

**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

NO P23 OF 2012

On appeal from
the Full Court of the Family Court of Australia

BETWEEN:

[STANFORD]

Appellant

AND:

[STANFORD]

Respondent



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**SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH
(INTERVENING)**

Filed on behalf of the Attorney-General of the
Commonwealth by:

Australian Government Solicitor
50 Blackall Street
BARTON ACT 2600
DX5678 Canberra

Date of this document: 28 August 2012

Contact: Niamh Lenagh-Maguire

File ref: 12046200

Telephone: 02 6253 7557

Facsimile: 02 6253 7304

E-mail: niamh.lenagh-maguire@ags.gov.au

PART I FORM OF SUBMISSIONS

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

PART II INTERVENTION

2. The Attorney-General of the Commonwealth (the **Commonwealth**) intervenes under s 78A of the *Judiciary Act 1903* (Cth).

PART III WHY LEAVE TO INTERVENE SHOULD BE GRANTED

3. Not applicable.

PART IV LEGISLATIVE PROVISIONS

- 10 4. The relevant constitutional provisions are found in ss 51(xxi) and 51(xxii) of the Constitution. The relevant legislative provisions are found in the *Family Law Act 1975* (Cth) (the **Family Law Act**), in particular ss 4, 39, 43, 72, 75, 79, 81 and 94AAA, and in the *Inheritance (Family and Dependants Provision) Act 1972* (WA) (the **State Inheritance Act**), in ss 6 and 7.

PART V ARGUMENT

A SUMMARY

5. The Commonwealth makes the following three principal submissions concerning the constitutional validity of the property settlement jurisdiction conferred by the Family Law Act.
 - 20 5.1 First, the marriage power in s 51(xxi) of the Constitution supports the conferral of jurisdiction to make orders in property settlement proceedings “arising out of the marital relationship”, even where that marriage is ongoing. As proceedings “arising out of the marital relationship”, they possess a sufficient connection to that head of Commonwealth legislative power: see paragraphs 38-46 below.
 - 5.2 Second, the interposition of a case guardian on the commencement of property settlement proceedings does not take those proceedings outside the validly conferred jurisdiction: see paragraphs 47-48 below.
 - 30 5.3 Third, the substitution of a legal personal representative on the continuation of property settlement proceedings also does not take those proceedings outside the validly conferred jurisdiction; that is, the

continuation of property settlement proceedings under the Family Law Act and orders made in the continued proceedings are supported by the marriage power, where the claim arises out of, and therefore has a sufficient connection with, the relationship of marriage: see paragraphs 49-55 below.

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6. On the construction of the Family Law Act, the Commonwealth submits that the principle in s 43 concerning “the need to preserve and protect the institution of marriage” is relevant to the exercise of the property settlement jurisdiction under s 79; however, the principle does not confine the scope of that jurisdiction: see paragraphs 27-28 below.
 7. Further, the provisions of the Family Law Act conferring jurisdiction with respect to property settlement proceedings are not to be read down by reference to the State Inheritance Act, nor are they inconsistent with that Act in the circumstances of the present case: see paragraphs 29-37 below.
 8. The Commonwealth makes no submission on whether the orders the subject of the appeal ought to have been made in the circumstances of this case.

B STATUTORY FRAMEWORK

9. The meaning and operation of a statute must first be ascertained before considering its constitutional validity.¹
- 20 10. Part V of the Family Law Act deals with the jurisdiction of courts. Division 1 confers jurisdiction, including on the Family Court, in relation to “matrimonial causes” instituted under the Act: s 39(5)(a). Relevantly to the present proceedings, the Family Law Act provides that:
 - 10.1 a matrimonial cause, other than proceedings for a decree of nullity of marriage or certain declarations, may be instituted under the Act “in a Court of summary jurisdiction of a State”: s 39(2);
 - 10.2 “each court of summary jurisdiction of each State” is invested with federal jurisdiction to hear those matrimonial causes: s 39(6);² and

¹ See, for example, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11] (Gummow, Hayne, Heydon and Kiefel JJ); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 519 [46] (French CJ).

² Pursuant to s 39(7), the Governor-General may, by Proclamation, fix the day on and after which proceedings in relation to matters arising under Part V of the Family Law Act may not be instituted in, or transferred to, a court of summary jurisdiction in a specified State or Territory. The *Jurisdiction of Courts of Summary Jurisdiction (Matrimonial Causes) Proclamation 2006*, which commenced on 1 July 2006, provides that “the proceedings set out in subsection 39(6) of the [Family Law] Act may not be instituted in, or transferred to, a court of summary jurisdiction in the Perth metropolitan region, other than the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia”.

10.3 an appeal lies to the Family Court from a decree of the Magistrates Court of Western Australia exercising original jurisdiction under the Act: s 94AAA(1A)(a).

10 11. A “matrimonial cause” is defined in s 4(1) to include “proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them being proceedings: arising out of the marital relationship”: paragraph (ca)(i) of the definition. That is, the courts exercising jurisdiction under the Family Law Act have jurisdiction with respect to property settlement proceedings as part of the jurisdiction conferred by s 39 in respect of matrimonial causes.³

20 12. Part VIII of the Family Law Act is headed “Property, spousal maintenance and maintenance agreements”.⁴ The Part sets out the rules governing the exercise of the jurisdiction conferred by s 39, including the powers available in property settlement proceedings. In particular, s 79(1) provides that, “[i]n 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 ...”.⁵ Section 4(1) defines “property settlement proceedings” to include, “in relation to the parties to a marriage – proceedings with respect to ... the property of the parties or either of them”: paragraph (a)(i) of the definition.

13. The Family Law Act prescribes a number of considerations as relevant to the exercise of the property settlement jurisdiction.

13.1 For example, the court “shall not make an order [in property settlement proceedings] ... unless it is satisfied that, in all the circumstances, it is just and equitable to make the order”: s 79(2).

30 13.2 In considering what order (if any) should be made in property settlement proceedings under s 79, the court is required by s 79(4) to take into account a number of matters, including: the financial and non-financial contribution of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any property of the parties

³ The statutory definition of “matrimonial cause” in s 4(1) of the Family Law Act may be broader than the constitutional term “matrimonial causes” in s 51(xxii) of the Commonwealth Constitution. On the particular scope of the matrimonial causes power, see, for example, *Lansell v Lansell* (1964) 110 CLR 353 at 367.2 (Taylor J, Owen J agreeing at 370.8), 368.8 (Menzies J); *Russell v Russell* (1976) 134 CLR 495 at 507.7-512.5 (Barwick CJ), 525.4-527.3 (Gibbs J), 537.7-538.5 (Mason J); *Re F; Ex parte F* (1986) 161 CLR 376 at 383.9-384.2 (Gibbs CJ), 407.5 (Dawson J).

⁴ See *Kennon v Spry* (2008) 238 CLR 366 at 398-400 [93]-[98] (Gummow and Hayne JJ) for a discussion of Part VIII of the Family Law Act.

⁵ Section 79 is a provision defining to the power of the court in property settlement proceedings, not a provision conferring jurisdiction. The provision that confers jurisdiction (s 39, read in conjunction with the definition of “matrimonial cause” in s 4) relevantly confines the court’s jurisdiction to proceedings “arising out of the marital relationship”. Absent such a restriction, s 79 would be likely to be too wide: *Dougherty v Dougherty* (1982) 163 CLR 278 at 286-287 (Mason CJ, Wilson and Gibbs JJ).

to the marriage or either of them; the contribution of a party to the marriage to the welfare of the family and any children of the marriage, including as homemaker or parent; the effect of any proposed order upon the earning capacity of a party to the marriage; any relevant matters referred to in s 75(2) of the Family Law Act; any other relevant order made under the Act; and any child support that a party is or might be liable to provide. (Section 75(2) specifies matters that are to be taken into account in exercising jurisdiction under s 74 of the Family Law Act in spousal maintenance proceedings.)

- 10 14. Section 81 further provides that, in proceedings under Part VIII (other than proceedings for the declaration of interests in property under s 78 or “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”.
15. Section 43 provides that the Family Court and any other court exercising jurisdiction under the Act (not limited to the property settlement jurisdiction) shall, in the exercise of that jurisdiction, have regard to a number of principles, one being “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”: s 43(1)(a).
- 20 16. Where a party to a marriage dies before property settlement proceedings are completed, s 79(8) allows the proceedings to be continued by or against a legal personal representative of the deceased. The continuation mechanism extends not only to proceedings in which an order has not yet been made under s 79(1), but also to appeals and applications for extension of time in which to appeal.⁶
17. Rule 6.15(2) of the Family Law Rules 2004⁷ (the **Rules**) requires a party or a legal personal representative, on the death of a party, to “ask the court for procedural orders in relation to the future conduct of the case”. Rule 6.15(3) provides that the court may order that the legal personal representative “be substituted for the deceased person as a party”, as contemplated by s 79(8)(a). In the continued proceedings, the court may make such order as it considers appropriate with respect to any of the property of the parties to the marriage or either of them, if the court is of the opinion that “it would have made an order with respect to property if the deceased party had not died ... and ... that it is still appropriate to make an order with respect to property”: s 79(8)(b).
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⁶ *Gilbert v Estate of Gilbert* (1989) 98 FLR 68 at 81.7.

⁷ The Rules are made under s 123(1) of the Family Law Act, which permits rules to be made “for or in relation to the practice and procedure to be followed in the Family Court and any other courts exercising jurisdiction under [the Family Law Act]”.

C RELEVANT HISTORY OF THE MATRIMONIAL CAUSES JURISDICTION

18. The matrimonial causes jurisdiction under the Family Law Act and earlier legislation – including the jurisdiction with respect to property settlement disputes – has been reformulated over time. Commonwealth legislation conferring that jurisdiction has relied on both the marriage power in s 51(xxi) and the matrimonial causes power in s 51(xxii).⁸ This Court has determined challenges to the constitutional basis of the jurisdiction. The current constitutional basis for, and ambit of, the property settlement jurisdiction is a product of the legislative initiatives and this Court's pronouncements on those initiatives.

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19. The *Matrimonial Causes Act 1959* (Cth) (the **Matrimonial Causes Act**), which commenced on 1 February 1961, established the first national law for the dissolution of marriage and other relief and conferred jurisdiction over "matrimonial causes" on State courts.

19.1 Under the Matrimonial Causes Act, maintenance, custody and property matters were characterised as ancillary matters and were within jurisdiction if they related to "concurrent, pending or completed proceedings" for the dissolution of marriage, nullity of marriage, judicial separation, restitution of conjugal rights, jactitation of marriage, or various declarations.

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19.2 In *Lansell v Lansell*,⁹ s 86 of the Matrimonial Causes Act was upheld as a valid exercise of the Commonwealth's power under s 51(xxii).¹⁰ Section 86 provided for the Supreme Court of a State or Territory to order that "a party to a marriage make, for the benefit of all or any of the parties to or the children of the marriage, such a settlement of property to which the parties are or either of them is entitled as the Court thinks just and equitable in the circumstances of the case".¹¹ This Court held that the matrimonial causes power supported the jurisdiction because s 86 provided for ancillary relief in a substantive proceeding.¹² This was so in circumstances where the property settlement orders affected

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⁸ The Commonwealth Parliament has power under s 51(xxii) "with respect to ... divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants".

⁹ *Lansell v Lansell* (1964) 110 CLR 353.

¹⁰ Paragraphs 26-27 of the submissions of the Attorney-General for Western Australia appear to suggest that *Lansell* may have dealt with the scope of the marriage power in s 51(xxi). However the report of the arguments in the case and the various reasons for decision make it clear that the parties and the Court proceeded on the basis that the constitutional question in that case was the scope of the "matrimonial causes" power in s 51(xxii), and that alone.

¹¹ *Lansell v Lansell* (1964) 110 CLR 353 at 356.5.

¹² *Lansell v Lansell* (1964) 110 CLR 353 at 366.1-367.9 (Taylor J, Owen J agreeing at 370.8), 361.8-363.8 (Kitto J), 369.2 (Menzies J), 369.8-370.7 (Windeyer J).

property acquired by a party to a marriage after the marriage's dissolution.¹³

10 20. In 1980, the Commonwealth Parliament's Joint Select Committee on the Family Law Act observed that, in enacting the Matrimonial Causes Act, "the Commonwealth did not attempt more ... than to codify the existing State laws of ... divorce. Fundamental changes were proposed in a series of Bills introduced into the senate ... in 1973 and 1974".¹⁴ Those fundamental changes were realised when the Family Law Act, which received Royal Assent on 12 June 1975, replaced the Matrimonial Causes Act. The Family Law Act brought "within the federal jurisdiction not only custody, maintenance and property disputes that were ancillary to a divorce, but all proceedings [including those] relating to ... the property of the parties to a marriage or either of them".¹⁵ This property dispute jurisdiction, established to be independent of divorce proceedings, was among the aspects of the Family Law Act challenged in *Russell v Russell*.¹⁶

20 21. At the time of this Court's decision in *Russell v Russell*, paragraph (c)(ii) of the definition of matrimonial cause in s 4(1) of the Family Law Act referred to "proceedings with respect to ... the property of the parties to a marriage or of either of them". The definition was said to be "without any limitation of any kind".¹⁷ That is, construed in the context of the Act, the jurisdiction purported to extend to "entertain[ing] proceedings brought between persons no longer married and relating to rights of property which did not arise out of the matrimonial relationship".¹⁸

21.1 The jurisdiction conferred by reference to paragraph (c)(ii) of the definition was read down in *Russell v Russell* and limited to "proceedings for ancillary relief" in relation to the principal relief of annulment or dissolution of marriage, in reliance on the matrimonial causes power, s 51(xxii).¹⁹

30 21.2 However, a majority of the Court observed in *Russell v Russell* that the marriage power, s 51(xxi), would support a property settlement jurisdiction in proceedings brought by a party to a marriage "separate

¹³ See the summary of the facts given by Taylor J in *Lansell v Lansell* (1964) 110 CLR 353 at 364.4-365.1, in combination with the answer to question 2 at 371. See also Kitto J at 362.7.

¹⁴ *Family Law in Australia*, Report of the Joint Select Committee on the Family Law Act (1980) [1.5].

¹⁵ *Family Law in Australia*, Report of the Joint Select Committee on the Family Law Act (1980) [2.4].

¹⁶ *Russell v Russell* (1976) 134 CLR 495.

¹⁷ *Fisher v Fisher* (1986) 161 CLR 438 at 451.8 (Mason and Deane JJ).

¹⁸ *Russell v Russell* (1976) 134 CLR 495 at 528.1 (Gibbs J) (emphasis added).

¹⁹ *Russell v Russell* (1976) 134 CLR 495 at 542.8 (Mason J).

and independent” of proceedings for divorce and other “principal relief”.²⁰

22. Soon after *Russell v Russell*, the Family Law Act was amended, in reliance on the matrimonial causes power, by the *Family Law Amendment Act 1976* (Cth), to alter the definition of “matrimonial cause”, limiting the property settlement proceedings that could be brought to proceedings between the parties to a marriage “with respect to the property of the parties to the marriage or of either of them, being proceedings in relation to concurrent pending or completed, proceedings for principal relief between those parties”.

10 23. In 1980, the Report of the Joint Select Committee on the Family Law Act, *Family Law in Australia* was released. The Committee considered the possibility of a matrimonial property regime based on the marriage power in s 51(xxi), having particular regard to Mason J’s reasons for judgment in *Russell v Russell*.²¹

23.1 The Committee noted that, in order for property proceedings to be supported by s 51(xxi), the property the subject of such proceedings must “in some way [be] incidental or related to the fact of marriage”.²²

20 23.2 The Committee recommended “that the Commonwealth move to amend the [Family Law Act] by relating the jurisdiction in respect of matrimonial property disputes to the marriage power”, with “the property jurisdiction ... limited to require (i) the proceedings to be between the parties to the marriage; (ii) that the dispute relate to the property or proprietary claims of either party; (iii) that the claim arises out of the marital relationship, or arises by reason of the fact that the parties are married”.²³

24. Following the Committee’s recommendation, the Family Law Act was amended by the *Family Law Amendment Act 1983* (Cth).

²⁰ *Russell v Russell* (1976) 134 CLR 495 at 525.3 (Gibbs J), 540.2 (Mason J, Stephen J agreeing at 529.7), 552.9 (Jacobs J). Gibbs J accepted that it was within the scope of s 51(xxi) for the Commonwealth Parliament to “declare the duty of one party to a marriage to support and maintain the other” (at 524.9-525.1). For differing reasons Gibbs J and Mason J (with whom Stephen J agreed) both considered that the definition of “matrimonial cause” in the Family Law Act (as enacted) went too far. For Gibbs J see 528.9. For Mason J, see 538.8: s 51(xxi) would support a provision creating or defining the rights of the parties “arising out of or in consequence of marriage”; but the definition of “matrimonial cause” went beyond this principle in two respects (see 541.2: “a jurisdiction unlimited as to parties”; and 542.8: “any property howsoever and whensoever acquired”). In the result, both Gibbs and Mason JJ read down the definition to confine it to proceedings between parties to a marriage that were ancillary to proceedings for principal relief. Yet their Honours’ (respective) reasons disclose what subsequent cases confirmed: they considered that s 51(xxi) was capable of supporting a wider conception of “matrimonial cause” than that reflected by the actual result in *Russell*.

²¹ *Family Law in Australia*, Report of the Joint Select Committee on the Family Law Act (1980) [2.64].

²² *Family Law in Australia*, Report of the Joint Select Committee on the Family Law Act (1980) [2.65].

²³ *Family Law in Australia*, Report of the Joint Select Committee on the Family Law Act (1980) [2.71] (emphasis added).

24.1 The amendment, supported by the marriage power, conferred a property settlement jurisdiction that was not ancillary to divorce or other matrimonial cause proceedings, but was to “enable proceedings to be brought by parties to a marriage in relation to property of the parties at any time where the proceedings arise out of the marriage relationship”.²⁴

24.2 The definition of “matrimonial cause” in s 4(1) of the Family Law Act was amended to include, in paragraph (ca)(i), “proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings ... arising out of the marital relationship”.²⁵

25. Following that amendment, and consistent with the scope of the marriage power endorsed in *Russell v Russell*, the property settlement jurisdiction conferred by s 79 of the Family Law Act was held, in *Fisher v Fisher*,²⁶ and *Dougherty v Dougherty*,²⁷ to have a valid operation in so far as it related to claims arising out of, or having a sufficient connection with, the marriage relationship. Further, *Fisher v Fisher* upheld the validity of s 79(8) (allowing the continuation of property settlement proceedings after the death of one of the parties to a marriage) as a law with respect to marriage within s 51(xxi).²⁸

20 D RELEVANT STATUTORY OPERATION

26. The exercise of the property settlement jurisdiction under s 79 of the Family Law Act involves what has been accepted as a “preferred” four-step approach.²⁹ In exercising the jurisdiction under ss 39 and 79, the court’s statutory task is to make, subject to certain requirements being met, such order as it considers appropriate and is satisfied is just and equitable, altering the interests of the parties to the marriage in property, being property of the

²⁴ See the Minister’s Second Reading Speech on the Family Law Amendment Bill 1983, House of Representatives, *Debates*, 13 October 1983 at 1704.

²⁵ Paragraphs 51-52 of the submissions of the Attorney-General for Western Australia rely on the Second Reading Speech for the *Family Law Amendment Act 1983*, to contend that s 79 was only intended to operate in the face of a marital breakdown (including during the 12-month period of separation required for divorce proceedings). In fact, the Second Reading Speech indicates a much broader purpose for s 79: “The Bill in sub-clause 3(1) will enable proceedings to be brought by all parties at any time where the proceedings arise out of the marital relationship”: House of Representatives, *Debates*, 13 October 1983, 1704 (column b).

²⁶ *Fisher v Fisher* (1986) 161 CLR 438 at 445.4 (Gibbs CJ, Wilson J agreeing at 454.9), 451.5 (Mason and Deane JJ), 461.7 (Dawson J).

²⁷ *Dougherty v Dougherty* (1987) 163 CLR 278 at 286.1, 286.8 (Mason CJ, Wilson and Dawson JJ), 293.9-294.3 (Brennan J), 299.8-300.4 (Gaudron J).

²⁸ *Fisher v Fisher* (1986) 161 CLR 438 at 449.2, 449.7 (Gibbs CJ), 453.5-454.1 (Mason and Deane JJ), 458.4 (Brennan J), 462.6 (Dawson J).

²⁹ *Hickey & Hickey & A-G for the Commonwealth of Australia (Intervener)* (2003) 30 Fam LR 355 at [39]; *Angellini & Angellini* [2011] FamCAFC 190 at [71]. The four-step approach involves: (i) identifying the relevant property; (ii) determining the contribution based entitlements; (iii) adjusting the contribution based entitlements by reference to the relevant considerations; and (iv) determining what order is just and equitable in all the circumstances of the case.

parties to the marriage or either of them. The discretion so conferred, and exercised compatibly with the statutory framework, is very wide.³⁰

Relationship between ss 43(1)(a) and 79 of the Family Law Act

27. The exercise of the discretion under s 79 may involve the creation or definition of rights. If those rights “have their basis in the marital relationship”, in the sense of being determined in a claim arising out of that relationship, the exercise of jurisdiction under s 79 will have a sufficient connection with and be supported by s 51(xxi).³¹

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

20 28.1 The terms of s 79 contemplate the effect of a property settlement order on a marriage as a factor relevant to the exercise of the discretion. Section 79(1B) provides that the court, in certain circumstances, may adjourn property settlement proceedings to “enable the parties to the marriage to consider the likely effects (if any) of an order ... on the marriage or the children of the marriage”.

28.2 In any event, the mere making of a property settlement order is not, without more, necessarily inconsistent with the preservation of the marital relationship.³² The present case, in which the husband and wife remained married until the wife died, notwithstanding the Magistrate’s property settlement order, demonstrates that a property settlement between parties to an ongoing marriage need not be inconsistent with the preservation of the marriage.

Relationship between the Family Law Act and the State Inheritance Act

30 29. The Family Law Act should not be read down to avoid inconsistency with the State Inheritance Act. Where an order made in exercise of the property settlement jurisdiction is within constitutional limits, “there can be no limitation

³⁰ See *Norbis v Norbis* (1986) 161 CLR 513 at 521.3 (Mason and Deane JJ, Brennan J agreeing at 536.2); *Mallet v Mallet* (1984) 156 CLR 605 at 608.2-609.3 (Gibbs CJ). See further, as an example of the scope of the discretion and the property that may be the subject of such an order, *Farmer v Bramley* [2000] FamCA 1615 at [56]-[57]; [66]-[69]; [78]-[79]; cf at [193]-[195].

³¹ *Dougherty v Dougherty* (1987) 163 CLR 278 at 288.5 (Mason CJ, Wilson and Dawson JJ).

³² The point was made by Gleeson CJ, during the special leave application in *Sterling v Sterling*, that “one way of preserving the institution of the marriage is to make it work fairly to both parties in difficult circumstances”: [2001] HCA Trans 445 at 135-136.

on the Court's powers emanating from the need to preserve the scope of State legislative powers".³³

30. If, on the proper construction of a Commonwealth law, inconsistency with a State law arises, that inconsistency is resolved in favour of the Commonwealth law by the operation of s 109 of the Constitution, and not by any other principle.³⁴

10 30.1 The ultimate question in determining s 109 inconsistency is whether there is any "real conflict" between the Commonwealth and the State law. The resolution of that question turns principally on the intention disclosed by the proper construction of the Commonwealth law.

30.2 By way of example from a case concerning the operation of the Family Law Act (in circumstances different from those in the present case), in the absence of a clear and contrary indication, a Commonwealth law will not ordinarily be construed so as to "confer jurisdiction to make an order authorizing or requiring the doing of an act which is specifically prohibited and rendered criminal by the ordinary criminal law of the State or Territory in which the act would be done".³⁵

20 30.3 A similar principle (drawn from a case concerning a different statutory regime) is that "a law which deals indifferently with companies and natural persons does not affect the regimes prescribed by laws dealing with bankruptcy and insolvency; a law of the former kind would have to manifest clearly an intention to affect those regimes before it would be held to do so".³⁶

30.4 However, to approach the task of statutory construction with the goal of avoiding inconsistency rather than identifying the intended scope of the Commonwealth law is to circumvent the operation of s 109 and effectively "reserve" certain power to State Parliaments at the expense of power of the Commonwealth Parliament, contrary to the orthodoxy that has prevailed since the decision in the *Engineers Case*.³⁷

30 31. The Family Law Act, in conferring property settlement jurisdiction, addresses in general terms claims based on factors including the contribution of a

³³ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1991) 175 CLR 218 at 261.6 (Mason CJ, Dawson, Toohey and Gaudron JJ).

³⁴ See *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1991) 175 CLR 218 at 261.6 (Mason CJ, Dawson, Toohey and Gaudron JJ); *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 85 ALJR 945 at 952 [36]-[37].

³⁵ *P v P* (1994) 181 CLR 583 at 602.3 (Mason CJ, Deane, Toohey and Gaudron JJ).

³⁶ *Patrick Stevedores (No 2) Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at 36 [43] (Brennan CJ, McHugh, Gummow, Kirby, and Hayne JJ).

³⁷ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129: see *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1991) 175 CLR 218 at 261.6 (Mason CJ, Dawson, Toohey and Gaudron JJ).

spouse to the property of the marriage or to the welfare of the family, or both.³⁸ The jurisdiction conferred by the Family Law Act “arises out of the marital relationship”.

- 10 32. The State Inheritance Act confers jurisdiction to vary the disposition of a deceased’s estate on application by or on behalf of eligible claimants, based on legitimate claims upon the deceased person’s bounty,³⁹ to be satisfied from the estate. It involves a two-stage process⁴⁰ of determining whether adequate provision has been made for the claimant and, if not, whether the discretion should be exercised to order that such provision as the court thinks fit be made out of the deceased’s estate. The jurisdiction under the State Inheritance Act arises “upon the death of a testator”.⁴¹
- 20 33. The Commonwealth and the State jurisdictions deal with “entirely different problems”.⁴² While continued property settlement proceedings under the Family Law Act, on the death of a party to a marriage, may in truth have a close temporal connection to the disposition of the deceased’s estate, that disposition is separate from the alteration of property rights that may reduce or enlarge that estate. That is, “provisions governing the continuation of proceedings ... merely lead to the creation and enforcement of liabilities and obligations binding on the estate, the effect of which is to diminish the value of the estate. There is no inconsistency in the co-existence with these provisions of testator’s family maintenance legislation”.⁴³
34. This Court has, in analogous cases, held that Commonwealth legislation conferring jurisdiction to adjust property interests founded on the marriage relationship is not inconsistent with State legislation enabling persons (including spouses and former spouses) asserting a claim against a testator or an intestate to enforce a claim against his or her estate after his or her death.⁴⁴ Matrimonial causes (in the statutory sense of the Family Law Act) and testator’s family maintenance are “separate and independent legal topics”.⁴⁵

³⁸ *Smith v Smith* (1986) 161 CLR 217 at 242.7 (Mason, Brennan and Deane JJ).

³⁹ *Smith v Smith* (1986) 161 CLR 217 at 242.8 (Mason, Brennan and Deane JJ).

⁴⁰ *Singer v Berghouse* (1994) 181 CLR 201 at 208.8 (Mason CJ, Deane and McHugh JJ); *Vigolo v Bostin* (2005) 221 CLR 191 at 197-198 [4]-[6] (Gleeson CJ), 212-213 [56] (Gummow and Hayne JJ). The two stages are summarised by Buss JA in *Devereaux-Warnes v Hall (No 2)* (2007) 35 WAR 127 at 144 [66]-[69].

⁴¹ *Johnston v Krakowski* (1965) 113 CLR 552 at 566.3 (Taylor J).

⁴² *Johnston v Krakowski* (1965) 113 CLR 552 at 566.4 (Taylor J). See also *Smith v Smith* (1986) 161 CLR 217 at 233.3 (Gibbs CJ, Wilson and Dawson JJ).

⁴³ *Smith v Smith* (1986) 161 CLR 217 at 244.8 (Mason, Brennan and Deane JJ).

⁴⁴ *Johnston v Krakowski* (1965) 113 CLR 552 at 566.4 (Taylor J), 569.6 (Menzies J); *Smith v Smith* (1986) 161 CLR 217 at 233.5-234.7 (Gibbs CJ, Wilson and Dawson JJ), 242-250 (Mason, Brennan and Deane JJ).

⁴⁵ *Smith v Smith* (1986) 161 CLR 217 at 242.9 (Mason, Brennan and Deane JJ).

35. In *Johnston v Krakowski*,⁴⁶ this Court found that the jurisdiction to make orders as to maintenance in a matrimonial cause under the Matrimonial Causes Act and the jurisdiction to award maintenance out of an estate under the *Administration and Probate Act 1958* (Vic) were not inconsistent. Rather, the maintenance that could be awarded under each jurisdiction was made “against a different person, in different circumstances, and by reference to different criteria”.⁴⁷ The fact that one action could only be commenced during the lifetime of a spouse, and the other only upon the death of a spouse was also significant in determining that the provisions were “entirely different”.⁴⁸

10 36. In *Smith v Smith*,⁴⁹ members of this Court emphasised the distinction between the Family Law Act’s operation with respect to maintenance agreements and the *Family Provision Act 1982* (NSW), the latter operating “only after the death of a person whose estate ... is sought to be made liable for the maintenance, education or advancement in life of an ‘eligible person’ ...”.⁵⁰ Justices acknowledged that, in contrast, the Family Law Act did not authorise the making of a maintenance order against the legal personal representative of a party, or former party, to a marriage.⁵¹ Members of the Court observed that provisions allowing the continuation of proceedings and enforcement of orders against the estate of a deceased person “merely lead to the creation and enforcement of liabilities and obligations binding on the estate, the effect of which is to diminish the value of the estate”; and those provisions could co-exist with, and were therefore not inconsistent with, testators’ family maintenance legislation of the kind then in issue.⁵²

20 37. On its proper construction, s 79(8) of the Family Law Act is in no way inconsistent with the State Inheritance Act. Unlike proceedings under the State Inheritance Act, proceedings under s 79(8) must (relevantly) be proceedings “arising from the marital relationship”. The fact that as a result of property settlement proceedings a person other than a party to the marriage may ultimately benefit (through the disposition of the deceased’s estate) from an order under s 79(8) is immaterial to the characterisation and validity of s 79(8).⁵³ This serves to emphasise that s 79(8) and the State Inheritance Act deal with entirely different problems. There is no “direct inconsistency or actual contrariety” between the two statutes, at the very least in the way they

⁴⁶ *Johnston v Krakowski* (1965) 113 CLR 552.

⁴⁷ *Johnston v Krakowski* (1965) 113 CLR 552 at 569.2 (Menzies J); *Smith v Smith* (1986) 161 CLR 217 at 243.5, 243.8 (Mason, Brennan and Deane JJ).

⁴⁸ *Johnston v Krakowski* (1965) 113 CLR 552 at 566.4 (Taylor J).

⁴⁹ *Smith v Smith* (1986) 161 CLR 217.

⁵⁰ *Smith v Smith* (1986) 161 CLR 217 at 232.8 (Gibbs CJ, Wilson and Dawson JJ).

⁵¹ *Smith v Smith* (1986) 161 CLR 217 at 232.2 (Gibbs CJ, Wilson and Dawson JJ), 244.4 (Mason, Brennan and Deane JJ).

⁵² *Smith v Smith* (1986) 161 CLR 217 at 244.8 (Mason, Brennan and Deane JJ); see also 232.3-234.7 (Gibbs CJ, Wilson and Dawson JJ).

⁵³ *Fisher v Fisher* (1986) 161 CLR 438 at 454.1 (Mason and Deane JJ); see also 449.4 (Gibbs CJ), and 462.9 (Dawson J).

apply to the present case.⁵⁴ The same reasoning led to the conclusion that there is nothing in the provisions of Part VIII of the Family Law Act to suggest that the Commonwealth Parliament intended to mark out and exhaustively “cover” any “field” concerning the provision of maintenance or other benefits for one spouse, or other eligible claimants, out of the deceased estate of the other spouse.⁵⁵

E CONSTITUTIONAL VALIDITY OF SECTION 79 OF THE FAMILY LAW ACT

General principles

- 10 38. The marriage power is a non-purposive Commonwealth legislative power.⁵⁶
The general principles to be applied in determining whether a Commonwealth law is with respect to a non-purposive head of legislative power are settled.⁵⁷
- 38.1 The Constitutional text is to be construed “with all the generality which the words used admit”.
- 38.2 The character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges that it creates.
- 38.3 The practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power.
- 20 38.4 Where a law is one “with respect to two subject matters, one of which is, and the other of which is not, a subject matter appearing in s 51, it will be valid notwithstanding that there is no independent connection between the two subject matters”.
- 38.5 Where there is a sufficient connection, “the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice”.
- 30 39. Accordingly if there is a “sufficient connection” between the operation of s 79 of the Family Law Act in the circumstances of the present case and the marital relationship – that is, if the proceedings arise out of the marital relationship – the order of the Full Court of the Family Court the subject of this appeal will be within the legislative power of the Commonwealth Parliament under s 51(xxi).

⁵⁴ Cf *Smith v Smith* (1986) 161 CLR 217 at 234.7 (Gibbs CJ, Wilson and Dawson JJ).

⁵⁵ *Smith v Smith* (1986) 161 CLR 217 at 234.3 (Gibbs CJ, Wilson and Dawson JJ).

⁵⁶ *Sterhouse v Coleman* (1944) 69 CLR 457 at 471.2 (Dixon J), cited with approval by Mason and Deane JJ in *Re F; Ex parte F* (1986) 161 CLR 376 at 388.6.

⁵⁷ *Grain Pool of Western Australia v The Commonwealth* (2000) 202 CLR 479 at 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

40. The grants of legislative power in ss 51(xxi) and (xxii) “are cumulative. Each must be given its full scope and effect. Neither is to be read down by reference to the other.”⁵⁸ Legislative power under s 51(xxi) extends to “laws defining and regulating the respective rights duties and obligations of the parties *inter se*” and will “authorize laws defining or modifying and re-defining the legal incidents of [the marriage] relationship”;⁵⁹ it extends to the “mutual rights and obligations of spouses”;⁶⁰ to “laws regulating the mutual rights and obligations of those who marry”;⁶¹ and “to the definition of the respective rights, duties and obligations of the parties arising out of or in consequence of marriage”.⁶² Cases subsequent to the decision in *Russell* have consistently proceeded on the basis of this view of the marriage power.⁶³

Scope of property settlement jurisdiction

41. The meaning of “matrimonial cause” in s 4 of the Family Law Act is supported by the Commonwealth Parliament’s power with respect to “marriage” in s 51(xxi). Because reliance has not been placed on s 51(xxii) alone, a “matrimonial cause” as defined in the Family Law Act may be broader than the constitutional term, and the property settlement jurisdiction is not limited to making orders that are ancillary to divorce or other proceedings amounting to matrimonial causes.⁶⁴ The provisions of the Family Law Act conferring jurisdiction with respect to matrimonial causes, being proceedings “arising out of the marital relationship”, on that basis, have a sufficient connection with, and are laws with respect to, “marriage”.

42. The development of the matrimonial cause jurisdiction demonstrates that the provisions of the Family Law Act conferring jurisdiction with respect to property settlement proceedings have been tailored to conform with and fall within the power as delineated by the Court. Indeed, the High Court’s consideration of s 79, including s 79(8), and the view that s 51(xxi) extends to “laws defining and regulating the respective rights, duties and obligations of

⁵⁸ *P v P* (1994) 181 CLR 583 at 600.4 endorsing (among other authorities) *Russell v Russell* (1986) 134 CLR 495 at 539.4-539.5 (Mason J).

⁵⁹ *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 at 560.8-561.1 (Taylor J).

⁶⁰ *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 at 572.7 (Menzies J).

⁶¹ *Attorney-General (Vic) v The Commonwealth* (1962) 107 CLR 529 at 602.5 (Owen J).

⁶² *Russell v Russell* (1976) 134 CLR 495 at 538.7 (Mason J, with whom Stephen J agreed at 529.7); see also 547.6-548.1 (Jacobs J).

⁶³ See, for example, *Fisher v Fisher* (1986) 161 CLR 438 at 445.9-446.1 (Gibbs CJ), 452.8-453.2 (Mason and Dean JJ), 455.5-456.3 (Brennan J) and 460.8-461.1 (Dawson J).

⁶⁴ Although the scope of the matrimonial causes power has not been given exhaustive definition in the judgments of this Court, a narrower reading of the power has been favoured. See, for example, *Lansell v Lansell* (1964) 110 CLR 353 at 368.7 (Menzies J); *Russell v Russell* (1976) 134 CLR 495 at 525.7 (Gibbs J), 538.5 (Mason J).

the parties [to a marriage] *inter se*”,⁶⁵ all but forecloses the constitutional issues raised in the present proceedings.⁶⁶

10 43. The marriage power extends to the making of property settlement orders between a husband and wife where there is “a claim ... based on circumstances arising out of the marital relationship”.⁶⁷ A claim will “arise out of the marriage relationship” when it concerns the parties to the marriage in that capacity, and not some capacity which bears no connection to the marriage relationship. Hence, where the marriage is “purely coincidental” to a claim grounded solely in, for example, contract, tort, or a partnership, power under s 51(xxi) is unlikely to be attracted; but, where the claim concerns “the respective property interests of the parties *inter se* for reasons associated with, and finding their source in, the marriage relationship”, a sufficient connection is likely to exist.⁶⁸

20 44. A law conferring rights or obligations will “arise out of the marital relationship” where the right is granted or the obligation is imposed by reference to the marital relationship;⁶⁹ that is, it will be such a law if the marital relationship is “the ground or reason” for making the relevant order.⁷⁰ Where “rights are created by virtue of the exercise of a judicial discretion which necessarily takes account of considerations arising out of the marital relationship”,⁷¹ such as required by s 79(4), a sufficient connection to the marriage power exists. That (as in the present case) the marriage is ongoing at the time of the application for relief under s 79 does nothing to sever that connection.

45. Accordingly, the jurisdiction conferred by the Family Law Act over property settlement proceedings is neither limited to, nor dependent on, the breakdown of the marriage relationship.⁷² (The scope of the marriage power in this regard is demonstrated in other contexts under the Family Law Act.⁷³)

⁶⁵ See paragraph 40 above.

⁶⁶ *Fisher v Fisher (No 2)* (1986) 161 CLR 438 at 451.5 (Mason and Deane JJ); *Dougherty v Dougherty* (1987) 163 CLR 278; and *Kennon v Spry* (2008) 238 CLR 366 at 396 [88] (Gummow and Hayne JJ).

⁶⁷ *Dougherty v Dougherty* (1987) 163 CLR 278 at 286.7 (Mason CJ, Wilson and Dawson JJ).

⁶⁸ *Dougherty v Dougherty* (1987) 163 CLR 278 at 286.8 (Mason CJ, Wilson and Dawson JJ).

⁶⁹ *Re F; Ex parte F* (1986) 161 CLR 376 at 389.2 (Mason and Deane JJ), citing *Stenhouse v Coleman* (1944) 69 CLR 457 at 471.2.

⁷⁰ *Dougherty v Dougherty* (1987) 163 CLR 278 at 293.9-294.1 (Brennan J).

⁷¹ See, in particular, *Fisher v Fisher (No 2)* (1986) 161 CLR 438 at 453.8 (Mason and Deane JJ), also 453.1; see also 456.8 (Brennan J) and 461.9 (Dawson J).

⁷² Compare the view expressed by Kitto J in *Lansell v Lansell* (1964) 110 CLR 353 at 361.9 that property settlement proceedings are properly ancillary to divorce proceedings, and therefore within the matrimonial causes power in s 51(xxii), because: “The making of a settlement may be a way of carrying to completion, or nearer to completion, the task of dealing fully with the relationship which is the subject of the matrimonial cause.”

⁷³ See, for example, Part VIIIA of the Family Law Act. In *ASIC v Rich* [2003] FamCA 1114 at [59], the court observed that Part VIIIA of the Family Law Act, inserted by the *Family Law Amendment Act 2000* (Cth), “permits parties to make agreements governing the financial consequences of divorce either before they marry or during their marriage ...” (emphasis added).

However, the fact that the marital relationship is ongoing may be relevant to the exercise of the discretion under s 79.⁷⁴

46. Further, whenever a "matrimonial cause" is instituted under the Family Law Act "putting any of those rights in suit, there is a 'matter' which 'arises' under that law of the Commonwealth".⁷⁵

46.1 A court, otherwise having jurisdiction under the Family Law Act, is given jurisdiction, in the exercise of the discretion conferred by s 79 read with ss 43, 75 and 81, to make an order that creates new rights in property of a marriage.

10 46.2 An application for an order under s 79 gives rise to a "matter" – the controversy about the right that would be created by adjustment of the property of a marriage.⁷⁶

46.3 The "matter" so "arising under" the Family Law Act, irrespective of any evidence of a breakdown in the marital relationship of the husband and wife, subsists until the completion of proceedings, with the making of an order sourced in s 79 or a determination to make no order.

20 46.4 The proceedings here, commenced in a State court of summary jurisdiction (exercising federal jurisdiction), constituted a "matter" that "arose under" the Family Law Act on their inception and have continued to involve a "matter" so arising, despite the absence of a breakdown in the marital relationship and despite their continuation pursuant to s 79(8).

Case guardians

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

48. Part 6.3 of the Rules deals with the conduct of a case by a "case guardian".

30 48.1 In the case of a "person with a disability", only a "case guardian" can "start ... a case" on the person's behalf: r 6.08(1). The Dictionary, which forms part of the Rules, defines a "person with a disability" as a person

⁷⁴ See also, for example, ss 79(5)(e) and 75(2)(o), providing that the court shall take into account "any fact or circumstances which, in the opinion of the court, the justice of the case requires to be taken into account".

⁷⁵ *Hooper v Hooper* (1955) 91 CLR 529 at 536.7 (Dixon CJ, McTiernan, Williams, Webb, Fullagar, Kitto, Taylor JJ).

⁷⁶ Orders made under s 79 "perform a dual function by creating and enforcing rights in one blow": *Fisher v Fisher* (1986) 161 CLR 438 at 453.9 (Mason and Deane JJ).

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 instructions for the conduct of, the case”.

48.2 A case guardian must be a person who “has no interest in the case that is adverse to the interest of the person needing the case guardian”: r 6.09(b). The Dictionary defines a “case guardian” to include a “next friend, guardian ad litem, tutor or litigation guardian”.

10 48.3 In conducting the case, the case guardian must, among other things, “do anything required by these Rules to be done by the party” and “may, for the benefit of the party, do anything permitted by these Rules to be done by the party”: r 6.13(1)(b) and (c). The involvement of the case guardian, who conducts the proceedings in the interest of the party, does not alter the character of the proceedings so as to take them out of the validly conferred jurisdiction, supported by s 51(xxi).⁷⁷ The property settlement proceedings are still to be characterised as proceedings “arising out of the marital relationship”.

20 48.4 The mechanism of a case guardian is procedural, not substantive; and the person, on whose behalf the case guardian acts, remains a party to the proceedings.⁷⁸ The mere involvement of a case guardian does not alter the nature of the proceedings, so as to take the proceedings outside the validly conferred jurisdiction.

Continued proceedings

49. Similarly, the continuation of property settlement proceedings by a legal personal representative on the death of a “party to the marriage” does not alter the character of the proceedings as proceedings “arising out of the marital relationship”.

⁷⁷ The role of the case guardian in proceedings under the Family Law Act is based on the roles of the “next friend” and “guardian ad litem” in Chancery proceedings and (after the Judicature Acts of the 1870s) also at common law: UK Rules of the Supreme Court (1883) O.16, r. 16, 21. The role of each was to act in the interests of the person for whom they were next friend or guardian ad litem, subject to the supervision of the Court. In so doing a guardian ad litem for example was, “competent to give his consent to any matter relating to the conduct of the cause ...”: *Knatchbull v Fowle* (1876) 1 Ch D 604; see also *Fryer v Wiseman* (1876) 45 LJ Ch 199; and *Leeming v Lady Murray* (1888) 28 WR 338 at 339, per Jessell MR: “An analogous case is that of a guardian acting on behalf of an infant. All the ordinary proceedings in an action are within his control, including the power to compromise the suit”. The general supervisory powers of the Court included (inter alia) giving consent (where necessary) to the actions of the next friend and, in appropriate cases enquiring into whether the suit is indeed for the benefit of the disabled person and also removing a person as next friend, for example, where the interest of the next friend is adverse to that of the infant: see entry on “Next Friend” in *Encyclopaedia of the Laws of England*, vol 9 (2nd ed, 1908).

⁷⁸ See *White v Green* [2009] FamCA 237 at [26]-[29]; *Starkey v Starkey* [2008] FamCA 962 at [49]-[50]; *State Rail Authority of New South Wales v Hammond* (1988) 15 NSWLR 395 at 400G-401D.

50. Section 79(8)(a) of the Family Law Act provides that, “[w]here, 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 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”.⁷⁹ Part 6.4 of the Rules relevantly deals with the conduct of a case by a legal personal representative.

10 50.1 Rule 6.15(2) requires a party or a legal personal representative, on the death of a party, to “ask the court for procedural orders in relation to the future conduct of the case”. As noted, s 79(8)(a) provides that “proceedings may be continued”.

50.2 Rule 6.15(3) provides that the court may order that the legal personal representative “be substituted for the deceased person as a party”, as contemplated in s 79(8)(a).

50.3 The Explanatory Guide to the Rules defines “legal personal representative” to mean, “for a deceased party – the executor or administrator of the party’s estate”.⁸⁰

20 50.4 The continuation of proceedings by the legal personal representative does not alter the character of the proceedings so as to take them out of the validly conferred jurisdiction. If the proceedings were validly commenced in the first instance, the proceedings remain valid on continuation under s 79(8). The legal personal representative is simply “substituted” as a party.⁸¹

51. The effect of s 79(8) of the Family Law Act is to authorise the making of an order after the death of one party, where s 79(1) otherwise would provide a “temporal restriction”.⁸² The substitution of the legal personal representative of the deceased spouse enables the court to determine whether to complete the making of the s 79 order.

30 52. In relation to any such continued proceedings, s 79(8)(b) provides that ,“if the court is of the opinion ... that it would have made an order with respect to property if the deceased party had not died; and ... it is still appropriate to make an order with respect to property ... the court may make such order as

⁷⁹ Similar provision is made by s 79A(1C) of the Family Law Act with respect to pending proceedings to vary or set aside an order made under s 79, including, for example, on grounds of fraud under s 79A(1)(a).

⁸⁰ The Note to the Explanatory Guide to the Rules states: “This explanatory guide, unlike the dictionary, is not part of the Rules and is offered only as an explanation of the words and expressions mentioned in this guide”. “Legal personal representative” is not defined in the Family Law Act.

⁸¹ Rule 6.15(3).

⁸² *Fisher v Fisher (No 2)* (1986) 161 CLR 438 at 457.7 (Brennan J).

it considers appropriate [including] with respect to ... any of the property of the parties to the marriage or either of them".⁸³ An order made under s 79(8)(b) "may be enforced on behalf of, or against, as the case may be, the estate of the deceased party".⁸⁴

53. The validity of s 79(8) has already been determined by this Court. Validity was assumed in *Smith v Smith*,⁸⁵ where it was noted that the Family Law Act does "not authorise the making of a maintenance order against the legal personal representative of a party or former party to a marriage", but "[p]roceedings with respect to the property of parties to a marriage or either of them, pending at the death of a party, may be continued by or against his or her legal personal representative".⁸⁶

54. In *Fisher v Fisher*,⁸⁷ the validity of s 79(8) was upheld as a law with respect to marriage within s 51(xxi).

54.1 Gibbs CJ held that s 79(8) was valid, finding both that the continued proceedings possessed a sufficient connection to the marital relationship to make the provision a law with respect to marriage, and that the law was also capable of characterisation as a law providing for the survival of a valid right of action.⁸⁸

54.2 Mason and Deane JJ held that s 79(8) was valid on the basis that it was a valid exercise of the marriage power to provide for the continuation of proceedings where the conferral of jurisdiction in the first instance was a valid exercise of the power. Their Honours also held that the "proceedings continue to have their initial character as something arising out of the marital relationship, the effect of s 79(8) being to provide for the survival of the claim on the death of a party".⁸⁹

54.3 Brennan J held that s 79(8) "provides the machinery for enforcing the moral obligations with respect to property arising from a spouse's marital relationship" and was "a law with respect to marriage".⁹⁰

54.4 Dawson J held that when one party to a marriage dies, it does not follow that proceedings that arose out of the marital relationship cease to have a sufficient connection with marriage; "the necessary connection with the legislative power is provided by the subject-matter

⁸³ A reference to a "party to a marriage" includes a reference to a person who was a party to a marriage that has been "terminated by the death of one party to the marriage": s 4(2) of the Family Law Act.

⁸⁴ Section 79(8)(c) of the Family Law Act.

⁸⁵ *Smith v Smith* (1986) 161 CLR 217.

⁸⁶ *Smith v Smith* (1986) 161 CLR 217 at 244.4, 244.6. See also 232.3.

⁸⁷ *Fisher v Fisher* (1986) 161 CLR 438.

⁸⁸ *Fisher v Fisher* (1986) 161 CLR 438 at 449.2, 449.7.

⁸⁹ *Fisher v Fisher* (1986) 161 CLR 438 at 452.5, 452.8.

⁹⁰ *Fisher v Fisher* (1986) 161 CLR 438 at 458.4.

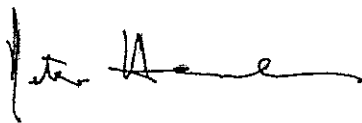
of the proceedings which remains as it was when the proceedings were commenced".⁹¹

55. An order within the scope of s 79(8) will be supported by the marriage power in s 51(xxi). The court's power to make property settlement orders in continued proceedings under s 79(8) will necessarily be exercised in circumstances where there is a sufficient connection with the marital relationship.⁹²

PART VI ORAL ARGUMENT

10 56. The Attorney-General of the Commonwealth estimates that one hour will be required for the presentation of oral argument.

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PETER HANKS QC

Telephone: 03 9225 8815

Facsimile: 03 9225 7293

Email: peter.hanks@vicbar.com.au

.....
RICHARD HOOKER

Telephone: 08 9220-0444

Facsimile: 08 9325 9894

Email: rhooker@francisburt.com.au



.....
DANIELLE FORRESTER

Telephone: 02 6141 4147

Facsimile: 02 9230 8920

Email: danielle.forrester@ag.gov.au

Counsel for the Attorney-General of the Commonwealth

⁹¹ *Fisher v Fisher* (1986) 161 CLR 438 at 462.4- 462.8.

⁹² See the dissenting judgment of Mason J in *Gazzo v Comptroller of Stamps (Victoria)* (1981) 149 CLR 227 at 247.9-248.3. That approach must now be taken to be correct in light of *Fisher v Fisher* and the principles concerning the characterisation of Commonwealth legislation.

**IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY**

NO P23 OF 2012

On appeal from
the Full Court of the Family Court of Australia

BETWEEN:

[STANFORD]

Appellant

AND:

[STANFORD]

Respondent

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**ANNEXURE TO THE SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE
COMMONWEALTH (INTERVENING)**



Filed on behalf of the Attorney-General of the
Commonwealth by:

Australian Government Solicitor
50 Blackall Street
BARTON ACT 2600
DX5678 Canberra

Date of this document: 29 August 2012

Contact: Niamh Lenagh-Maguire

File ref: 12046200

Telephone: 02 6253 7557

Facsimile: 02 6253 7304

E-mail: niamh.lenagh-maguire@ags.gov.au

LEGISLATIVE PROVISIONS

1. The relevant constitutional provisions are found in ss 51(xxi) and 51(xxii) of the Constitution. The relevant legislative provisions are found in the *Family Law Act 1975* (Cth) (the **Family Law Act**), in particular ss 4, 39, 43, 72, 75, 79, 81 and 94AAA, and in the *Inheritance (Family and Dependants Provision) Act 1972* (WA) (the **State Inheritance Act**), in ss 6 and 7.
2. This Annexure sets out verbatim the relevant provisions as they existed between 9 July 2010 and 19 January 2012, together with a later provision that has since amended s 43 of the Family Law Act.

RELEVANT PROVISIONS OF 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:

...

(xxi) marriage;

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

...

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RELEVANT PROVISIONS OF THE FAMILY LAW ACT

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:

20

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

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

(ii) a decree of nullity of marriage; or

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

(i) a marriage; or

(ii) a divorce; or

(iii) the annulment of a marriage;

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by decree or otherwise; or

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

(caa) proceedings between:

(i) a party to a marriage; and

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

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- (d) proceedings between the parties to a marriage for the approval by a court of a maintenance agreement or for the revocation of such an approval or for the registration of a maintenance agreement; or
- (e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship (other than proceedings under a law of a State or Territory prescribed for the purposes of section 114AB); or
- (ea) proceedings between:
 - (i) the parties to a marriage; or
 - (ii) if one of the parties to a marriage has died--the other party to the marriage and the legal personal representative of the deceased party to the marriage;

being proceedings:

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- (iii) for the enforcement of, or otherwise in relation to, a maintenance agreement that has been approved under section 87 and the approval of which has not been revoked;
- (iv) in relation to a maintenance agreement the approval of which under section 87 has been revoked; or
- (v) with respect to the enforcement under this Act or the applicable Rules of Court of a maintenance agreement that is registered in a court under section 86 or an overseas maintenance agreement that is registered in a court under regulations made pursuant to section 89; or

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(eaa) without limiting any of the preceding paragraphs, proceedings with respect to a financial agreement that are between any combination of:

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- (i) the parties to that agreement; and
- (ii) the legal personal representatives of any of those parties who have died;

(including a combination consisting solely of parties or consisting solely of representatives); or

- 10
- (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.
- 20
- (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
 - (b) in any other case--the date on which the application instituting the proceedings is made.
- 30
- (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
 - (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
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- (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
- (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.

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(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.

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(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.

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(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).

(7A) The Governor-General may, by Proclamation, declare that a Proclamation made under

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

Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011

Schedule 1—Amendments relating to family violence

11 Paragraph 43(1)(ca)

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Omit “safety”, substitute “protection”.

(Commenced 7 June 2012)

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:

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(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).

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- (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.

75 Matters to be taken into consideration in relation to spousal maintenance

- (1) In exercising jurisdiction under section 74, the court shall take into account only the matters referred to in subsection (2).

- (2) The matters to be so taken into account are:

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(a) the age and state of health of each of the parties; and

contributed to the income, earning capacity, property and financial resources of the other party; and

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

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

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

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

(i) the property of the parties; or

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

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

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(i) a party to the marriage; or

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

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

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

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

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

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

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

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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.

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

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(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:

(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

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(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:

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

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

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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

(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

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(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.

(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:

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

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(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).

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(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):

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- (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
- (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.

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- (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.

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

- (14) If:

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

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- (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;

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- (a) a decree of the Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia exercising original jurisdiction under this Act; or
 - (b) a decree or decision of a Family Law Magistrate of Western Australia exercising in the Magistrates Court of Western Australia original jurisdiction under this Act rejecting an application that he or she disqualify himself or herself from further hearing a matter.
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- (2) Subsections (1) and (1A) have effect subject to section 94AA.
 - (3) The jurisdiction of the Family Court in relation to an appeal under subsection (1) or (1A) is to be exercised by a Full Court unless the Chief Judge considers that it is appropriate for the jurisdiction of the Family Court in relation to the appeal to be exercised by a single Judge.
 - (4) Subsection (3) has effect subject to subsections (8) and (10).
 - (5) An appeal under subsection (1) or (1A) is to be instituted within:
 - (a) the time prescribed by the standard Rules of Court; or
 - (b) such further time as is allowed in accordance with the standard Rules of Court.
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- (6) In 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.
 - (7) If, in dismissing an appeal under subsection (1) or (1A), the Family Court is of the opinion that the appeal does not raise any question of general principle, it may give reasons for its decision in short form.
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- (8) A single Judge or a Full Court may:
 - (a) join or remove a party to an appeal under subsection (1) or (1A); or

subsection (10) to be dealt with, subject to conditions prescribed by the standard Rules of Court, without an oral hearing.

- (12) An appeal does not lie to a Full Court from a decision of a single Judge exercising jurisdiction under this section.
- (13) The single Judge referred to in subsection (3), (8) or (10) need not be a member of the Appeal Division.

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- (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;
- (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 ;
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- (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 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.
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- (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
- (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.

40 Date of filing: 29 August 2012