

BETWEEN:



[STANFORD]
Appellant

and

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[STANFORD]
Respondent

APPELLANT'S SUBMISSIONS

Part I: Publication of Submissions

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

Part II: Issues Arising in the Proceeding

1. The central issues are:

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- a) The proper construction of the definition of "*matrimonial cause*" in s 4(1)(ca) of the *Family Law Act 1975* (Cth) ("the Act").
 - b) The proper construction of s 79 of the Act 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 of the Act as they affect the construction of that provision.
 - e) Whether the Full Court in this case interpreted s 79 too broadly, in particular, in ordering the continuance of prior proceedings.
 - 40 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 Act as a statement of policy guiding the exercise of jurisdiction.
 - h) The validity of the general principles created 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.
 - 50 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.

10 **Part III: Notices under Section 78B of the *Judiciary Act 1903* (Cth)**

2. The Appellant served notices under Section 78B of the *Judiciary Act 1903* (Cth) on 6 July 2012.

Part IV: Citation

3. The decisions of Duncanson M of the Family Court of Western Australia are referred to as

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[REDACTED]

4. The decision of Full Court of the Family Court of Australia comprised of Bryant CJ, May & Moncrieff JJ of 21 October 2011 is reported as

Stanford & Stanford (2011) FLC ¶93-483

5. The decision of Full Court of the Family Court of Australia comprised of Bryant CJ, May & Moncrieff JJ of 19 January 2012 is reported as

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Stanford & Stanford (2012) FLC ¶93-495

Part V: Material Facts

6. The material facts were not in dispute before the Full Court of the Family Court of Australia ("the Full Court") and are set out in paragraphs 9-23 of its first decision. The paragraphs are extracted here for ease of reference.

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9. *The wife is 89 years and the husband 87. The parties were married in 1971, it was the second marriage for both parties. This year the parties will have been married for 40 years. Their children from previous marriages are their respective case guardians.*

10. *For 37 years the parties lived in the former matrimonial home at an inner suburb of Perth which is registered in the husband's sole name.*

11. *The property was purchased by the husband and his first wife in February 1962. They obtained a war service loan in April 1964 secured by mortgage and built the house.*

12. *In December 1966 the husband and his first wife were divorced. The home was subsequently transferred to the husband's sole name.*

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13. *In June 1968 the wife divorced her first husband. In December 1968 she won \$16,000 on Lotto and used the majority of her winnings to pay out the mortgages on her home in a southern suburb of Perth.*

14. *In April 1974 the wife sold her southern Perth suburb home to her daughter C Rafter and her daughter's husband for \$13,000. The daughter subsequently renovated and sold the property for \$64,000 in May 1979.*

15. *The husband and wife retired in 1989. They both then were entitled to a pension from the Department of Veteran's Affairs. The parties continue to receive pension payments.*

- 10 16. *The evidence in the trial revealed a number of important facts, none of which were regarded as controversial in the appeal hearing.*
17. *In March 1995 the husband made a will. He did not discuss the will with his wife. In a letter dated 27 March 1995 to his wife and his sons its was explained that as the wife intended to leave her estate to her daughters,¹ excluding the husband, he provided for the wife to have a life tenancy in the inner Perth suburb home and for his estate to be divided equally between his sons or their children. The husband further explained that he was certain the wife's daughters would have no expectations of him, just as his sons would have no expectations from the wife. The wife was unaware of the letter.*
- 20 18. *The wife was appointed the husband's carer on 1 March 2002. In August 2003 and February 2004 the husband suffered two strokes. He recovered well.*
19. *On 1 September 2005 the wife signed an Enduring Power of Attorney in favour of her daughters. The husband was not aware of this.*
20. *On 30 December 2008 the wife suffered a stroke. She was admitted into full time residential care and cannot return to reside in the former matrimonial home to live with the husband. The wife also suffers from dementia.*
- 30 21. *On 28 February 2009 the husband had a fall and was hospitalized but later returned to the home where he has continued to live with his son.*
22. *Although physical separation was forced upon them, it was at least the husband's case that the parties are still in a marital relationship. The husband continues to provide for the wife, he has placed \$40,000 into an account for her use. He visits her three times a week at the care facility.*
23. *On 8 March 2009 the husband signed an Enduring Power of Attorney appointing his son, K Stanford and A Stanford, the wife of the husband's deceased son, R, jointly and separately to be his attorneys.*
- 40 7. The further relevant facts are:
- a) In or about 2005 the wife executed a will in favour of her daughters (Ms C Rafter and Ms G Brims).
- b) On 17 August 2009 (after the wife was diagnosed with dementia and at a time when she lacked the testamentary capacity to change her will), the wife's daughter, Ms C Rafter, as the wife's case guardian commenced proceedings in the Family Court of Western Australia for alteration of property interests pursuant to s 79 of the Act seeking an equal division of the net assets of the husband and wife.

The Family Court of Western Australia Proceedings

- 50 8. From 7 – 15 July 2012, the proceedings were heard in the Family Court of Western Australia before Magistrate Duncanson.
9. Ms C Rafter alleged during the hearing that the purpose of bringing and continuing the proceedings for a property settlement was "to improve her mother's quality of life and provide for her future economic needs",² but the Full Court held that the

¹ Ms C Rafter and Ms G Brims.

- 10 wife's needs were adequately met and to the extent that they were not, the provision made by the husband for the wife's needs would maintain her.³
10. On 9 July and 30 September 2010, the Magistrate delivered reasons for decision in which she rejected argument that she lacked jurisdiction to order a property settlement because the marriage was intact and held that it was not necessary to determine whether the wife needed a capital sum from which she would benefit.⁴ And further:
- 20 a) Determined that the wife's entitlements derived from her contributions during the marriage and that she should not be deprived of them, notwithstanding she did not have a need for a property settlement and that she would not benefit from such an order.⁵
- b) Noted that she was aware that her order might require the husband to sell the matrimonial home, in which he was residing, and ordered that he pay the wife \$612,931 (being 42.5% of the value of the home and funds standing to the credit of the parties)⁶. The only substantial asset was the home in which the husband resided.

The Full Court of the Family Court of Australia Proceedings

- 30 11. On 21 October 2010 the husband gave a Notice of Appeal, on 8 November 2010 obtained a stay of the Magistrate's orders pending determination of the appeal, on 13 April 2011 the appeal was heard by the Full Court at Perth and on 14 September 2011 the wife died.
12. The Full Court provides a summary of the appeal proceedings in paragraphs 11-16 of its second decision.⁷
13. On 21 October 2011 allowing the appeal, the Full Court held:
- 40 a. There is no doubt that the Family Court has jurisdiction to make an order for property settlement where parties have not separated.⁸
- b. The Magistrate erred in determining that there was a need for a property settlement and that the wife would benefit therefrom.⁹
- c. The wife's needs were adequately met and to the extent that they were not, the provision made by the husband for the wife's needs would maintain her.¹⁰
- 40 d. It was not just and equitable for the husband to be required to sell the parties' matrimonial home in order to fund a capital sum to the wife.¹¹
- e. There are many aspects of this application which do not require an 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.¹²
- f. The rights of each party remain, including the right to pursue a property settlement.¹³
- 50 14. The Full Court sought submissions as to whether the matter should be remitted for rehearing or, whether the Full Court should re-exercise the discretion of the Magistrate.

³ Ibid.

⁴ Ibid, 160.

⁵ Ibid.

⁶ Ibid.

⁷ (2012) FLC ¶ 93-495.

⁸ *Stanford & Stanford* (2011) FLC ¶93-483, 85 974.

⁹ Ibid, 85 988.

¹⁰ Ibid.

¹¹ Ibid, 85 990.

¹² Ibid.

¹³ Ibid.

- 10 15. On 21 November 2011, the wife's daughters jointly applied to the Family Court of Western Australia to be substituted as legal personal representatives of the wife on the basis that they were joint executors and beneficiaries pursuant to the wife's last will and testament and were substituted by order made on 30 November 2011.
16. The Appellant submitted that the wife's death meant that it was inappropriate for any order for property settlement to be made.¹⁴
17. Both parties submitted that the Full Court should re-exercise the discretion of the Magistrate.¹⁵
18. The Full Court delivered its reasons on the re-exercise of discretion on 19 January 2012 and held:
- 20 a) *The many years of marriage and the wife's contributions demand that those moral obligations [to the wife] be discharged by an order for property settlement.*¹⁶
- b) *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.*¹⁷
- 30 c) *The husband sought an adjustment on account of various factors in s 75(2). As he will, pursuant to the orders we intend to make, have use of the property until his death, in our view there is no need for a further adjustment.*¹⁸
19. Section 43(1) and its implications were not discussed in the judgment, despite having been raised by the Appellant.
20. The Full Court ordered that the husband pay the wife's estate the sum of \$612,931 at some later time, which may even be as late as his death, or at some earlier time, if desired by the husband's case guardian.

The High Court of Australia Proceedings

21. The Appellant has sought leave to appeal from that part of the Full Court's judgment of 21 October 2011 whereby:
- 40 a) The Court upheld the Magistrate's determination that the Family Court had jurisdiction to make an order for property settlement; and
- b) The Family Court ordered the continuance of proceedings initiated by the Magistrate, and
- the whole of the judgment of 19 January 2012 and the orders made by the Full Court on 19 January 2012. Special leave to appeal was granted to the Appellant by French CJ and Bell J on 22 June 2012.
22. The Appellant has filed a summons seeking leave to rely on an amended notice of appeal.

Part VI: The Appellant's Argument

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Legislative Background

23. This appeal essentially concerns the ambit of the power under s 79 of the Act to make property orders. To elucidate the limits of the power conferred on the Family

¹⁴Ibid, 86 305 – 86 308.

¹⁵Stanford & Stanford (2012) FLC ¶93-495, 86 305.

¹⁶Ibid, 86 314.

¹⁷Ibid.

¹⁸Ibid.

- 10 Court under that provision, the shifts in Commonwealth matrimonial causes
legislation regarding property orders and their purposes sets the scene.
24. The appellant contends that a consideration of the jurisdictional history of the
legislative scheme which facilitates property division between married parties
demonstrates that the power of the Family Court to make orders pursuant to s 79 of
the Act does not extend so far as to enable the interference by the Court in intact
marriages. Thus, the Magistrate and the Full Court acted beyond power in making the
orders now appealed.
25. The need to protect the institution of marriage and the family unit has been
consistently expressed by parliament as policy underlying family law legislation.¹⁹ At
20 the same time the legislation recognised the need to provide for a scheme where
parties could obtain property orders upon the breakdown of marriage.²⁰ Historically,
there was a requirement that this relief only be available as ancillary to proceedings
for principal relief, such as divorce.²¹ In the enactment of the *Family Law Act 1975*
(Cth), parliament dispensed with this requirement.²² However, the provisions were
found to be unconstitutional in *Russell v Russell; Farrelly v Farrelly*²³ and the Act was
amended to revert back to the previous requirement of a necessary link between
ancillary proceedings for property settlement and principal relief.²⁴
26. Thereafter the issue was the subject of an extensive report²⁵ (“the Report”) which
30 identified as a major concern the problems associated with a split jurisdiction,
namely that until the parties were separated for 12 months they could not access the
Federal jurisdiction and were reliant upon State laws.²⁶ This created a number of
problems including a lack of protection for a wife’s claim to have her non-financial
contributions to property recognised under the laws of the majority of the States in
the interregnum before divorce proceedings could commence.²⁷
27. As a result of the Report parliament enacted the *Family Law Amendment Act 1983*
(Cth) which again enabled property proceedings to be instituted without the link to
claims for principal relief.²⁸ Importantly however, nowhere in the debates²⁹ or in the
judicial consideration of the legislation was it contemplated that final property
settlement orders would be made where the parties were not separated and had an
40 intact marriage and the emphasis was always on relief consequent upon the
breakdown of marriage.
28. Marriage as an institution cannot be maintained as an exclusive union by court
order.³⁰ 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.

¹⁹ *The Family Law Act 1975 (Cth)*, s 43; *Matrimonial Causes Act 1959 (Cth)*, ss 9-17.

²⁰ *Matrimonial Causes Act 1959 (Cth)* s 86; *Family Law Act 1975 (Cth)*, s 79

²¹ *Lansell v Lansell* [1964] 110 CLR 353

²² *The Family Law Act 1975 (Cth)* as originally enacted.

²³ (1976) 134 CLR 495.

²⁴ *The Family Law Amendment Act 1976 (Cth)* - see amendment to the definition of matrimonial cause; Second Reading Speech, The Family Law Amendment Bill 1976 (Cth), House of Representatives, Bob Ellicott (20 May 1976); Report of the Joint Select Committee on the Family Law Act 1975 (1980), 11.

²⁵ Report of the Joint Select Committee on the Family Law Act 1975 (1980)

²⁶ *Ibid*, 13, for example see *Married Women’s Property Act 1935 (Tas)*

²⁷ *Ibid*, 13-14.

²⁸ *The Family Law Amendment Act 1983 (Cth)* - see amendment to the definition of matrimonial cause.

²⁹ Report of the Joint Select Committee on the Family Law Act 1975 (1980), 11-25; Second Reading Speech, The Family Law Amendment Bill 1983 (Cth), Senate, Senator Gareth Evans (15 September 1983).

³⁰ See *R v L* (1991) 174 CLR 379, where the institution of marriage is described as “*The unique relationship of each marriage the delicacy of the relationship which is intended to survive good times and bad, temptations and despondency and the vicissitudes of family life preclude the possibility of curial enforcement of connubial rights.*”

10 29. As noted by Brennan J, 'the relationship between husband, wife and children of the marriage, which are at the heart of the marriage vow, are essentially personal, not proprietary.'³¹

30. Central to the Appellant's submissions is his contention that, consistent with ss 51(xxi) and (xxii) parliament only conferred power to make property settlements to ensure that the uniquely personal relationships of the family, and matters incidental thereto are protected. As noted by Brennan J:

*Section 51(xxi) is unique in that the words do not empower the parliament to legislate upon the customary incidence of marriage such that the nature of the marriage relationship is affected.*³²

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The Characteristics of Property Settlement Orders

31. While s 79 confers a very wide discretion on the Family Court, that discretion is not unlimited. Its exercise is conditioned by the requirement that orders made under it are just and equitable (s 79(2)), and that the Court should take into account the matters specified in s 79(4) and the general principles embodied in ss 43 and 81, so far as they are applicable.³³

32. An order for property settlement under s 79 of the Act has the following characteristics:

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a) It imposes a change to the property rights of the parties to which they neither necessarily agree, nor consent.

b) It is an order which is intended to finally determine the financial relationship between the litigants.³⁴

c) It is not capable of later variation (except on narrow grounds under s 79A of the Act)³⁵ even by reason of changed circumstances (However, a property order between separated parties may be set aside where the consent to do so is implied by a reconciliation, renewing and continuing of the marital relationship.)³⁶

d) It is made in the context of s 81 of the Act which provides for finality "*as far as practicable*".

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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.

34. This contention is supported by the legislative history to which the Appellant has referred.

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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.

³¹ *Fisher v Fisher* (1986) 67 ALR 513, 525 (Brennan J).

³² *Ibid*, 525 (Brennan J).

³³ *Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513 (Mason & Deane JJ).

³⁴ *Taylor v Taylor* (1979) 143 CLR 1; *In the Marriage Cawthorn* [1998] FLC 92-805 at 85,060 and *Franklin and Mcleod* (1993) 121 FLR 430 at 442.

³⁵ *Ibid*.

³⁶ However, where parties obtain an order under s 79 and reconcile the reconciliation is viewed as implied consent to set aside the previous property order: *Matthews v Matthews* (2006) FLC 93-298.

- 10 36. The concept of dispute is a matter that arose in *The King v Commonwealth Court of Conciliation and Arbitration and The Merchant Services Guild of Australasia*³⁷. That was a case dealing with the constitutional investiture of power to deal with industrial disputes. It was held in that case that the concept of dispute connotes a real and substantial difference having some element of consistency and likely if not adjusted to engender relevantly the industrial peace of the community. The same can be said of marital disputes where they exist.
- 20 37. The Appellant will contend that adopting this concept of real and substantial differences, the exercise of judicial power under s 51(xxi) is limited to such disputes which arise upon the breakdown marital relationship. The importance of the breakdown of the marriage was emphasised in *the Marriage of Doyle*³⁸:
- It must be presumed, from the enactment of sec. 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)

Statutory Framework

- 30 38. The basis for the Family Court's jurisdiction in relation to property settlement is founded on the existence of a "*matrimonial cause*" which relevantly, for the statutory purposes of the Act, is defined in s 4(1)(ca) of the *Family Law Act 1975* (Cth) to include:-
- (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*; (emphasis added).
39. The following preconditions to satisfy this definition may be noted; the proceedings constituting the exercise of jurisdiction must:-
- a) *be between the parties to a marriage*;
- b) *with respect to the property of one or both parties to the marriage*; and
- c) *arise out of the marital relationship*.³⁹
- 40 40. The Full Court in this case held that because the wife had made contributions to the assets enjoyed by the parties during their long marriage, it was appropriate to "*allow the wife's estate the benefit of a share of the property in which she has established an interest*"⁴⁰. It found that the original proceedings had not terminated or been extinguished by reason of the wife's death but remained on foot.
41. The Full Court also observed that
- Other particular factors that pertain to this case are the fact that the house was in the name of the husband and the wife had no legal interest to leave to her estate, and that orders can be made which will enable the husband to enjoy the assets of the parties until his death.*⁴¹
- 50 42. In particular, relying on dicta of Brennan J in *Fisher v Fisher*⁴² the Full Court held that it had jurisdiction and power to make an order under s 79 for the benefit of the wife's

³⁷ [1912] 15 CLR 586.

³⁸ (1989) 13 FamLR 200 (Lindenmayer J).

³⁹ This qualification is essential to confine not only the operation of the Family Court to matters within the powers and authorities conferred under the Act, but also within the constitutional limits of the Commonwealth legislative powers. (*Russell v Russell* [1976] HCA 23; (1976) 134 CLR 495, 510-512 (Barwick CJ)).

⁴⁰ (2012), 86,314.

⁴¹ *Ibid.*

⁴² *Fisher*, 526-527. The Full Court noted his Honour's view that s 79(8) does not confer jurisdiction on the Family Court to entertain proceedings commenced *after the death* of one of the parties to the marriage but could make property orders in proceedings commenced

10 estate in order to satisfy the moral claims of the deceased wife through her contribution to the marriage during its many years. While her need no longer subsisted, it was held to be appropriate to allow the wife's estate the benefit of a share of the property.⁴³ The Court regarded itself as exercising the discretion originally sought to be exercised by the Magistrate.⁴⁴

43. In consequence the Full Court proceeded to determine the claim subsequently brought by the wife's daughters of her previous marriage and made the orders that are the subject of this appeal.

44. 2 preliminary issues arise from the Full Court's findings:

20 a) The Court assumed in effect that any proceedings between married people with respect to their property are proceedings arising out of the marital relationship. The Appellant contends for a more specific reading, namely that to *arise out of the marital relationship* the proceedings must operate upon a relationship which has broken down and requires external judicial assistance to resolve. In the instant case there never was a controversy arising out of the marital relationship, during the wife's life.

b) The controversy following her death concerned the enhancement of her estate.

30 45. In so holding, the Full Court demarked the principal issue for the decision of this Court: Does the Family Court, where the death of one of the parties to an intact marriage bring the marriage relationship to an end, have jurisdiction in respect of a "matrimonial cause", as defined in s 4(1)(ca) of the Act, to make an order under s 79 permanently disposing of the property of the surviving party to the marriage where the effect of the order is to enlarge the estate of the deceased party for the benefit of children of the deceased who have never have been, "children of the marriage".

46. This general question entails the following sub-issues. The Appellant contends the proper answer is "no" to each sub-issue, except c) and f):

40 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?

between the parties to a marriage arising out of the marital relationship or otherwise falling within para (ca) of the definition of "matrimonial cause" in s 4(1) of the Act. The crucial question is it is submitted: Do the 'continued' proceedings arise out of the marital relationship? See further below.

⁴³Stanford & Stanford (2012) FLC ¶93-495, 86 314.

⁴⁴At the heart of the appeal is the Appellant's contention that the death of the wife brought about a change in the *character and nature* of the proceedings that had been commenced before the Magistrate. The Magistrate's discretion had been directed to the issue of the adequacy of the provision made for the wife's residential care. That purpose lapsed upon her death and with it, it is submitted, the magisterial foundation for the re-exercise of the Magistrate's discretion: *Vitzdamm-Jones* (1981) 148 CLR 383, 37; 45-47 (Barwick CJ). A distinction should be drawn between a provision providing for the *continuance* by a legal personal representative of one of the parties of proceedings commenced before the death of the party, asserting or disputing a right derived from the relationship between the parties to the marriage, and the claim of a stranger to the marriage against a surviving party 'continued' or commenced after the death of an applicant. In the former case substitution can be validly made since the proceedings arise directly out of the marital relationship: see *Fisher*, 518 (Gibbs CJ); *Dougherty v Dougherty* [1987] HCA 33; (1987) 163 CLR 278, considered below at paragraph 77.

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- 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?
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- 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?

Contention that the Full Court wrongly read s 79 too broadly

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47. The assumption of jurisdiction by the Full Court to make the impugned orders is not supported by the dicta of Brennan J⁴⁵ on which the Court relied. His Honour’s remarks were not definitive about the power of the Family Court to make orders after the death of one of the parties to the marriage and certainly were not directed to circumstances where the dispute was between the beneficiaries of the deceased’s estate and the surviving party.
48. In making orders of the kind made on 19 January 2012 the Full Court was essentially disposing of the property owned by the Appellant in favour of beneficiaries of the wife’s estate, who were outside of the marital relationship. The basis for the order was that it was property of a person who had been a party to the marriage.
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.⁴⁶ 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 and Dependents Provision) Act 1972* (WA) (“Inheritance Act”).
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50. If properly construed, s 79 permits proceedings of the kind entailed in this appeal, it is capable of circumventing relevant principles applicable under State inheritance legislation.⁴⁷ A construction that avoids this is to be preferred. Those principles are based on statutory considerations not necessarily consistent with the broad general discretion available under s 79 of the Act.⁴⁸ As identified by the Full Court in its judgment, this case has “*particular relevance in contemporary Australian society*”⁴⁹,
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- given Australia’s ageing population and the increased incidence of blended families.

⁴⁵ *Fisher*, 527.

⁴⁶ The contingency of this feature can be illustrated by asking: What if the applicant/ case guardian had been a niece or someone of a more remote association? If no regard is to be had to the nature of that association, what justification could there be for simply making an order aggrandising the wife’s estate in *se*?

⁴⁷ In the case of Western Australia, the principles may be found in *Pogorelic v Banovich* [2007] WASC 45, 4-12; *Devereaux-Warnes v Hall* [No 3] [2007] WASC 235; (2007) 35 WAR 127; *Lathwell v Lathwell* [2008] WASC 256.

⁴⁸ These are: “just and equitable” (ss 79(1) and (2) and “appropriate” in s 79(8)). Brennan J in *Fisher* (at his [9]) envisaged that there might be no such inconsistency between state TFMA laws and orders made under the Act, citing *Smith v Smith* [1986] HCA 36; (1986) 161 CLR 217.

⁴⁹ (2011) FLC 93-483, 85 964.

- 10 The outcome of this case will significantly impact on the jurisprudence of family law in such cases.
51. The determinative question is, it is submitted, in the particular circumstances of this case; what is the nature of the applications, both original and subsequent, and do they satisfy the requirements identified in paragraphs 39.
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*."⁵⁰ 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.
- 20 53. In some circumstances there may be a continuing factor, such as the appropriate guardianship arrangements of a child of the marriage which remains as a residual issue arising from the pre-existing elements of a particular marriage.⁵¹ But there is no relevant circumstance in the present case whereby the interests of the children of the mother in her estate derive their force from something that was intrinsic to the former marital relationship.
54. Further, it is necessary definitionally that the proceedings "*arise out of the marital relationship*."⁵² The mere fact that the property the subject of the application was owned by one of the parties to a pre-existing marriage is no reason why persons who are not children of the marriage and who do not require, guardianship protection or maintenance, should effectively be authorised to make a claim upon the survivor's property in their own right.
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Proper Construction of s 79 of the Act

55. In providing for property settlements, s 79 of the Act should not be read, objectively, to extend beyond alteration of the interest in the property of one of the parties to the marriage **in the context of the breakdown of the relationship:**
- a) upon the termination of the marriage relationship by death;⁵³
 - b) for the benefit of persons who are not "children of the marriage".⁵⁴
- 40 56. By reason of those limitations s 79 should not be construed as providing a *general power* to order settlements of property simply on the basis that the property is owned by a previously married person.⁵⁵
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.⁵⁶

⁵⁰ This is even if the proceedings might have been so characterised prior to that point.

⁵¹ In *Fisher*, Gibbs CJ (at 518) observed that orders concerning custody or guardianship arrangements, as was the subject of the application considered in that case, may be appropriate after the death of one or both of the parties to the marriage with regard to children of the marriage requiring their protection and nurture. The latter were aspects that rose from the very heart of the marital relationship and were of continuing force after the demise of one party.

⁵² 'Arise from' imports notions of connection and causality. Synonyms or metaphors used in cases concerned with the marriage power are 'flow from', 'derived from' and 'wrapped up in': *Russell v Russell* (1976) 134 CLR 495, 509-511 (Barwick CJ); 525 (Gibbs J).

⁵³ See s 79(1)(a); 79(1C)(ba): ("parties to the marriage").

⁵⁴ See s 79(1)(d); 79(1B)(c); 79(4)(a); 79(2)(a); 79(4)(f) and (g): ("child of the marriage").

⁵⁵ *Lansell v Lansell* (1964) HCA 42; (1964) 110 CLR 353, 360 (Kitto J) dealing with the then s 86 of the Matrimonial Causes Act authorizing property orders.

⁵⁶ See relevantly, *Fisher* Brennan J (at 526), holding that the jurisdiction conferred by s 79(1) will operate only for the benefit of the parties to the marriage or a child of the marriage and Dawson J (at 530), that a law under s 79(1) is limited by the definition of matrimonial cause to proceedings arising out of the marital relationship and that the provision only authorises the creation of new ones to satisfy claims arising from marriage upon the property of the spouse.

- 10 58. More specifically, s 79(8)(a) provides that: “Where, before property settlement proceedings are completed, a party to the marriage dies ... the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party.” (Emphasis added)

No identity of ‘proceedings’

- 20 59. Identifying the nature of the proceedings at a particular point of time is relevant and necessary because where, before property settlement proceedings have been completed, a party to the marriage dies, an order can only be made under s 79(8) if the legal effect of the order is to authorise the legal personal representative of the deceased party to continue ‘the’ (that is, those) proceedings. The provision in its terms implies an identity of the proceedings prior to and following the death of the party.
- 30 60. Having regard to the change in the nature of the proceedings after the wife’s death, it can be said that, although the original proceedings may have qualified as a matrimonial cause they changed to proceedings properly to be characterized as an inheritance claim. As presently constituted the proceedings, in both reality and causality, do not concern antecedent rights of the applicants arising from the marital relationship that continued after the wife’s death.⁵⁷ The rights to a share in the property of the surviving spouse do not have their source in the marital relationship after the termination 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.
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.
- 40 63. This Court should therefore answer the questions posed in paragraph 46 above as we have indicated, namely by the response that the answer to each of those questions is “no”, except for subparagraph c) and f).

Construing s 79 consistently with its constitutional validity

64. It is accepted that the definition of matrimonial causes is not exactly coterminous with the concept of matrimonial cause in s 51 (xxii). In order to determine the outer limits of the statutory jurisdiction conferred upon the Family Court under the Act and the powers vested in the Court under s 79 it is relevant to have regard to the constitutional limits set by s 51(xxi) and (xxii) of the Constitution.
65. First, in construing the relevant provisions of the Act, it is submitted that a construction should be avoided that is right at the edge of, or beyond constitutionality, unless clearly and unambiguously expressed.⁵⁸

⁵⁷In *Fisher, Mason and Deane JJ* (at 522-524) saw the issue as depending on whether proceedings carried on by the legal personal representative deal with a subject matter with a *different character which does not arise out of the relationship of marriage*. In the event they held that the definition of ‘matrimonial cause’ in s 4 restricted proceedings to those brought in relation to the marital relationship.

⁵⁸This is in accordance with the settled practice of this Court not to decide constitutional questions if a matter can be determined on the basis of statutory construction: *Chief Executive Officer of Customs v El Hajje* [2005] HCA 35; (2005) 224 CLR 159; *Re Patterson; Ex Parte Taylor* [2001] HCA 51; (2001) 207 CLR 391, 473-474 (Gummow & Hayne JJ). It is conceded that in determining issues of construction, reference to constitutional notions and limits can, however, shape the meanings of particular statutory terms and expressions. If the choice is between reading a statutory provision in a way that will invalidate it and reading it in a way that will not, a Court should choose the latter course when it is reasonably open: *Morcilovic v The Queen* [2011] HCA 34, 390 (Heydon J); *Residual Assco Group Ltd v Spalvins* [2000] HCA 33; (2000) 202 CLR 629, 644; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4; (2008) 234 CLR 532, 553.

10 66. Secondly, it is submitted that where contingently a construction of the relevant provisions is likely to produce inconsistency with State laws within the meaning of s 109 of the Constitution, with consequent displacement of State laws including common law rights, this Court should prefer a construction that avoids that conclusion, unless compellingly obvious.

Framework of constitutional power and the ambit of s 79

67. The constitutional validity of the relevant provisions only arise if this Court holds that s 79, in its terms, authorized the Full Court to entertain a continuance of the proceedings commenced by the case guardian in the first instance.

20 68. It is accepted that Parliament can validly make laws under s 51 (xxi) and (xxii) of the Constitution adjusting or altering property interests associated with proceedings for principal relief involved in divorce and other forms of altering the marriage relationship.⁵⁹ This is due to the fact that the proceedings have a *sufficiently close connection* with the maintenance or dissolution of the marital relationship. Provision of such relief is either *directly* or *incidentally* entailed in the proceedings.⁶⁰ Even wearing the latter aspect such proceedings fall within the penumbra of the power.

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.⁶¹

30 70. Even if the marriage power is characterised as non-purposive the question can be posed: Is the conferring upon the Family Court of power to make property orders augmenting the estate of a former party to the marriage whose sole benefit is for third parties an appropriate and adapted means of preserving those pre-existing mutual obligations? That question can be determined either as a matter of proximity (the *closeness* of the relationship of the third parties and the surviving spouse).⁶² Alternatively, it entails disproportionality in allowing third parties to pursue interests in the surviving spouse's property that are capable of no effect in preserving the defunct relationship which represent a substantial incursion into his right to dispose of his residual estate. Such disproportionality points to a lack of constitutional connection. See for instance the suggestion as to the use of the judgment of the Full Court in this case to "*circumvent the traditional avenues for challenging a Will by preemptively issuing proceedings in the Family Law system prior to the testator's death.*"⁶³

40 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

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⁵⁹ *Lansell v Lansell* [1964] HCA 42; (1964) 110 CLR 353.

⁶⁰ The constitutional distinction between matters that lie at the core of the head of power under s 51 and those which are incidental to making effective the grant of legislative power has a long pedigree in the High Court; see *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ); L Zines, *The High Court and the Constitution* (5th Edition, Federation Press, 2008), 51.

⁶¹ It is debatable whether the marriage power in s 51 (xxxi) is *purposive* in giving sanctity and security to the marital relationship and the creation of mutual obligations and benefits associates with it; see regarding purposive powers *Cunliffe v The Commonwealth* (1994) 187 CLR 579 at 296 (Mason CJ); see contra Dawson J in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 88; *Leask v The Commonwealth* (1996) 187 CLR 579, 600-601 (Dawson J).

⁶² Regarding *closeness of connection* see paragraphs 68-69 and 81.

⁶³ www.harwoodandrews.com/publications_bulletins_detail.aspx?view=218

10 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.

20 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).⁶⁴ It is not a proceeding
arising from the marital relationship, nor one involving divorce or a matrimonial
cause, in their constitutional sense.

73. S 79 should be read down accordingly.

30 74. It is accepted that the constitutional power to make property settlements associated
with the marital relationship extends in some circumstances to children of the
marriage. However in *Ex parte F*⁶⁵ the Court held that for the purposes of ss (xxii) of s
51 the expression children should be confined to those of the marriage. In *Russell*⁶⁶
the High Court held that under s 51 (xxi) Parliament could make a law affecting the
property rights of *parties to the marriage* arising from the mutual rights and duties
between spouses and the children of the marriage. But *Russell* went no further in
relation to persons not children of the marriage.

75. In *R v Lambert*⁶⁷ the High Court held that s 51 (xxi) would enable third parties outside
the marriage relationship to be the subject of orders made in proceedings between
the parties to the marriage. This could extend to the custody of a child of the
marriage by a third party after the death of one of the spouses. Even conceding that
extension of jurisdiction *Lambert* does not support a proposition as broad as that
expressed by the Full Court in this matter. Nor can the High Court's decision in *Dowel*
*v Murray*⁶⁸ be taken to support the Full Court's determination.

40 76. *Lambert* in fact supports the proposition that proceedings brought under the Act in
relation to the custody of a child that interfere with a general State law enacted for
the protection of children may be invalid or it displaces the operation of State child
welfare legislation.

77. In *Dougherty v Dougherty*⁶⁹ the High Court held that where a son of the married
parties sought leave to intervene in proceedings begun by the wife seeking
maintenance for herself and the dependent children of the marriage the proceedings
constituted a matrimonial cause within ss 4(1)(ca)(i) of the Act which comprised a
single proceeding. The filing of the application to intervene did not mark the
commencement of a new proceeding. The fact that:

- 50 a) the intervening son was a child of the marriage; and
b) was seeking a special property provision for antecedent unpaid service on
farms owned by the father at the time when the original proceedings for
maintenance were still on foot

⁶⁴This argument is predicated on the mutual exclusivity of the nature of the proceedings instituted before the Magistrate, not arising out of the marital relationship, and the present proceedings which are generally one with respect to the more of property. It is conceded that if the proceedings had a dual character, one within jurisdiction, and one outside, the jurisdiction could be constitutionally supported: *Fisher* (Gibbs CJ (at 521)). It is submitted, however, that that is not the case in this instance.

⁶⁵ *Re F: Ex Parte F* (1986) 66 ALR 1.

⁶⁶ *Russell v Russell* (1976) 9 ALR 103.

⁶⁷ (1980) 32 ALR 505.

⁶⁸ (1979) 22 ALR 577.

⁶⁹ [1987] HCA 33; (1987) 163 CLR 278.

10 meant that the son's application effectively merged with that of his mother. It was not a new claim or cause of action initiated after her death.

The relevance and limited authority of *Fisher v Fisher*

20 78. In the courts below the Appellant did not assert that either ss 79(1) or (8) were invalid. His submissions were directed to establishing that s 79 did not encompass the kind of orders ultimately made 'in the circumstances' by the Full Court or, if they did, the orders were inconsistent with s 43(1)(a) of the Act in not subverting the marital relationship. The Appellant maintains that to dispose of this appeal, it is not necessary to establish that the relevant provision in s 79 strays beyond the constitutional boundaries of s 51 (xxi) and (xxii) of the Constitution. In the first place, this requires a consideration of the High Court's authority in *Fisher v Fisher*.

79. The sole question for determination in *Fisher* was the constitutional validity of s 79(8) of the Act. To the extent that it is relevant it is submitted that it supports the contentions of the Appellant. In the alternative, it is distinguishable for reasons given below.

80. The factual context of *Fisher* evinces the following differences with the current appeal.

- 30
- 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.

40 81. Gibbs CJ held⁷⁰ 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.

50 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.

⁷⁰*Fisher*, 520-521.

- 10 83. Mason and Deane JJ held⁷¹ 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.
- 20 84. Brennan J⁷² 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.⁷³ 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*.⁷⁴
- 30 85. His Honour also relied on the qualification attaching to the power by reason of imposing a modifying requirement that the Court be satisfied as to the appropriateness of the orders as restricting the law to one within constitutional power.⁷⁵
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.⁷⁶ 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.⁷⁷
- 40 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.

Criterion of "appropriateness" as confining discretion within constitutional bounds

88. In *Fisher* this Court recognized that s 79(8)(b)(ii) operated to keep the Family Court's exercise of discretion within its constitutional circumference. In that regard it has a similar function to s 15A of the *Acts Interpretation Act 1901* (Cth). It is submitted that considerations of whether an order is 'appropriate' are therefore not simply a matter of unbounded purely evaluative discretion going to the merits of an order but also

⁷¹Ibid, 523-524 (Mason & Deane JJ).

⁷²Ibid, 526-528 (Brennan J).

⁷³His Honour's remark (at 514) that: "The death of a spouse will not always extinguish or satisfy the moral claims of the surviving spouse and children to which effect would have been given if the proceedings had been completed" expresses a certain contingency or ambivalence about the operation of the subsection.

⁷⁴There is some ambiguity in his Honour's reasons where he speaks (at 526) about the Court making an order "satisfying the moral obligations owed to their children." The present proceedings cannot be said as continuing to allow the Court to make an order to satisfy any moral obligation by the Appellant to the children of his former spouse.

⁷⁵Ibid, 527 (Brennan J).

⁷⁶Ibid, 528-531 (Dawson J).

⁷⁷This is evidenced by his statement (at 530): "If there is power to provide for the commencement of the proceedings, there is power to provide for their termination." This assumes the proceedings are the same in each case.

- 10 have the constitutional dimension. It establishes a boundary to the relevant statutory power that engages considerations of *proportionality*.⁷⁸
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 by reference to the constitutional power under s 51(xxi).

20 **The limiting effect of the requirement of 'just and equitable'**

90. It is submitted that the criterion of 'just and equitable' functions in the same way as the requirement that the Family Court's orders be 'appropriate'. While it engages the merits of a dispute between the parties to the marriage regarding marital property, it is not open-ended and incapable of judicial review. The necessity that the Court be 'satisfied' imposes a jurisdictional precondition on the exercise of the power that confine it to matters arising out of the marital relationship, including, admittedly, survivorship rights and disposition of spousal property after the death of one of the parties. Put as an alternative to whether the orders were appropriate, the orders are incapable of being seen to be 'just and equitable' if they are in substance a claim
- 30 between children of the wife unrelated to the surviving party which treat him as a surrogate sources of property by dint of an accidental relationship with the Appellant through their mother.
91. This Court should hold that the orders made 19 January 2012 were not made within the jurisdiction of the Full Court and are a nullity.

Part VII: Applicable Provisions

92. The applicable provisions as at 19 January 2012 when the Orders were made is exhibited and marked "exhibit 1" to this submission.

40 **Part VIII: Orders Sought**

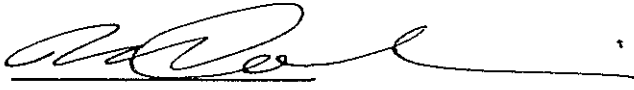
1. The appeal be allowed.
2. Orders 1-2 of the Full Court of the Family Court of Australia dated 19 January 2012 be set aside.
3. The Form 1 Application of the Legal Representatives of the Wife filed 17 August 2009 be dismissed.
4. The Legal representatives of the wife pay the appellant's costs of and incidental to this appeal.
- 50 5. Such further order as this Court thinks fit.

PART IX:

The Appellant estimates it will take 1.5 – 2 hours to present his oral argument.

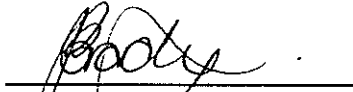
⁷⁸It should be noted that proportionality relevantly has two separate operations for the purposes of this argument. A law that is capable of allowing an outcome that is disproportionate to the settlement of a marital dispute arguably exceeds the implied incidental reach of placita 51 (xxi). Alternatively, an outcome that is disproportionate in depriving a party to the marriage of property unrelated to the *purpose* of an application under s 79(1) is not capable of being "appropriate and adapted" to the achievement of the *statutory* end; for the content of "appropriate and adapted" see *The Commonwealth v Tasmania* ("Tasmanian Dam case") [1983] HCA 21; (1983) 158 CLR 1.

10 These submissions were prepared by:


Hon Peter Dowding SC

(Signed)

Dr Peter Johnston of Counsel


Ms Jorja Brady of Counsel

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Exhibit 1

Applicable Provisions

The Constitution

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:

- (i) trade and commerce with other countries, and among the States;
- (ii) taxation; but so as not to discriminate between States or parts of States;
- 20 (iii) bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
- (iv) borrowing money on the public credit of the Commonwealth;
- (v) postal, telegraphic, telephonic, and other like services;
- (vi) the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth;
- (vii) lighthouses, lightships, beacons and buoys;
- (viii) astronomical and meteorological observations;
- (ix) quarantine;
- 30 (x) fisheries in Australian waters beyond territorial limits;
- (xi) census and statistics;
- (xii) currency, coinage, and legal tender;
- (xiii) banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money;
- (xiv) insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned;
- (xv) weights and measures;
- (xvi) bills of exchange and promissory notes;
- 40 (xvii) bankruptcy and insolvency;
- (xviii) copyrights, patents of inventions and designs, and trade marks;
- (xix) naturalization and aliens;
- (xx) foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth;
- (xxi) marriage;
- (xxii) divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants ...

109 Inconsistency of laws

50 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.

SECT 4

Interpretation

(1) In this Act, the standard Rules of Court and the related Federal Magistrates Rules, unless the contrary intention appears:

"matrimonial cause" means:

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

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(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:

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(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

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10 with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104.

SECT 39

Jurisdiction in matrimonial causes

(1) Subject to this Part, a matrimonial cause may be instituted under this Act:

- (a) in the Family Court; or
- (b) in the Supreme Court of a State or a Territory.

20 (1A) Subject to this Part, a matrimonial cause (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) may be instituted under this Act in the Federal Magistrates Court.

(2) Subject to this Part, a matrimonial cause (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) may be instituted under this Act in a Court of summary jurisdiction of a State or Territory.

(3) Proceedings for a divorce order may be instituted under this Act if, at the date on which the application for the order is filed in a court, either party to the marriage:

- (a) is an Australian citizen;
- (b) is domiciled in Australia; or
- (c) is ordinarily resident in Australia and has been so resident for 1 year immediately preceding that date.

30 (4) Proceedings of a kind referred to in the definition of *matrimonial cause* in subsection 4(1), other than proceedings for a divorce order or proceedings referred to in paragraph (f) of that definition, may be instituted under this Act if:

- (a) in the case of proceedings between the parties to a marriage or proceedings of a kind referred to in paragraph (b) of that definition in relation to a marriage--either party to the marriage is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date; and
- (b) in any other case--any party to the proceedings is an Australian citizen, is ordinarily resident in Australia, or is present in Australia, at the relevant date.

40 (4A) In subsection (4), *relevant date*, in relation to proceedings, means:

- (a) if the application instituting the proceedings is filed in a court--the date on which the application is so filed; or

- 10 (b) in any other case--the date on which the application instituting the proceedings is made.
- (5) Subject to this Part and to section 111AA, the Supreme Court of each State is invested with federal jurisdiction, and jurisdiction is conferred on the Family Court and on the Supreme Court of each Territory, with respect to matters arising under this Act in respect of which:
- (a) matrimonial causes are instituted under this Act; or
- (b) matrimonial causes are continued in accordance with section 9; or
- 20 (d) proceedings are instituted under regulations made for the purposes of section 109, 110, 111, 111A or 111B or of paragraph 125(1)(f) or (g) or under Rules of Court made for the purposes of paragraph 123(1)(r); or
- (da) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ; or
- (e) proceedings are instituted under section 117A.
- (5AA) Subject to this Part and to section 111AA, the Federal Magistrates Court has, and is taken always to have had, jurisdiction with respect to matters arising under this Act in respect of which matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) are instituted under this Act.
- 30 (5A) Subject to this Part and to section 111AA, the Federal Magistrates Court has jurisdiction with respect to matters arising under this Act in respect of which proceedings are instituted under:
- (a) regulations made for the purposes of section 109, 110, 111, 111A or 111B; or
- (b) regulations made for the purposes of paragraph 125(1)(f) or (g); or
- (c) section 117A; or
- (d) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ.
- 40 (6) Subject to this Part and to section 111AA, each court of summary jurisdiction of each State is invested with federal jurisdiction, and jurisdiction is conferred on each court of summary jurisdiction of each Territory, with respect to matters arising under this Act in respect of which:
- (a) matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) are instituted under this Act; or

- 10 (b) matrimonial causes (other than proceedings of a kind referred to in subparagraph (a)(ii) or paragraph (b) of the definition of *matrimonial cause* in subsection 4(1)) are continued in accordance with section 9; or
- (d) proceedings are instituted under:
- (i) regulations made for the purposes of section 109, 110, 111, 111A or 111B; or
 - (ii) regulations made for the purposes of paragraph 125(1)(f) or (g); or
 - (iii) standard Rules of Court made for the purposes of paragraph 123(1)(r); or
 - (iv) Rules of Court made for the purposes of paragraph 87(1)(j) of the *Federal Magistrates Act 1999*; or
- 20 (da) proceedings are instituted under Division 4 of Part XIII AA or under regulations made for the purposes of section 111CZ; or
- (e) proceedings are instituted under section 117A.

Note: Under section 39A of the *Judiciary Act 1903*, the jurisdiction conferred by this subsection on a State court of summary jurisdiction may only be exercised by certain judicial officers of the court.

(7) The Governor-General may, by Proclamation, fix a day as the day on and after which proceedings in relation to matters arising under this Part may not be instituted in, or transferred to, a court of summary jurisdiction in a specified State or Territory.

30 (7AAA) Without limiting the generality of subsection (7), a Proclamation under that subsection may be expressed to apply only in relation to one or more of the following:

- (a) proceedings of specified classes;
- (b) the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction in a specified part of a State or Territory;
- (c) the institution of proceedings in, or the transfer of proceedings to, a court of summary jurisdiction constituted in a specified way.

(7AA) A court of summary jurisdiction in a State or Territory shall not hear or determine proceedings under this Act instituted in or transferred to that court otherwise than in accordance with any Proclamation in force under subsection (7).

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(7A) The Governor-General may, by Proclamation, declare that a Proclamation made under subsection (7) is revoked on and from a specified date and, on and after the specified date, this Act (including subsection (7)) has effect as if the revoked

10 Proclamation had not been made, but without prejudice to the effect of the revoked Proclamation in respect of the jurisdiction of courts before the specified date.

(8) Jurisdiction with respect to a matter arising under this Act in respect of which a matrimonial cause is instituted under this Act is not conferred on a court of a Territory unless at least one of the parties to the proceedings is, at the date of the institution of the proceedings or the date of the transfer of the proceedings to the court of the Territory, ordinarily resident in the Territory.

20 (9) The jurisdiction conferred on or invested in a court by this section includes jurisdiction with respect to matters arising under any law of the Commonwealth in respect of which proceedings are transferred to that court in accordance with this Act.

SECT 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:

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- (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.

SECT 79

Alteration of property interests

40 (1) In property settlement proceedings, the court may make such order as it considers appropriate:

- (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or

- 10 (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage--altering the interests of the bankruptcy trustee in the vested bankruptcy property;

including:

(c) an order for a settlement of property in substitution for any interest in the property; and

(d) an order requiring:

(i) either or both of the parties to the marriage; or

(ii) the relevant bankruptcy trustee (if any);

20 to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

(1A) An order made under subsection (1) in property settlement proceedings may, after the death of a party to the marriage, be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

(1B) The court may adjourn property settlement proceedings, except where the parties to the marriage are:

(a) parties to concurrent, pending or completed divorce or validity of marriage proceedings; or

30 (ba) parties to a marriage who have divorced under the law of an overseas country, where that divorce is recognised as valid in Australia under section 104; or

(bb) parties to a marriage that has been annulled under the law of an overseas country, where that annulment is recognised as valid in Australia under section 104; or

(c) parties to a marriage who have been granted a legal separation under the law of an overseas country, where that legal separation is recognized as valid in Australia under section 104;

40 on such terms and conditions as it considers appropriate, for such period as it considers necessary to enable the parties to the marriage to consider the likely effects (if any) of an order under this section on the marriage or the children of the marriage, but nothing in this subsection shall be taken to limit any other power of the court to adjourn such proceedings.

(1C) Where the period for which a court has adjourned property settlement proceedings as provided by subsection (1B) has not expired and:

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- (a) divorce or validity of marriage proceedings are instituted by one or both of the parties to the marriage; or
 - (ba) the parties to the marriage have divorced under the law of an overseas country and the divorce is recognised as valid in Australia under section 104; or
 - (bb) the marriage is annulled under the law of an overseas country and the annulment is recognised as valid in Australia under section 104; or
 - (c) the parties to the marriage are granted a legal separation under the law of an overseas country and the legal separation is recognized as valid in Australia under section 104;
- 20
- a party to the first-mentioned proceedings may apply to the court for the hearing of those proceedings to be continued.
- (2) The court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.
 - (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:
 - (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
 - (b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and
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- 40
- (c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent; and
 - (d) the effect of any proposed order upon the earning capacity of either party to the marriage; and
 - (e) the matters referred to in subsection 75(2) so far as they are relevant; and

- 10 (f) any other order made under this Act affecting a party to the marriage or a child of the marriage; and
- (g) 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.

(5) Without limiting the power of any court to grant an adjournment in proceedings under this Act, where, in property settlement proceedings, a court is of the opinion:

- 20 (a) that there is likely to be a significant change in the financial circumstances of the parties to the marriage or either of them and that, having regard to the time when that change is likely to take place, it is reasonable to adjourn the proceedings; and

(b) that an order that the court could make with respect to:

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

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

if that significant change in financial circumstances occurs is more likely to do justice as between the parties to the marriage than an order that the court could make immediately with respect to:

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

- 30 (iv) the vested bankruptcy property in relation to a bankrupt party to the marriage;

the court may, if so requested by either party to the marriage or the relevant bankruptcy trustee (if any), adjourn the proceedings until such time, before the expiration of a period specified by the court, as that party to the marriage or the relevant bankruptcy trustee, as the case may be, applies for the proceedings to be determined, but nothing in this subsection requires the court to adjourn any proceedings in any particular circumstances.

40 (6) Where a court proposes to adjourn proceedings as provided by subsection (5), the court may, before so adjourning the proceedings, make such interim order or orders or such other order or orders (if any) as it considers appropriate with respect to:

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

(b) any of the vested bankruptcy property in relation to a bankrupt party to the marriage.

10 (7) The court may, in forming an opinion for the purposes of subsection (5) as to whether there is likely to be a significant change in the financial circumstances of either or both of the parties to the marriage, have regard to any change in the financial circumstances of a party to the marriage that may occur by reason that the party to the marriage:

- (a) is a contributor to a superannuation fund or scheme, or participates in any scheme or arrangement that is in the nature of a superannuation scheme; or
- (b) may become entitled to property as the result of the exercise in his or her favour, by the trustee of a discretionary trust, of a power to distribute trust property;

20 but nothing in this subsection shall be taken to limit the circumstances in which the court may form the opinion that there is likely to be a significant change in the financial circumstances of a party to the marriage.

(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:

30 (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.

40 (9) The Family Court, or a Family Court of a State, shall not make an order under this section in property settlement proceedings (other than an order until further order or an order made with the consent of all the parties to the proceedings) unless:

- (a) the parties to the proceedings have attended a conference in relation to the matter to which the proceedings relate with a Registrar or Deputy Registrar

10 of the Family Court, or a Registrar or Deputy Registrar of the Family Court of that State, as the case may be;

(b) the court is satisfied that, having regard to the need to make an order urgently, or to any other special circumstance, it is appropriate to make the order notwithstanding that the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or

(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

20 (10) The following are entitled to become a party to proceedings in which an application is made for an order under this section by a party to a marriage (the *subject marriage*):

(a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order were made;

(aa) a person:

(i) who is a party to a de facto relationship with a party to the subject marriage;

and

(ii) who could apply, or has an application pending, for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship;

30 (ab) a person who is a party to a Part VIIIAB financial agreement (that is binding on the person) with a party to the subject marriage;

(b) any other person whose interests would be affected by the making of the order.

(10A) Subsection (10) does not apply to a creditor of a party to the proceedings:

(a) if the party is a bankrupt--to the extent to which the debt is a provable debt (within the meaning of the *Bankruptcy Act 1966*); or

(b) if the party is a debtor subject to a personal insolvency agreement--to the extent to which the debt is covered by the personal insolvency agreement.

40 (10B) If a person becomes a party to proceedings under this section because of paragraph (10)(aa), the person may, in the proceedings, apply for:

(a) an order under section 90SM; or

(b) a declaration under section 90SL;

10 in relation to the de facto relationship described in that paragraph.

(11) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage:

(i) when the application was made, the party was a bankrupt;

(ii) after the application was made but before it is finally determined, the party became a bankrupt; and

20 (c) the bankruptcy trustee applies to the court to be joined as a party to the proceedings;

and

(d) the court is satisfied that the interests of the bankrupt's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the bankruptcy trustee as a party to the proceedings.

(12) If a bankruptcy trustee is a party to property settlement proceedings, then, except with the leave of the court, the bankrupt party to the marriage is not entitled to make a submission to the court in connection with any vested bankruptcy property in relation to the bankrupt party.

30 (13) The court must not grant leave under subsection (12) unless the court is satisfied that there are exceptional circumstances.

(14) If:

(a) an application is made for an order under this section in proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them; and

(b) either of the following subparagraphs apply to a party to the marriage (the *debtor party*):

(i) when the application was made, the party was a debtor subject to a personal insolvency agreement; or

40 (ii) after the application was made but before it is finally determined, the party becomes a debtor subject to a personal insolvency agreement; and

- 10 (c) the trustee of the agreement applies to the court to be joined as a party to the proceedings; and
- (d) the court is satisfied that the interests of the debtor party's creditors may be affected by the making of an order under this section in the proceedings;

the court must join the trustee of the agreement as a party to the proceedings.

- 20 (15) If the trustee of a personal insolvency agreement is a party to property settlement proceedings, then, except with the leave of the court, the party to the marriage who is the debtor subject to the agreement is not entitled to make a submission to the court in connection with any property subject to the agreement.

- (16) The court must not grant leave under subsection (15) unless the court is satisfied that there are exceptional circumstances.

- (17) For the purposes of subsections (11) and (14), an application for an order under this section is taken to be finally determined when:

- (a) the application is withdrawn or dismissed; or
- (b) an order (other than an interim order) is made as a result of the application.

SECT 81

Duty of court to end financial relations

- 30 In proceedings under this Part, other than proceedings under section 78 or proceedings with respect to maintenance payable during the subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.

The Acts Interpretation Act 1901 (Cth)

SECT 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.

The Inheritance (Family & Dependents) Act 1972 (WA)

SECT 16

16 . Order for increased provision

(1) Where it would not be inequitable to grant relief having regard to all possible implications in respect to other persons, and an application for increased provision is made by or on behalf of a person in respect of whom an order has been made under this Act on the ground that since the date of that order circumstances have so changed that undue hardship will be caused if increased provision is not made, the Court may make an order for increased provision.

20 (2) Notice of any application made under subsection (1) shall be served on the Administrator and on such other persons as the Court may direct.

SECT 17

17 . Court may decide effect of order on property disposed of

Where the burden of any provision ordered to be made falls upon the portion of the estate to which any person would, apart from that order, be entitled under the will or on intestacy, the Court may determine that a periodic payment or a lump sum shall be set aside or appropriated to represent or in commutation of such proportion of the provision ordered to be made as falls upon that portion of the estate, and thereupon —

(a) the Court may exonerate such portion from all or any further liability;

30 (b) the Court may direct in what manner the periodic payment shall be secured and to whom any lump sum shall be paid;

(c) the Court may give directions as to the manner in which any moneys accruing shall be invested for the benefit of the person in whose favour the provision is made.