

If a separation is required for s 79 orders, in some circumstances parties may have to separate even if they do not want to do so. Section 43 could be used to argue that in some circumstances a s 79 order is necessary to protect the marriage.

My reading of the transcript of the oral submissions is that a number of the High Court justices were prepared to allow the appeal on the spot on the basis that the Full Court did not follow the 2 step approach required by s 79(8). However, Justice Kiefel in particular, appears to have been concerned about the wider issue of whether s 79 orders could be made in an intact marriage. Hopefully, the High Court will not take the easy way out and will give some guidance on this issue rather than leave it unresolved until another day.