IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P23 of 2012

BETWEEN:

[STANFORD]
Appellant

and

[STANFORD]
Respondent

APPELLANT'S REPLY

Part I: Publication of Submissions

This reply is in a form suitable for publication on the internet.

Part II: Reply

1. The appellant claims that s 51(xxi) of the Constitution is essentially directed not only to regulating the form and process by which parties marry, but is essentially directed to preserving marriages, not destroying them. The power under s 51 (xxii) is clearly directed at resolving the circumstances which arise on the breakdown of a marriage. That said, however, statutory powers such as those in s 79 of the *Family Law Act 1975* (Cth) should be read as constitutionally valid and authorised by the marriage power to the extent that they are directed to the objective of maintaining intact marriages. Conversely, the Court should be reluctant to read the statutory power as one that can be exercised in a way that undermines the marital relationship (the very antithesis of preservation). Further the legislation clearly is directed in this way and the submissions from the Attorney-General of NSW highlight these elements in paragraphs 27-28.
2. Despite referring to the legislative history, neither the respondent nor the interveners can point to any material to indicate that the Act was intended to cover the relationship between parties in a subsisting marriage.
3. The severing of the link between the institution of property settlement proceedings and its relationship to principal relief is, the appellant submits, clearly linked to an intention to permit parties to resolve issues promptly following the breakdown of their relationship. In this respect, it is to be noted that whilst the Commonwealth Attorney-General in their submissions ("CS") quotes from the second reading speech of the 1983 amendments to the Act, it omits the critical words which appear at the time the Bill was read in both houses, namely:
   Mr Duffy in his second reading speech to the House of Representatives said:
   > *Any government that cares for people and is concerned to minimize unhappiness and social conflict must give paramount consideration to family law matters. Family law affects more Australian – adults and children – than any other single area of law. When marriages breakdown, for whatever reason, every effort must be made to ensure speedy resolution of differences with a minimum of trauma and expense and the maximum possible benefit to all parties.*
   >
   > ...
   >
   > *Property proceedings at present can only be brought in relation to concurrent, pending or completed proceedings for dissolution or annulment of marriage between the parties. The Bill in sub clause 3(1) will enable proceedings to be brought by parties to a marriage in relation to property of the parties at any time where the proceedings arise out of the marital relationship. This is a further significant recommendation of the Joint Select Committee and will be of advantage to many*

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persons faced with marital breakdown who wish to secure a settlement of property rights before the 12 month period of separation required for divorce proceedings are required.[1]

These sentiments were echoed by Senator Gareth Evans in his second reading speech to the Senate:

Free from the burden of attributing fault, the Family Court can now concentrate on being satisfied as to the fact of marriage breakdown and on deciding the most equitable distribution of property, the proper level of maintenance and, of overwhelming importance, the best possible arrangements for the welfare of any children of the marriage.[2]

4. For the greater part, the appellant is not in disagreement with the *general submissions* advanced by the Commonwealth Attorney-General on both *constitutional issues and principles of construction* of the relevant provisions, including s 79, of the Act. The validity of s 79 is not, however, a question to be asked and determined in the abstract. It must be asked and answered with respect to the particular proceedings that were the subject matter of the present appeal.
5. The appellant does not contend that s 79, including subsection (8), of the Act *properly construed* is beyond Commonwealth legislative power under ss 51(xxi) or (xxii) to the (dissolution and ancillary power) of the Constitution.
6. Cases such as *Johnston v Krakowski*[3] and *Smith v Smith*[4], CS were concerned with the continuing need for maintenance in situations where the proceedings under the Commonwealth legislation continued to have vitality after the death of a party or former party to a marriage.
7. The statement of issues in Part II, paragraph 1 of the respondent's submissions ("RS") does not fully cover the range of issues identified in the appellant's submissions ("AS") at paragraph 1(a), (c) – (h) (inclusive).
8. The appellant does not take issue with the dates referred to in RS paragraph 5 and the appellant notes the respondent omits the date of the commencement of the Family Court proceedings (17 August 2009). By way of reply, the appellant contends that the following are significant to the resolution of this appeal:
    a. The Magistrate at first instance made a number of important findings about the manner in which the parties arranged their finances, namely that:
        i. The wife introduced into the marriage $13,000 being the sale proceeds of her former matrimonial home which she had sold to her daughter (the respondent wrongly claims the finding was she "applied" the proceeds to the marriage);[5] **(3AB1205), (3AB1194)**
        ii. the parties kept their finances separate;[6] **(3AB1205)**
        iii. the parties only source of income after they both retired was their veteran's affairs pensions;[7] **(3AB1204)**
        iv. the parties lived a frugal lifestyle;[8] **(3AB1204)**
        v. at the time of trial, the wife had savings of $61,754;[9] **(3AB1202)**
        vi. the husband had saved some $52,000 of which he had established a trust account with $43,834 of which the wife was the beneficiary. **(3AB1202-1203)**
    b. The Court accepted the husband's sworn evidence that the parties *"never had a cross word"*.[10] **(3AB1205)**

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[1] See Duffy, Second Reading Speech on the Family Law Amendment Bill 1983, House of Representatives, *Debates*, 13 October 1983. See also page 24 to the submissions of Attorney-General of WA.
[2] See Senator Evans, Second Reading Speech on the Family Law Amendment Bill 1983, *Debates*, 1 June 1983.
[3] (1965) 113 CLR 552.
[4] (1986) 161 CLR 217.
[5] [redacted], 51 & 128. **(3AB1194) (3AB1205)**
[6] Ibid, 119. **(3AB1205)**
[7] Ibid, 118. **(3AB1204)**
[8] Ibid, 121. **(3AB1204)**
[9] Ibid, 108. **(3AB1202)**
[10] Ibid, 124. **(3AB1205)**

c. About 1995, following a discussion between the parties, each appears to have unilaterally made their own wills and kept them private.[11] **(3AB1194)** The husband's will left his estate to his children as he believed the wife would to hers, but he gave his wife a life tenancy in the home. **(3AB1194)**

d. There was never a legitimate controversy about the wife or her representative having to seek relief under the jurisdiction to meet her needs. Although the appellant concedes that the wife's case guardian claimed it was necessary, it was clearly established not to be. The Full Court found unequivocally that there was not and had not been a need for financial support for the wife.[12] **(3AB1301)**The resource established by the husband to meet any need for the wife was never called upon. **(3AB1296)** Neither of the wife's children ever sought to access the trust fund[13] **(3AB1296)**, nor were they ever called upon to make a contribution themselves for any requirement of the wife's.**(2AB724-725)**

9. The scheme of the Act envisages that a valid exercise of the jurisdiction under s 79 may, in appropriate circumstances, continue as a valid exercise of jurisdiction under s 79(8). The appellant contends that the Court had no jurisdiction on the facts of the case as found to make orders under s 79(1). Hence, since jurisdiction cannot be created under s 79(8) on the wife's death, the Court had no jurisdiction to make the orders now appealed.
10. If the appellant is wrong in this submission the appellant submits that the Full Court failed to properly consider its obligations under s 79(8). This section requires that the Court undertake these steps:
    a. determining that if the death had not occurred it would have made an order (not the order);
    b. that it was still appropriate to make an order;
    c. re-undertake the processes required by s 79 of the Act (the 4 step process)[14] including an analysis of s 75(2); and
    d. then consider s 79(2), i.e. the obligation on the Court not to make an order unless it is satisfied that it is just and equitable in all of the circumstances.
11. The appellant contends that a final order made by the Court under s 79(8) should not be an order giving effect to some entitlement that the wife might have had, prior to her death. The nature of this being a new determination, rather than a continuation of an old determination is highlighted by s 79(9) which requires the Court not to make an order unless all of the parties have attended a conference. This point was not taken before the Full Court, but it is submitted that the parties to the proceedings at the point at which orders were made by the Full Court had not been called upon to attend any such conference. This is a precondition to the making of an order, unless the Court has resolved it. This highlights that there must be contemporary scrutiny of all of the statutory elements before an order is made and as enunciated in *Fisher*[15], the Court should not exercise its jurisdiction lightly.[16]
12. Clearly the fact that only a stranger to the marriage will benefit has to be a relevant consideration and yet the Full Court did not review the death of the wife in the context of these sections, merely adverted to the timing of the disposition as important to do justice and equity under s 79(2) of the Act and without further explanation concluded that the proper order was that a stranger to the marriage should receive a fixed sum.
13. The appellant does not dispute the respondent's submission in paragraph 19, so far as it goes. However, in *Fisher*[17] the Court expressly indicated that an order

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[11] [redacted], 53. **(3AB1194)**
[12] *Stanford v Stanford* (2011) FLC 93-483, 85-988. **(3AB1301)**
[13] [redacted], 81 **(3AB1199)**; *Stanford v Stanford* (2011) FLC 93-483, 85-986 & 85-988. **(3AB1296 & 1301)**
[14] *Hickey and Hickey and Attorney-General for the Commonwealth of Australia (Intervener)* (2003) FLC 93-143.
[15] *Fisher & Fisher* (1986) 1 CLR 438.
[16] Ibid, 448.
[17] See Note 15 above.

benefitting complete strangers was a discretionary power which should not be exercised lightly, a matter that the Full Court does not appear to have considered.

14. *Dougherty*[18] is confined by its facts because it related to proceedings:
    a. following the breakdown of the marriage; and
    b. initiated by the wife in relation to the property of the parties to the marriage and joined by the parties' son in relation to the property of the parties to the marriage.
15. Whilst the proceedings were held to arise out of the marital relationship these elements are critical to an understanding of the judgment in *Dougherty*.[19] The appellant agrees that procedurally, the identity of the party who commenced the proceedings and the identity of the party who continues them may not make a difference. However, the absence of the critical factors to which we have referred distinguishes the present case from *Dougherty*.[20]
16. Regarding RS paragraph 8, the essential question is whether the constitutional ambit of s 51(xxi) is sufficiently wide to support the orders of the kind made under s 79(1) and (8). The appellant contends that orders of this kind made in the instant circumstances cannot be said to arise directly out of the marital relationship.
17. In RS paragraph 11 the respondent's main point is that separation is not a prerequisite to making orders for maintenance of a spouse or for the division of property in the wife's favour while she is alive. Even if that proposition is accepted and was entailed in the original application regarding the financial needs of the wife for residential support before she died, it does not apply in raising a matrimonial cause as defined in s 4(1)(c) and (ca) of the Act once there was, after her death, no continuing requirement to make financial arrangements for her residential care.
18. The appellant's interpretation echoes the view expressed at first instance by Dessau J in *Jennings (by his next friend State Trustees Limited) v Jennings*,[21] where her Honour held that *"an order finally determining the property issues between the parties who had never formed an intention to sever their relationship could not be appropriate, fair or just in that context"* [in the context of s 79 proceedings].[22]
19. Proceedings for final orders to permanently determine the property relationship between parties to a marriage who are not separated are not within jurisdiction and are clearly contrary to the principles in s 43 of the Act. If the proceedings are instituted beyond jurisdiction, they cannot be continued after the death of one of the parties to the proceedings.
20. The propositions in RS paragraphs 15-17 can be read as suggesting no more than if, in the circumstances of this case, the husband and wife are within their respective limitations of health and age in a happy relationship and a third party initiates proceedings there is ipso facto a breakdown of their marriage.
21. The respondent's contention is effectively that the jurisdiction to litigate property settlement proceedings arises where there is a continuation of the consortium vitae albeit with some elements of physical separation. This suggests that a third party purporting to act on behalf of one of the spouses can disrupt their property arrangements when there has been no end to the consortium vitae. As was observed during argument in the special leave application in *Sterling:*

    > *It may be this case will later be thought to take on a life of its own, where it is enough to demonstrate physical separation, ergo property division, and at least there is a highly contestable question whether that principle can be seen as underlying this decision.*[23]

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[18] *Dougherty & Dougherty* (1987) 163 CLR 278.
[19] Ibid.
[20] Ibid.
[21] (1997) FLC 92-773.
[22] Ibid, 84-538.
[23] *Sterling & Sterling & Protective Commissioner* (2001) 22(16) Leg Rep SL4 HCA.

22. The appellant contends that physical separation or restrictions affecting the nature of the cohabitation between parties are not the same as ending a marriage and initiating Family Court proceedings, nor should they be.
23. The appellant never objected to supporting his wife and went so far as saying to the Court, that if there was an established need he was always willing to meet it. However, leaving aside the question of whether an order for maintenance could be made during a subsisting marriage, the fact is that the nature of a property order is completely different from a maintenance order. The appellant refers to the nature of a final property settlement order in his submissions at paragraph 31 et seq, in particular, the finality, the lack of later variation and the fact that it is a major intrusion into the rights of the parties to determine their own property relationship during the subsistence of a marriage. It is relevant that historically final property settlement orders could not be made until there was at least a separation and for much of Australia's history, proceedings for divorce or other principal relief.
24. The appellant does not take issue with the description of the jurisdictional and historical arguments made in the submissions filed by the Western Australian Attorney-General as intervener in these proceedings. The appellant does, however, take issue with paragraphs 11, 70 and 71 of the Attorney-General's submissions. The appellant contends that the finding of the Magistrate[24] **(3AB1182), (3AB1189)** and the Full Court in this case that there had not been a breakdown of the marital relationship stands. **(3AB1268)**
25. The appellant submits that these findings were open on the evidence at the date of the Magistrate's decision and at the date of the Full Court's first decision. The principal issue the appellant has with the submissions made by the Western Australian Attorney-General is the suggestion that the simple act of issuing proceedings for settlement of property or for the benefit of a spouse brings about a marital breakdown. In this case the proceedings were found not to be for the benefit the wife[25] **(3AB1301)**, nor were they found to ensure the welfare of the wife, because she had no need[26]. **(3AB1301)**
26. The proposition of the Western Australian Attorney-General that simply the institution of a proceeding by a third party with a claim is enough to override the relationship of the husband and wife without any further evidence of desire or intention, cannot be maintained. Restating that proposition to its extreme, where a party has a minor disability by reason of which the party has have given a party an enduring power of attorney, but nevertheless is able to make his or her own decisions about his or her emotional relationships, could under WA's submission find themselves separated, even though they have an enduring loving relationship.
27. Again the appellant refers to Dessau J's view, which echoes the appellant's submission that, *"It strikes me as a perverse proposition that an administrator, appointed to represent a person who through disability is unable to organize his own affairs, could simply 'reach a decision' that the person's marriage has ended and ... cannot possibly be empowered to handle 'the affairs of the heart' or the most intimate aspects of the represented person's mind and soul."* In that case, the Court held that whilst the proceedings arose out of the marital relationship and jurisdiction existed, the Court should *"not proceed to exercise its jurisdiction in this case given that the parties have not separated and that as a matter of principle the Court should seek to protect, rather than to promote the downfall of, the parties' marriage."* Whilst the Full Court has preferred the approach of the judge at first instance in *Sterling v Sterling & the Protective Commissioner*[27], the appellant's argument in part mirrors the view expressed by Dessau J.

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[24] [redacted], 26 (3AB1182); [redacted]6, 19.
[25] *Stanford v Stanford* (2011) FLC 93-483, 85-988.
[26] *Stanford v Stanford* (2012) FLC 93-483, 47.
[27] [1999] FAMCA 1676.

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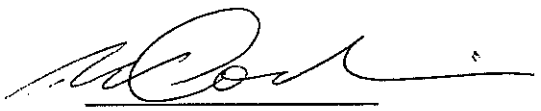

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