

BETWEEN:

[STANFORD]
Appellant

and

[STANFORD]
Respondent

10
A red rectangular stamp with the text "Redacted for Publication" in red, bold, sans-serif font.

RESPONDENT'S SUBMISSIONS

Part 1: Publication of Submissions

20 These submissions are in a form suitable for publication on the internet.

Part II: Issues Arising in the Proceeding

- 30
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?

Part III: Section 78B of the Judiciary Act 1903

- 40
3. The Respondent notes that the Appellant served notices under s 78B of the *Judiciary Act 1903* (Cth) on 6 July 2012.



Part IV: Material Facts

4. In addition to the facts set out in the Appellant's Statement of Material Facts, the Magistrate found¹, as the Full Court partially noted in its first judgment², that –
- (a) neither party intended to sever the marital relationship; but
 - (b) most of the elements of a normal marital relationship have ceased to exist; and
 - (c) the parties will never live together again.

10

5. The following further dates are relevant:

- 1974 the wife applied the proceeds of sale of her home to the marriage in 1974.³
- 16.05.1979 Rafter subsequently sold that property for a price of \$64,000.00. She carried out renovations to the property before it was sold.⁴
- 15.03.1995 Husband writes a Will. Does not discuss contents of Will with Wife and hid it from her⁵.
- 20 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.⁶
- 10.01.2002 Husband discharges mortgage over the matrimonial property (the war service loan).⁷
- 01.03.2002 Wife appointed carer for husband.⁸
- 2003 Husband has a stroke, but made good recovery.⁹
- 01.02.2004 Husband has another stroke, wife remained his carer.¹⁰
- 01.09.2005 Wife executes an Enduring Power of Attorney in favour of her daughters Rafter and Brims.¹¹ Wife executes Will with Rafter and Brims as joint beneficiaries.¹²
- 30 31.12.2008 Wife has a stroke and is admitted to a tertiary hospital¹³.
- 09.01.2009 Wife transferred to rehabilitation hospital¹⁴

¹ [REDACTED] at [24]-[25]

² *Stanford v Stanford* (2011) FLC 93-483, at [41]

³ [REDACTED] at [113]

⁴ *Ibid* at [51]

⁵ *Ibid* at [53]

⁶ *Ibid* at [53]

⁷ *Ibid* at [114]

⁸ *Ibid* at [54]

⁹ *Ibid* at [55]

¹⁰ *Ibid* at [56]

¹¹ *Ibid* at [57]

¹² Affidavit of Rafter and Brims sworn 17 November 2011 at annexure B

¹³ [REDACTED] FCWAM 26, at [58]

Jan to
May 2009 various meetings take place regarding Wife's arrangements including discussion with husband regarding nursing home and bond requirements.¹⁵

28.02.2009 Husband has a fall and admitted to hospital for eight days.¹⁶

10.03.2009 Wife's First Aged Care Assessment Team (ACAT) Assessment. Recommendation is for high residential care for wife.¹⁷

16.03.2009 Wife is transferred to a Transitional Care Program for further rehabilitation.¹⁸

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.¹⁹

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 C Rafter continues to receive bills for the wife's care.²⁰

20 17.05.2009 C Rafter, G 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.²¹

19.05.2009 Wife has an unsuccessful home assessment, it is identified that the wife will never be able to return to the home to live.²²

25.05.2009 C Rafter executes interim care client agreement using the enduring power of attorney. Accounts for residential care met from wife's pension.²³

30 11.06.2009 Letter from solicitors for wife to husband seeking he raise a bond for \$300,000.00 for low care placement for the wife.²⁴

¹⁴ Ibid at [58]

¹⁵ Ibid at [62]

¹⁶ Ibid at [59]

¹⁷ Ibid at [61]

¹⁸ Ibid at [61]

¹⁹ Ibid at [63] and [64]

²⁰ Ibid at [65]

²¹ Ibid at [70]

²² Ibid at [68] and [69]

²³ Ibid at [65]

²⁴ [REDACTED], at [74]

- 30.06.2009 Letter from husbands solicitors raising the concept of a reverse mortgage to fund a bond for the wife but allow the husband to remain in the home.²⁵
- 10.07.2009 Third ACAT Assessment conducted wife has deteriorated and requires High Residential care.²⁶
- 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 C Rafter or G Brims.²⁷
- 10 23.07.2009 Assisted by the daughter in law, the husband opens a trust account for the wife with himself as the trustee²⁸ but does not inform C Rafter of the account until September 2009.²⁹
- 05.08.2009 Daughter in law of the husband, stopped payments from Husband's account for Wife's Health Cover. C Rafter subsequently re-instates cover.³⁰
- August 2009 Social worker at the care facility makes application for an administration Order at State Administrative Tribunal.³¹
- 25.09.2009 Brims and Rafter continue to seek accommodation for wife at an alternate nursing home which required a deeming fund consisting of deposits from the family, refundable when the placement is no longer required. Offer accepted by C Rafter, G Brims and husband upon inspection of facilities. That same day acceptance of offer was withdrawn by the husband to transferring wife, as a result of daughter in law and son of husband deeming the care facility to be unacceptable for the wife.³²
- 20 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.³³
- 30 26.10.2009 C. Rafter appointed as case guardian for her mother in Family Court of Western Australia.³⁴

²⁵ Ibid at [75]

²⁶ Ibid at [76]

²⁷ Ibid at [77]

²⁸ Ibid at [81]

²⁹ Transcript 15 July 2010 at pages 41 to 42

³⁰ Ibid at [82]

³¹ Ibid at [83]

³² Ibid at [85], [86], [87] and [88]

³³ Husband's Form 1A Response filed 20 October 2009, sworn on a date unknown.

³⁴ Order of the Magistrates Court at 150 Terrace Road, Perth

- 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.³⁵
- 09.07.2010 Magistrate determines that the court has jurisdiction to determine the matter.³⁶
- 30.09.2010 Magistrate delivered reasons for decision and made final property settlement orders pursuant to section 79 of the Family Law Act 1975 (Cth) 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 adjustments made in relation to section 75(2).³⁷
- 10 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.³⁸
- 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 2011.³⁹

20

Part V: Constitutional provisions, Statutes and Regulations

6. The Appellant has set out all relevant Constitutional provisions, statutes and Regulations at "exhibit 1" to the Appellant's Submissions, save for the following:

- (a) Constitution of the Commonwealth of Australia, chapter III⁴⁰
- (b) Section 4(2), s. 43(2), s.72, s.74 and s. 94AAA(6) of the Family Law Act 1975 (Cth)⁴¹
- 30 (c) Part 6.3 and Part 6.4 of the Family Law Rules 2004 (the Rules)⁴²
- (d) Part of the Dictionary to the Rules which contains the definition 'person with a disability'⁴³
- (e) Inheritance (Family and Dependants Provision) Act 1972 (WA), s.7⁴⁴

³⁵ [REDACTED], at [93]

³⁶ [REDACTED], at [132], [155], [158]

³⁷ Order of the Magistrates Court at 150 Terrace Road, Perth

³⁸ Order of the Full Court of the Family Court of Australia at Perth

³⁹ Pages 10 to 13 below

⁴⁰ Pages 14 to 15 below

⁴¹ Pages 16 to 18 below

⁴² Page 18 below

⁴³ Page 19 below

Part VI: Respondent's Argument

7. Section 79(8) of the *Family Law Act 1975* (Cth) empowering the Family Court to make orders with respect to the property of the parties to the marriage after the death of one party was enacted within the Commonwealth Parliament's power pursuant to s 51(xxi) of the *Constitution* (Cth) to make laws with respect to marriage.⁴⁵
8. The power under s 51(xxi) to make laws with respect to marriage is broader than and unqualified by the power to make laws with respect to "divorce and matrimonial causes" vested in the Commonwealth Parliament by s 51(xxii).⁴⁶
9. Construction of legislation must start with the statutory language, which in this case is neither ambiguous nor obscure.⁴⁷ On its ordinary meaning the legislation permits the orders made by the Full Court.
10. The result arising from applying the ordinary meaning conveyed by s.79, being the orders made on 19 January 2012, taking into account its context in the Act and the purpose or object underlying the Act, is not 'manifestly absurd' or 'unreasonable' in the particular circumstances of this case.⁴⁸ Extrinsic materials should not be used to displace the plain words of s.79.
11. Part VIII of the Act empowers the court to make orders with respect to, among other things, maintenance (s.74) and property settlement (s.79). A spouse's liability to maintain the other spouse may arise during the marriage and before spouses separate, if conditions in s.72 are satisfied.⁴⁹ This is implicitly accepted by the Appellant given the orders he sought at trial and ground 3 of his appeal against the Magistrate's orders.⁵⁰ 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.
12. The enactment by the Commonwealth Parliament of the *Family Law Amendment Act 1983* (Cth) does not evince any Parliamentary intention to limit proceedings with respect to property to those which are ancillary to divorce proceedings where a marriage is no longer intact. On the contrary, section 4(1)(ca) of the Act in separate sub-paragraphs distinguishes between those proceedings 'arising out of the marital relationship' (s

⁴⁵ *Fisher v Fisher* (1986) 161 CLR 438; [1986] HCA 61

⁴⁶ *Re F; ex parte F* (1986) 161 CLR 376 at 387 per Mason and Deane JJ

⁴⁷ *Alcan (NT) v Territory Revenue* (2009) 239 CLR 27 at 46 – 47 per Hayne, Heydon, Crennan and Kiefel JJ

⁴⁸ Acts Interpretation Act 1901, s.15AB

⁴⁹ *Vick and Hartcher* (1991) FLC 92-262 at 78,764 – 78,765

⁵⁰ *Stanford v Stanford* (2011) FLC 93-483, at [8] and [81] – [91]

4(1)(ca)(i)) and those 'in relation to concurrent, pending or completed divorce' proceedings (s 4(1)(ca)(ii)).

13. The making of orders altering the interests of the parties of the marriage, in the particular factual circumstances of this case, do not comprise an exercise of the statutory power in a manner which suggests any failure to have regard to the need to preserve and protect the institution of marriage, in accordance with the 'direction' in s 43(1)(a) of the *Family Law Act 1975* (Cth).⁵¹

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

- 10 (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 2009.⁵² That controversy was sufficient to justify the proceedings being commenced and being pursued through the various stages they have, to reach this point.

20

16. When the wife's case guardian started the proceedings on behalf of the wife (to alter the interests of the spouses in their property) the application was for the determination of a 'matter', within the meaning of that term as used in Chapter III of the *Constitution*, as between the parties to the marriage.⁵³ The proceedings continued to be a 'matter' between the representatives of the parties to the marriage when the orders were made on 19 January 2012.

17. The proceedings commenced on behalf of the wife sought to engage s.79(1) of the Act.⁵⁴ 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.⁵⁵ 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.

30

⁵¹ For a candid and critical view of s.43 see *Seidler v Shallhofer* [1982] 2 NSWLR 80 at 100 per Hutley JA. Section 43(2) now provides an exception to the operation of s.43(1)(a), in respect of jurisdiction under the Act pertaining to de facto financial causes.

⁵² [REDACTED], at [58]-[84]

⁵³ *Re McBain; ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 at 404 [61] – 406 [62] per Gaudron and Gummow JJ, 458 [242] – 461 [249] per Hayne J; [2002] HCA 16

⁵⁴ [REDACTED], at [6]

⁵⁵ *Gabel and Yardley* (2008) FLC 93-386; *Strahan and Strahan (Interim Property Orders)* (2011) FLC 93-466 at [113], [132] – [139] and [224] – 226]

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) of the Act. Section 79(1)(a) 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. The Full Court properly exercised its powers under s.94AAA(6) of the Act to deal with the matter on 19 January 2012.⁵⁶
- 10 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*⁵⁷, "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 of the proceedings".⁵⁸ 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*⁵⁹ 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 personal representatives.
- 20 20. Section 79(1)(d) empowers the making of orders requiring a settlement or transfer for the benefit of "either or both of the parties to the marriage or a child of the marriage". The power in that paragraph is expressed to be inclusive of the orders which may be made in property settlement proceedings. Section 79(1)(a), on the other hand, is expressed generally to authorise an order "altering the interests of the parties to the marriage in the property", without any qualification as to beneficiaries of such order.
- 30 21. An exercise of the discretion of the Court to make an order pursuant to s 79(8)(b) 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.⁶⁰ Such an entitlement was intimately connected to and arose out of the marital relationship.

⁵⁶ *Allesch v Maunz* (2000) 203 CLR 172 at 180 [21] – 181 [24]

⁵⁷ (1986) 161 CLR 438 at 454; [1986] HCA 61, at [8].

⁵⁸ Under s.7 of the Inheritance (Family and Dependents Provision) Act 1972 (WA) the standing of applicants is limited.

⁵⁹ (1987) 163 CLR 278; [1987] HCA 33.

⁶⁰ *Stanford v Stanford* (2012) FLC 93-495, at [55]

Part VII: Respondent's argument on notice of contention or notice of cross-appeal

22. Not applicable

Part VIII: Estimate of hours for Respondent's Argument

23. The Respondent estimates it will take 1 – 1.5 hours to present the oral argument.

10

Dated 17 August 2012

These submissions were prepared by:

(Signed)

20

Greg McIntyre SC



Michael Berry

John Toohey Chambers, Perth
Telephone: (08) 6315 3394
Facsimile: (08) 6315 3399

Email: mberry@johntoohey Chambers.net.au

30

Exhibit 1 Applicable Provisions

The Constitution

Chapter III—The Judicature

10 Section 71 Judicial power and Courts

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Section 72 Judges' appointment, tenure, and remuneration

The Justices of the High Court and of the other courts created by the Parliament:

- 20
- (i) shall be appointed by the Governor-General in Council;
 - (ii) shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity;
 - (iii) shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.

- 30
- The appointment of a Justice of a court created by the Parliament shall be for a term expiring upon his attaining the age that is, at the time of his appointment, the maximum age for Justices of that court and a person shall not be appointed as a Justice of such a court if he has attained the age that is for the time being the maximum age for Justices of that court.

Subject to this section, the maximum age for Justices of any court created by the Parliament is seventy years.

- 40
- The Parliament may make a law fixing an age that is less than seventy years as the maximum age for Justices of a court created by the Parliament and may at any time repeal or amend such a law, but any such repeal or amendment does not affect the term of office of a Justice under an appointment made before the repeal or amendment.

A Justice of the High Court or of a court created by the Parliament may resign his office by writing under his hand delivered to the Governor-General.

Nothing in the provisions added to this section by the *Constitution Alteration (Retirement of Judges) 1977* affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.

A reference in this section to the appointment of a Justice of the High Court or of a court created by the Parliament shall be read as including a reference to the appointment of a person who holds office as a Justice of the High Court or of a court created by the Parliament to another office of Justice of the same court having a different status or designation.

10

Section 73 Appellate jurisdiction of High Court

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
 - (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
 - (iii) of the Inter-State Commission, but as to questions of law only;
- and the judgment of the High Court in all such cases shall be final and conclusive.

20

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

30

Section 74 Appeal to Queen in Council [see Note 12]

No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

40

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her

Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Section 75 Original jurisdiction of High Court

In all matters:

- 10
- (i) arising under any treaty;
 - (ii) affecting consuls or other representatives of other countries;
 - (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
 - (iv) between States, or between residents of different States, or between a State and a resident of another State;
 - (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;
- the High Court shall have original jurisdiction.

Section 76 Additional original jurisdiction

20 The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

- (i) arising under this Constitution, or involving its interpretation;
- (ii) arising under any laws made by the Parliament;
- (iii) of Admiralty and maritime jurisdiction;
- (iv) relating to the same subject-matter claimed under the laws of different States.

Section 77 Power to define jurisdiction

30 With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

- (i) defining the jurisdiction of any federal court other than the High Court;
- (ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;
- (iii) investing any court of a State with federal jurisdiction.

Section 78 Proceedings against Commonwealth or State

The Parliament may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.

Section 79 Number of judges

The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.

Section 80 Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

10

The Family Law Act 1975 (Cth)

Section 4(2)

A reference in this Act, the standard Rules of Court or the related Federal Magistrates Rules to a party to a marriage includes a reference to a person who was a party to a marriage that has been:

10

- (a) terminated by divorce (in Australia or elsewhere); or
- (b) annulled (in Australia or elsewhere); or
- (c) terminated by the death of one party to the marriage.

Section 43(2)

Paragraph (1)(a) does not apply in relation to the exercise of jurisdiction conferred or invested by Division 2.

20

Section 72 Right of spouse to maintenance

(1) A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

30

- (a) by reason of having the care and control of a child of the marriage who has not attained the age of 18 years;
 - (b) by reason of age or physical or mental incapacity for appropriate gainful employment; or
 - (c) for any other adequate reason;
- having regard to any relevant matter referred to in subsection 75(2).

(2) The liability under subsection (1) of a bankrupt party to a marriage to maintain the other party may be satisfied, in whole or in part, by way of the transfer of vested bankruptcy property in relation to the bankrupt party if the court makes an order under this Part for the transfer.

40

Section 74 Power of court in spousal maintenance proceedings

(1) In proceedings with respect to the maintenance of a party to a marriage, the court may make such order as it considers proper for the provision of maintenance in accordance with this Part.

Section 94AAA(6) On an appeal under subsection (1) or (1A), the Family Court may affirm, reverse or vary the decree or decision the subject of the appeal and may make such decree or decision as, in the opinion of the court, ought to have been made in the first instance, or may, if it considers appropriate, order a re-hearing on such terms and conditions, if any, as it considers appropriate.

10

20

Family Law Rules 2004 (Cth)

Part 6.3 Case guardian

6.08A Interpretation

In this Part:

a manager of the affairs of a party includes a person who has been appointed, in respect of the party, a trustee or guardian under a Commonwealth, State or Territory law.

6.08 Conducting a case by case guardian

- 10 (1) A child or a person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian.
- (2) Subrule (1) does not apply if the court is satisfied that a child understands the nature and possible consequences of the case and is capable of conducting the case.

Note 1 For service on a person with a disability, see rule 7.09.

Note 2 If a case is started by a child or person with a disability without a case guardian, the court may appoint a case guardian to continue the case.

6.09 Who may be a case guardian

A person may be a case guardian if the person:

- 20 (a) is an adult;
- (b) has no interest in the case that is adverse to the interest of the person needing the case guardian;
- (c) can fairly and competently conduct the case for the person needing the case guardian; and
- (d) has consented to act as the case guardian.

6.10 Appointment, replacement or removal of case guardian

- (1) A person may apply for the appointment, replacement or removal of a person as the case guardian of a party.

Note 1 Chapter 5 sets out the procedure for making an Application in a Case.

30 *Note 2* An application in relation to a case guardian may be made by a party or a person seeking to be made the case guardian or by a person authorised to be a case guardian.

- (2) A person who is a manager of the affairs of a party is taken to be appointed as the case guardian of the party if the person has filed:
- (a) a notice of address for service; and
- (b) an affidavit which:
- (i) provides evidence that the person has been appointed manager of the affairs of the party; and
- (ii) states that the person consents to being appointed as the case guardian of the party.

6.11 Attorney-General may nominate case guardian

- (1) If in the opinion of the court a suitable person is not available for appointment as a case guardian of a person with a disability, the court may request that the Attorney-General nominate, in writing, a person to be a case guardian.
- (2) A person nominated by the Attorney-General to be a case guardian of a person with a disability is taken to be appointed as such if the person files:
- (a) a consent to act in relation to the person with a disability;
 - (b) a copy of the written nomination of the person as a case guardian; and
 - (c) a Notice of Address for Service.

10

Note A consent to act must comply with subrule 24.01 (1).

6.12 Notice of becoming case guardian

A person appointed as a case guardian of a party must give written notice of the appointment to each other party and any independent children's lawyer in the case.

Note The case guardian may also need to file a Notice of Address for Service (see rules 8.05 and 8.06).

20 6.13 Conduct of case by case guardian

- (1) A person appointed as the case guardian of a party:
- (a) is bound by these Rules;
 - (b) must do anything required by these Rules to be done by the party;
 - (c) may, for the benefit of the party, do anything permitted by these Rules to be done by the party; and
 - (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.
- (2) The duty of disclosure applies to a case guardian for a child and a person with a disability.

30

Note 1 The court may order a case guardian to pay costs.

Note 2 Rule 13.01 sets out the elements of the duty of disclosure.

6.14 Costs of case guardian

The court may order the costs of a case guardian to be paid:

- (a) by a party; or
- (b) from the income or property of the person for whom the case guardian is appointed.

40

Family Law Rules 2004 (Cth)

Part 6.4 Progress of case after death

6.15 Death of party

- (1) This rule applies to a property case or an application for the enforcement of a financial obligation.
- 10 (2) If a party dies, the other party or the legal personal representative must ask the court for procedural orders in relation to the future conduct of the case.
- (3) The court may order that the legal personal representative of the deceased person be substituted for the deceased person as a party.

Note 1 The court may make other procedural orders, including that a person has permission to intervene in the case (see rules 1.12 and 6.05).

Note 2 For the effect of the death of a party in certain cases, see subsections 79 (1A), 79 (8), 79A (1C), 90SM (2), 90SM (8), 90SN (5), 90UM (8) and 105 (3) of the Act.

20

Dictionary to the Family Law Rules 2004 (Cth)

30

person with a disability:

in relation to a case, means a person who, because of a 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.

40

Inheritance (Family and Dependants Provision) Act 1972 (WA)

Section 7 Persons entitled to claim

(1) An application for provision out of the estate of any deceased person may be made under this Act by or on behalf of all or any of the following persons —

- (a) a person who was married to, or living as the de facto partner of, the deceased person immediately before the death of the deceased person;
- 10 (b) a person who at the date of the death of the deceased was receiving or entitled to receive maintenance from the deceased as a former spouse or former de facto partner of the deceased whether pursuant to an order of any court, or to an agreement or otherwise;
- (c) a child of the deceased living at the date of the death of the deceased, or then *en ventre sa mere*;
- (d) a grandchild of the deceased who at the time of death of the deceased was being wholly or partly maintained by the deceased or whose parent the child of the deceased had predeceased the deceased living at the date of the death of the deceased, or then
20 *en ventre sa mere*;
- (e) a parent of the deceased, whether the relationship is determined through lawful wedlock or otherwise, where the relationship was admitted by the deceased being of full age or established in the lifetime of the deceased.

(2) No application under subsection (1) shall be heard by the Court unless —

- (a) the application is made within 6 months from the date on which the Administrator becomes entitled to administer the estate of the deceased in Western Australia; or
- 30 (b) the Court is satisfied that the justice of the case requires that the applicant be given leave to file out of time.

(3) A motion for leave to file out of time may be made at any time notwithstanding that the period specified in subsection (2)(a) has expired.

[Section 7 amended by No. 75 of 1986 s. 2; No. 3 of 2002 s. 81.]