



**Chambers of the Hon. Diana Bryant AO
Chief Justice, Family Court of Australia**

**Submission in Response to the Australian Law Reform Commission
Issues Paper 44: *Equality, Capacity and Disability in Commonwealth Laws***

17 January 2014

Introduction

I welcome the opportunity to make a submission as part of the Australian Law Reform Commission's ("ALRC's") Review of Equal Recognition Before the Law and Legal Capacity for People with Disability. This submission is made in response to Issues Paper 44, *Equality, Capacity and Disability in Commonwealth Laws* ("the Issues Paper"), which was released on 15 November 2013.

I note that paragraph 286 of the Issues Paper is entitled 'Family law' and states as follows:

A range of potential issues that may affect people with disability being recognised as equal before the law, or exercising legal capacity, arise in the context of family law. The ALRC seeks stakeholder feedback on these issues which may, for example, relate to:

- *assessment of capacity where incapacity is either alleged by another party, or the court has concerns about the legal capacity of a party;*
- *legal representation and issues around the giving of instructions, discussed above at paragraph 191;*
- *case and litigation guardians, including issues of appointment, costs and exposure to liability;*
- *expert reports;*
- *primary and secondary considerations in parenting matters, including for example, assessment of capacity to provide for the needs of the child;*
- *spousal maintenance, including considerations of future need; and*
- *property orders.*

The paragraph concludes with 'Question 40', which asks:

*What issues arise in relation to family law that may affect the equal recognition of people with disability before the law and their ability to exercise legal capacity?
What changes, if any, should be made to Commonwealth laws and legal frameworks relating to family law to address these issues?*

There is reference in the list of family law related issues in paragraph 286 to an earlier discussion of case and litigation guardians in paragraph 191. Paragraph 191 states:

Capacity to give instructions and participate in litigation

A person's capacity affects their ability to engage with the justice system at a broad level, but also to start or defend proceedings, to give instructions, or to settle a matter. As a result, in considering the ability of people to access justice a number of issues arise, including:

- *the relevant standard of capacity;*
- *appropriate approach in circumstances where capacity is an issue in the course of proceedings and the role of legal practitioners representing a client who may lack capacity, as well as opponents in circumstances where the person is self-represented;*
- *appointment of litigation or case guardians, including the involvement of Public Guardians and Trustees and associated costs implications; and*
- *capacity and authority to give instructions to legal representatives.*

The two most significant issues raised in this submission concern funding for case guardians' legal costs and nomination of case guardians by the Attorney-General.¹ Although they have both been vexed issues for the Family Court of Australia ("the Court") for a number of years, they are becoming increasingly pressing, as the Court's case load is now comprised of the most difficult and complex disputes; many of which involve a party or parties with physical and/or mental disabilities.

I will also discuss the approach the Court takes in children's cases where a parent with a disability is seeking to spend significant time with their child, and I do so cognizant of ill-informed criticisms that the *Family Law Act 1975* (Cth) ("the Act") and courts exercising jurisdiction under it discriminate against disabled parents. I intend to then briefly refer to some select decisions in the areas of property, spousal maintenance and adult child maintenance which may be of interest to the ALRC. Finally, as sterilisation is a matter referred to by the President of the ALRC, Professor Rosalind Croucher, in the podcast dated 17 December 2013, I will refer to my submission on that topic made to the Senate Community Affairs Committee as part of its inquiry into the involuntary or coerced sterilisation of people with intellectual disabilities.

I make this submission in my capacity as Chief Justice of the Family Court of Australia and the views I express herein, which have been developed in consultation with the Court's Law Reform Committee, do not purport to represent those of other Family Court judges or of the Court as a whole.

¹ The *Family Law Rules 2004* (Cth) use the term "case guardian", as compared with "litigation guardian" which is used in the *Federal Circuit Court of Australia Rules 2001* (Cth).

Issues of relevance to the Family Court of Australia

Case guardians

Case guardians are governed by Part 6.3 of Chapter 6 of the *Family Law Rules 2004* (Cth) (“the Rules”).² With the exception of rule 6.13, which is discussed in more detail later in the submission, the rules pertaining to case guardians are in similar terms to those contained in the *Family Law Rules 1984* (Cth), which were superseded by the 2004 Rules.³ The Dictionary to the Rules states that “*case guardian* means a person appointed by the court under rule 6.10 to manage and conduct a case for a child or a person with a disability, and includes a next friend, guardian ad litem, tutor or litigation guardian.” According to the Explanatory Statement for the Rules, “[t]he term “case guardian”...is considered to be more user friendly than the others.”

Rule 6.08 of the Rules requires the appointment of a case guardian for any party who is a person with a disability. Specifically, sub-rule 6.08(1) provides that:

A child or a person with a disability may start, continue, respond to, or seek to intervene in, a case only by a case guardian.

The Dictionary to the Rules defines a “person with a disability” as one who, because of a mental or physical disability, does not understand the nature or possible consequences of the case or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the case.⁴ Rule 6.10 provides that a person may apply for the appointment, replacement or removal of a person as a case guardian of a party. An application can be made by a party or a person seeking to be made the case guardian or by a person authorised to be a case guardian. Procedurally, an application is made by way of an Application in a Case and supporting affidavit. Additionally, rule 1.10 of the Rules enables the court to make an order on its own initiative in relation to any matter mentioned in the Rules and thus the court can appoint a case guardian on its own motion, provided that the relevant provisions of the Part 6.3 of the Rules are met (see discussion below).

Rule 6.09 extends the former rule by providing that a person may be a case guardian if the person:

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

²Part 6.3 of Chapter 6 of the Rules applies only to proceedings in the Family Court of Australia. Case guardians in family law proceedings conducted in the Federal Circuit Court of Australia are governed by Chapter 1, Part 11, Division 11.2 of the *Federal Circuit Court of Australia Rules 2001* (Cth).

³ This is significant insofar as case law which predates the 2004 Rules, such as *Kannis & Kannis* [2002] FamCA 1150 on the role of case guardians, may continue to be relevant.

⁴ Sub-rule 1.16(3) provides that the Dictionary forms part of the Rules.

Rule 6.11 enables the court to request that the Attorney-General nominate, in writing, a person to be a case guardian if, in the opinion of the court, a suitable person is not available for appointment as a case guardian of a person with a disability. The appointment is automatic and occurs without the need for a court order, provided that the conditions of sub-rule 6.11(2) are met, ie. that the person files a consent to act, a written nomination and a Notice of Address for Service.

Rule 6.13 sets out the requirements for the conduct of a case by a case guardian. Pursuant to sub-rule 6.13(1), a person appointed as a case guardian of a party:

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

Sub-rule 6.13(2) provides that the duty of disclosure applies to a case guardian.⁵

The role of case guardians and their significance to the outcome of litigation

I have set out above the terms of rule 6.09, which concerns who may be appointed as a case guardian, and rule 6.13, which discusses the conduct of proceedings by a case guardian.

In the decision of *Kannis & Kannis* [2002] FamCA 1150, the Full Court of the Family Court (Nicholson CJ, Buckley and Kay JJ) confirmed that the overarching role of the Next Friend (as the Full Court then described it) is to conduct litigation and provide appropriate instructions to do so. The Full Court also said that the appointment of a Next Friend is necessary to enable a decision to be given which will be binding on the person under a disability (at [59]). The Full Court then referred to the decision of *Read & Read* [1944] SASR 26 at 28-9, where the Supreme Court of South Australia said:

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

More recently, the Full Court of the Federal Court in *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432 (Black CJ, Moore and Finkelstein JJ) said that, in substance, the purpose of appointing a case guardian is "to protect plaintiffs and

⁵ Rule 13.01 of the *Family Law Rules 2004* (Cth) sets out the elements of the duty of disclosure.

defendants who would otherwise be at a disadvantage, as well as to protect the processes of the court” (at [25]).

It is a role that has been described as:

...an invidious one in the sense that the person is taking on the decision-making responsibilities of the litigant whilst having to ensure that their own interests do not conflict with those of the litigant. That means that the case guardian has to make decisions which are often unpalatable to the individual litigant.⁶

The Full Court of the Family Court in *Forster & Forster* [2012] FamCA 47 emphasised the importance of ensuring that orders for the appointment of a case guardian not be made without due regard to the “very serious” consequences which may flow from that appointment. The Full Court opined that “...to relieve an adult person of the right to conduct his or her own litigation is a serious step and a serious deprivation of a fundamental right” (at [135]). The Full Court of the Family Court’s decision was cited with approval in the recent case of *Merrickson & Padmore* [2013] FamCA 916, where the trial judge, Loughnan J, said (at [26]):

The appointment of a case guardian is not discretionary. It goes to the integrity of legal proceedings that parties before the court have the capacity to present their case or to instruct a lawyer to do so, on their behalf.

The serious consequences of appointing a case guardian are illustrated by the case of *Forster* [2010] FamCAFC 205, a decision of Strickland J exercising the Court’s appellate jurisdiction as a single judge. In the context of long-running litigation, the father had filed an application to extend time to file a Notice of Appeal against parenting and property orders made by a federal magistrate, and against an order appointing a litigation guardian for him. The application for an extension of time was filed during the tenure of the case guardian’s appointment. Strickland J, in reliance on the Full Court’s decision in *Willshire & Willshire* [2009] FamCAFC 130, found that the father had no standing to file any application, including a Notice of Appeal, while there was a litigation guardian appointed for him. The only exception was a challenge to the appointment of the litigation guardian itself.⁷ Strickland J noted that, separate to the application before him, there was a further extant notice of appeal that had been filed by the father while a litigation guardian was appointed. Strickland J said that that Notice of Appeal, and the balance of the application before him, save for the appeal against the orders appointing the litigation guardian, had to await the outcome of the application seeking an extension of time and the outcome of the appeal, if the application was granted. Strickland J ultimately granted an extension of time and, as discussed below, the father’s appeal was upheld.

⁶ See *Anton & Malitsa* [2009] FamCA 623 at [2].

⁷ See *Forster & Forster* [2010] FamCAFC 205 at [3].

“Disability”, competence and the importance of medical evidence

A fundamental principle in decisions as to whether or not to appoint a case guardian is that litigants are assumed to be able to conduct their own proceedings and the party asserting otherwise bears the onus of establishing lack of competence to the court's satisfaction. As the Full Court of the Federal Court said in *L v Human Rights and Equal Opportunity Commission* [at 26]:

There is a presumption of competence unless and until the contrary is proved; that is, there is a presumption that a litigant of full age is competent to manage his or her affairs: *Masterman-Lister* at [17] per Kennedy LJ; *Murphy v Doman* (2003) 58 NSWLR 51; [2003] NSWCA 249 at [36] per Handley JA. When it is alleged that a person is incompetent, the onus of proof is on those so asserting: *Masterman-Lister* at [17] per Kennedy LJ; *Dalle-Molle v Manos* (2004) 88 SASR 193; [2004] SASC 102 at [17] per Debelle J; *Andreapoulou v Nowak* [2002] VSC 462; *Pratt v Dickson* [2000] QSC 314.

This passage has been cited with approval in appellate and first instance decisions of the Family Court.⁸

It is well accepted by the Family Court that the mere fact that a party may be conducting litigation in a way that appears to be inimical to their interests is not a sufficient legal basis upon which to appoint a case guardian. The Full Court of the Family Court in *Forster* said (at [126-7]):

It is the common experience of courts that many self-represented litigants appear to act against their interests, file voluminous documents and file many applications, some of which, at least at first blush, would enjoy no prospect of success.

As the Full Court of the Federal Court made clear in *L v Human Rights and Equal Opportunity Commission*, conduct that might on its face appear to be against the interest of a litigant does not compel the conclusion that the person is in “need” of a litigation guardian. At [34], the Court said:

...the fact that a litigant has put forward a case that reveals no reasonable cause of action may say nothing at all about the litigant's capacity to present such a case...

The difficulty that may attend the conduct of litigation in which a party who may have a form of disability is self-represented also does not of itself establish a need for a case guardian. The decision in *Materanzi & Suskain (No 2)* [2011] FamCA 276 is an example. In that case, the mother sought to have a case guardian appointed in parenting proceedings to which she was a party, on the basis that she was not able to adequately conduct or give adequate instructions for the conduct of the case. The trial judge, Forrest

⁸ See *Forster & Forster* [2012] FamCAFC 47; *Merrickson & Padmore* [2013] FamCA 916.

J, found that it was “abundantly clear” that the mother had a serious hearing defect that affected her ability to hear and understand the proceedings in which she was involved, and to speak and communicate with others. Nevertheless, in the absence of evidence that the mother was unable to properly participate in the proceedings, Forrest J declined to grant the application. Forrest J expressed his regret that the mother’s legal representatives withdrew from the case and that her counsel intended to do so also if the application to appoint a case guardian was refused, but went on to state that (at [18]-[21]):

I understand and appreciate that participation in litigation by the mother, with or without legal representation, is difficult for her. I am not though, satisfied simply because I appreciate the difficulty of it, that she is not capable of adequately conducting or giving adequate instructions for the conduct of the case.

...

[T]he lack of legal representation, as difficult as that makes the mother’s case, particularly in circumstances where she is alleging that the subject child...has been the victim of sexual abuse by the applicant father, and also that she was subject to significant domestic violence at the hands of the father will make this a very difficult case indeed.

That said, I am not satisfied that the grounds upon which I would be entitled to order the appointment of a case guardian are indeed present in this particular case.

The validity of the appointment of a case guardian is not dependent upon medical evidence as to the party’s capacity being before the court. The Full Court of the Federal Court in *L v Human Rights and Equal Opportunity Commission* said that the means by which the court will determine whether a guardian should be appointed can vary from case to case. The Full Court went on to say that there will be cases where no medical evidence will be available, such as where a litigant refuses to submit to a medical examination, and there will also be cases where the lack of capacity is so clear that medical evidence is not called for. However, the Full Court of the Family Court in *Forster & Forster* [2012] FamCAFC 47 said that appointing a case guardian in the absence of relevant medical evidence is a step that “should be approached with extreme care” (at [141]).

In that case, the father, who was a party to property and parenting proceedings, successfully appealed a decision of a federal magistrate to appoint a litigation guardian for him⁹ in circumstances in which the father had refused to attend a psychiatric assessment and there was no other medical evidence before the court. The Full Court found that the order requiring the father to undergo psychiatric assessment was not made on any proper grounds as it was intended to “complete his Honour’s already held view that [the father] was not competent”. To then go on, as the Full Court found the federal magistrate did, and infer that failure to comply with the order for assessment made the

⁹ The *Federal Circuit Court of Australia Rules 2001* (Cth) use the term ‘litigation guardian’, as compared to ‘case guardian’ in the *Family Law Rules 2004* (Cth).

appointment of a litigation guardian appropriate, was “fundamentally flawed” (at [137]-[8]). The Full Court concluded that there nothing in the material before the federal magistrate or in the federal magistrate’s reasons that supported the appointment of a litigation guardian (at [136]).

By way of contrast, the decision of O’Reilly J in *Salanger & Maxwell* [2011] FamCA 1248 is an example of a case in which a case guardian was appointed despite the party who was the subject of the appointment refusing to attend for psychiatric testing. O’Reilly J emphasised that her own observations of the party for whom an application to appoint a case guardian had been made would be insufficient to found such an appointment, because she would not, as a judge, be qualified to make that assessment. However, in circumstances in which the mother persistently refused to attend for a psychiatric evaluation O’Reilly J concluded that her own observations of the mother, her management of the case over a five-year period, and an earlier diagnosis of mental disability was a sufficient basis upon which to find that the mother could not conduct her case or give adequate instructions for the conduct of her case. Thus, although there was no current psychiatric report before the Court there was nevertheless medical evidence that had been tendered throughout the lengthy history of the proceedings that O’Reilly J was able to take into account.

Funding for case guardians’ legal costs

One of the most significant, if not the most significant, issue that arises in any discussion of case guardians is the availability of funds from which to meet the case guardian’s legal costs. As Cronin J observed in *Grierson & Grierson* [2009] FamCA 114, one of the considerations in the appointment of a case guardian is that the person who accepts that role must be objective and have no pecuniary interest in a personal sense in the matter. The availability of adequate funds to meet a case guardian’s legal expenses is therefore critical to their suitability for appointment if the circumstances so warrant.

Rule 6.14 of the Rules provides that the court may order the costs of a case guardian to be paid by a party or from the income or property of the person for whom the case guardian is appointed. *Salanger & Maxwell* is an example of a case where the legal costs of the case guardian appointed for the mother in parenting and property proceedings were to be met from the mother’s income and property.

However, in circumstances where it would not be appropriate to make an order that costs be met by the party, or where a litigant is impecunious, serious problems arise. Experience shows that the absence of a fund to meet legal costs is likely to act as a powerful disincentive to potentially suitable case guardians accepting an appointment. This is particularly so where the case guardian needs to instruct a legal practitioner, because the case guardian is personally liable for the costs and expenses of the legal practitioner. It may be possible to secure a grant of legal aid to fund a case guardian’s legal costs, but such grants can be difficult to obtain, particularly in property proceedings, and the process of seeking legal aid is itself time consuming.

In the case of *Modra & Modra* [2007] FamCA 1590, a long-standing parenting dispute involving serious allegations of child sexual abuse, Strickland J accepted medical evidence that the father required a case guardian to continue the parenting proceedings. Although the Public Advocate for the State of South Australia was prepared to act as a case guardian if appointed, that acceptance was conditional upon a grant of legal aid being made in his favour to enable him to instruct a solicitor. If a grant was not forthcoming, the Public Advocate would not be able to continue to act as the case guardian. Strickland J granted the request made by counsel for the independent children's lawyer for an adjournment so that the matter of legal aid funding could be explored. In so doing however, Strickland J expressed and repeated his concern about how long the process was taking and the effect that the delay must be having on the mother and children. A grant of legal aid was ultimately forthcoming but that did not occur until May 2007, approximately 16 months after Strickland J first became concerned about the apparent state of the father's mental health.

As this case illustrates, the need to identify a reliable source of funds from which to meet case guardians' legal costs can result in significant delays in the resolution of family law disputes. If a suitable case guardian cannot be found, then the proceedings cannot progress and the court will have no choice but to dismiss the application or applications, or stay the proceedings indefinitely pending the appointment of a case guardian. That has potentially very serious consequences for the families involved and particularly for children who may be the subject of or affected by disputation.

The Full Court of the Family Court (Finn, Thackray and Strickland JJ) observed in *Willshire & Willshire* [2009] FamCAFC 130 that it is a common occurrence for there to be no person, entity or authority available to take up appointment as a case guardian. The Full Court said that although State entities such as public trustees or public advocates are the obvious choice to take up such appointments where there is no other alternative, their ability to accept appointments was, the Full Court presumed, related to the question of costs. As I will discuss in the next section, which concerns the allied issue of the Attorney-General nominating case guardians, it would be highly desirable if discussions could take place between the Commonwealth and State governments as to establishing a pool of funds from which to meet case guardians' legal costs where they cannot be paid by the party themselves. I believe there would be considerable advantages in having such funds administered by State and Territory legal aid agencies, not least of which would include utilising existing expertise and maximising administrative efficiencies.

Nomination of case guardians by the Attorney-General

The final matter I wish to discuss, which is related to the issue of funding for case guardians, is nomination by the Attorney-General. As I stated earlier, rule 6.11 provides that the court may request that the Attorney-General nominate a suitable person in writing to be a case guardian if, in the opinion of the court, a suitable person is not available for appointment. Although the Court does not keep dedicated statistics on requests for nomination under rule 6.11, and responses to those requests, I arranged for a search to be undertaken of the Court's internal judgment database to identify those cases

where a request had been made. Although I recognise this is an imperfect search technique, I was able to locate a number of judgments involving requests for nomination. Unfortunately though, it does not appear that a nomination was forthcoming in any of those cases. One of the cases, *Connor & Hulett* [2011] FamCA 196, deals with the issue of nomination in some detail and I propose to quote extensively from that decision in my submission.

Before turning to *Connor & Hulett* I wish to refer to the matter of *Salanger & Maxwell*, which I believe amply demonstrates how the timely resolution of proceedings can be compromised where a suitable case guardian cannot be found and where a request for nomination under rule 6.11 is not responded to expeditiously, or indeed at all. As recorded by the trial judge, O'Reilly J, the matter had a long history, commencing by way of an application for parenting and property orders issued in 2003. On 15 May 2006 O'Reilly J made orders pursuant to rule 6.11 which her Honour hoped would result in the appointment of a case guardian by the Attorney-General. O'Reilly J said in her judgment at [19] “[u]nfortunately, my endeavour for appointment of a case guardian in 2006 via the Attorney-General failed”, resulting in the trial dates set down for June 2006 being vacated. The proceedings were stayed pending the determination of the father’s application for the appointment of a guardian and/or administrator for the mother under state legislation. In November 2006 the father’s application was dismissed. The two Tribunal initiated applications for guardianship were dismissed in April 2008, with there having been little progress in the proceedings before the Family Court. Those proceedings were stayed in September 2008 until further order.

By June 2010, after having periodically checked on progress with the case, O'Reilly J said she had become “increasingly concerned that the matter had languished and needed freshly to be brought to trial and finalised” (at [34]). Trial directions were made at that time. In October 2010 the mother filed an application seeking interim residence orders, with O'Reilly J delivering reasons for judgment in December 2010 whereby she said that she was not prepared to hear and determine the mother’s application until she attended for psychiatric assessment and report. Following the mother’s refusal to attend a psychiatric appointment, and with further trial dates having been vacated, in June 2011 the independent children’s lawyer filed an application for the appointment of a case guardian for the mother. The application came before O'Reilly J on 15 July 2011, and upon being satisfied that a suitable case guardian had been located who met the criteria contained in rule 6.09, an appointment was made. This occurred more than five years after an unsuccessful request for nomination had been made to the Attorney-General.

In orders made on 5 February 2010 in *Connor & Hulett* [2010] FamCA 103, Murphy J directed that a case guardian be appointed for the father and, by reason of no suitable person being available for appointment, requested that the Attorney-General nominate a person to so act. At [39] of the Reasons for Judgment, Murphy J expressed himself to be “profoundly concerned that the process contemplated by that appointment should not delay these proceedings.” That, unfortunately, did not come to pass.

I intend to quote at some length from Murphy J's Reasons for Judgment delivered on 16 March 2011 (*Connor & Hulett* [2011] FamCA 196), which incorporate his Honour's Reasons for Judgment delivered on 1 November 2010 (*Connor & Hulett (No 2)* [2010] FamCA 1013), as they detail the ultimately futile efforts made by the Court to secure a nomination of a case guardian by the Attorney-General. Murphy J said:

50. I am profoundly disappointed and saddened that the process contemplated – a process designed to assist a person with a disability, namely a mental illness – has, indeed, delayed these proceedings. In reasons delivered on 1 November 2010 I said:

19. I sought to make the point then, both orally to [the father] when he appeared before me and in the ex tempore reasons which issued subsequently, that the issue before the Court was both [the father's] capacity to properly represent himself and thus maximise his best chances as it were in the parenting proceedings and obtain orders which might be seen to reflect the caring and loving relationship that undoubtedly exists between the father and [the child].
20. This is a point which I have again sought to emphasis to [the father] on more than one occasion during the proceedings before me today.
21. Since the making of that order there has transpired what can only be described as extraordinarily unfortunate circumstances that have seen in the space of about nine months no progress whatsoever having been made toward the appointment of a case guardian to [the father].
22. The Court's processes, including the legislation and rules which govern it, contemplate a process whereby the Attorney-General appoints a case guardian so as to obviate the very sorts of difficulties that have occurred in this case. The difficulties encountered by the independent children's lawyer...in having a case guardian appointed in this case in accordance with the Court's rules are deposed to in an affidavit by [the independent children's lawyer] filed in these proceedings.
23. Those difficulties culminated in correspondence passing between [the independent children's lawyer] and the Attorney-General's Department and more recently in a letter dated 21 September 2010 addressed the Assistant Secretary of the Family Law Branch of the Attorney-General's Department by this Court's principal registrar, Ms Filipello. That letter sets out the difficulties attached to the

appointment for case guardian in this case and annexed for ease of reference a transcript of the proceedings before me...that sought to appoint a case guardian for [the father].

24. The principal registrar said in that letter:

From the Court's perspective this matter cannot progress any further until such time as a case guardian is in place. In effect it means that [the father] will not be able to spend [unsupervised] time with his child. I note that the order was made by Murphy J in February 2010 and I would ask that now the Attorney-General has taken up his portfolio the request made for the appointment of case guardian be expedited.

25. On 7 October 2010 a letter was received from the Assistant Secretary of the Family Law Branch of the Attorney-General's Department which I have marked as exhibit A in these proceedings.

26. I will quote the letter in full. It says:

Dear Ms Filippello, Thank you for your letter of 21 September 2010 regarding the Court's request for the Attorney-General to nominate a case guardian in the matter of [Connor] and for your offer of assistance in the development of the processes. The Department is not in a position to provide a nominee case guardian for the Attorney-General at this time as new arrangements for the nomination process for case guardians in the Family Court of Australia are currently being put in place. I understand the Attorney-General will provide the Court with further information as soon as possible and we look forward to working with you on this important area of family law policy.

27. Whatever new arrangements may or may not be put in place by the Attorney-General's Department as indicated in that letter they are of cold comfort to [the father] (and to the independent children's lawyer in this matter) each of whom have now had to wait nine months before finally receiving an answer that a case guardian would not be appointed.

28. The ramifications of this for this matter and ultimately a resolution of it and the making of orders ultimately considered to be in [the child's] best interests perhaps do not need to be dwelled upon in the course of these reasons. I

simply pause to observe that it is very unfortunate that the case has not been able to progress by reason of that fact.

51. No doubt governments at both state and federal level would be able to advance many reasons which they would presumably suggest as good reasons why no arrangements have been put in place so as to avail people with a serious debilitating illness such as mental illness from having a case guardian appointed for them in parenting cases before this Court. Whatever might be the merits (or demerits) of any such argument, what is at least clear is that, as at today, there are still no arrangements in place whereby case guardians can be appointed efficiently and effectively so as to allow people with a disability including specifically mental illness, which deprives them of the capacity to conduct proceedings on their own behalf.
52. That this is tragic for those individuals is one thing. That it has consequent tragic consequences for children is quite another.
53. I say no more than that it concerns me profoundly that those arrangements are not in place, and all the more so in circumstances where the most recent Australian of the Year, Professor McGorry has spent a considerable proportion of his time in that role attempting to educate the community with respect to mental illness and the tragedy of youth suicide in particular.
54. That there should have been a confluence of circumstances that have prevented the final determination of these proceedings in the period between July 2009 is to say the least tragic and profoundly disappointing.
55. That there should have been a delay of 12 months while a case guardian was sought is to say the very least extremely unfortunate, and, it needs to be said, tragic for the child, particularly in light of the orders which will ultimately be made in these proceedings today.

I am not aware of any new arrangements for the nomination of case guardians in the Family Court having been put in place. It is abundantly clear to me that the current system is not working effectively and I encourage the Attorney-General and his Department to give urgent consideration to funding for case guardians' legal costs generally, where those costs cannot be met by the party, and to instituting a nomination process that enables case guardians to be quickly appointed where a suitable candidate is not available. I return to the comments of the Full Court in *Willshire*, where it was said:

54. We cannot leave this appeal without commenting on the circumstance of the husband's own solicitor being appointed as the case guardian. That is highly unusual and indeed concerning, but it was brought about by the absence of any other person or any other relevant entity to take up the appointment. A request

had been made by the registrar to the Attorney-General pursuant to Rule 6.11 of the Family Law Rules but no nomination had been made.

...

56. It would be highly desirable, in our view, if the Attorney-General was able to initiate discussions for arrangements between the Commonwealth and State Governments which provide for a suitable case guardian to be appointed for a person in the position of the husband here where there is no alternative available. It is entirely unsatisfactory that the husband's own solicitor should be placed in the position where he is appointed as the husband's case guardian. They have entirely different roles in the conduct of the litigation.

I strongly endorse the Full Court's comments.

Decision making involving a parent or parents with a disability

I now wish to briefly discuss the approach the Court takes to making decisions about parental responsibility and time spent by a child with a parent who has an intellectual disability. I raise this issue in response to an article in *The Age* newspaper on 15 December 2012 entitled 'A child taken, a mother grieves'.¹⁰ According to that report, the case concerned 'Rebecca', the mother of an eight year old child. Rebecca suffered from a mild intellectual disability. It would appear that relatives of Rebecca's former partner and the father of the child applied to the Federal Magistrates Court for orders that the child live with them and also orders regarding parental responsibility. The article states that as a result of an order made by consent in the Federal Magistrates Court, in circumstances where a litigation guardian had been appointed for Rebecca, Rebecca only spends time with the child every second weekend and during part of school holidays. The decision is described as one which has "deeply concerned lawyers and human rights workers, who believe Rebecca is the victim of an inflexible Australian Family Law Act that discriminates against disabled parents in breach of United Nations conventions protecting the rights of the disabled and children" and which, for some, has "disturbing parallels" with the 'stolen generations'. Rebecca's litigation guardian is quoted as saying:

The [Family Law] [A]ct assumes the parties are normally the natural parents and where that is not the case it doesn't give preference to a natural parent. And it does not give protection to someone with a cognitive disability. It treats disability as a barrier to parenting just like drug addiction is a barrier.

If she didn't have a mild intellectual disability, I am sure that her child would still be living with her. It is wrong at every level.

¹⁰ Mark Baker, 'A child taken, a mother grieves', *The Age*, 15 December 2012, <http://www.theage.com.au/victoria/a-child-taken-a-mother-grieves-20121214-2bfd9.html>, accessed 7 January 2014.

On the same day an opinion piece authored by Ms Colleen Pearce, the Victorian Public Advocate, was published in the *Sydney Morning Herald*.¹¹ There, Ms Pearce said that the Federal Magistrates Court (now the Federal Circuit Court) or Family Court can remove children from a parent under the Family Law Act to a “better parent”, or where it is deemed in the best interests of the child. Ms Pearce is then quoted as saying “I am increasingly concerned that children are being removed from parents with a disability principally due to that disability and not because the cases meet the relevant tests.”

It is not appropriate for me to comment on individual decisions and certainly not on one that was made by consent in the former Federal Magistrates Court. However, insofar as it is being suggested that the Act discriminates against parents with an intellectual disability, or that the presence of an intellectual disability is of itself a disqualifying factor in an application in which a parent is seeking to spend substantial time with their child, I believe those views are misconceived.

In any case where parenting orders are sought, whether they be orders for the allocation of parental responsibility, or time spent with a child, or any other order concerned with the care, welfare and development of a child, the best interests of the child is the paramount consideration.¹² The Act makes no reference to a “better parent” test – the focus is unequivocally on the child’s interests and who is best positioned to meet the child’s needs.

How a court determines what is in a child’s best interests is by considering the matters contained in section 60CC of the Act. These include both ‘primary’ and ‘additional’ considerations. Relevantly, the two primary considerations are:

- the benefit to the child of having a meaningful relationship with both parents; and
- the need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence.¹³

The additional considerations include:

- the nature of the relationship of the child with each of the child’s parents and other persons, including grandparents and other relatives;
- the capacity of each of the child’s parents and any other person, including grandparents and other relatives, to provide for the needs of the child, including emotional and intellectual needs; and
- the attitude towards the child and to the responsibilities of parenthood demonstrated by each of the child’s parents.¹⁴

¹¹ <http://www.smh.com.au/federal-politics/political-opinion/disability-no-bar-to-good-parenting-20121214-2bf75.html> (accessed 7 January 2014).

¹² *Family Law Act 1975* (Cth), s 60CA.

¹³ *Ibid* s 60CC(2).

¹⁴ *Ibid* sub-ss 60CC(3)(b), (f), (i).

The court can consider any other fact or circumstance that it thinks is relevant to the decision of what orders would be in a child's best interests.¹⁵

I confirm that neither the primary nor the additional considerations make specific reference to whether or not a parent suffers from a disability, or how the presence of a disability may affect the outcome of parenting proceedings.

The following Family Court decisions, all of which involve a parent with an intellectual disability, may be of assistance to the ALRC in gaining insight into the Court's reasoning process. I believe that they refute any suggestion that the mere presence of an intellectual disability, regardless of its severity and independent of any other factors, will be determinative of the outcome of an application for parenting orders. A summary of some relevant cases follows:

Turnbull & Meagher [2013] FamCA 184

This matter involved an application by the mother for sole parental responsibility for her four children and that the children live with her, as they had been doing for the 15 months prior to hearing. It would appear that the father originally sought that the children live with him, or at least there was a disagreement between him and the mother as to the children's residence, but the father abandoned the proceedings a few months prior to the matter coming on for final hearing and thus the trial proceeded in his absence. The evidence before the Court was that the mother had an intellectual disability and that the father had a chronic medical condition. The evidence of the family report writer was that, during the time that the parties lived together, the children has been severely neglected, leading to significant developmental delays.

The trial judge, Austin J, found that apart from the father's deteriorating health, he also lacked insight into the children's emotional needs. In particular, the father had chosen to disengage from the children without satisfactory explanation. Austin J also had residual concerns about the mother's parenting capacity and the potential for her "intellectual delay" to compromise her ability to cater to the children's intellectual needs as they aged and matured, evidenced by the children's past delay in reaching developmental milestones. Austin J then said (at [57]):

That aside, the previous shortcomings in the mother's parenting capacity, evident from the children's delay in reaching milestones, are fortunately showing progressive improvement. With assistance from both the maternal grandmother and caseworkers from a non-government agency...the quality of the mother's care for the children in all respects has markedly improved.

¹⁵ Ibid sub-s 60CC(3)(m).

Austin J concluded (at [58]) “the evidence demands a conclusion that the mother is better suited than the father to provide for at least the children’s physical and emotional needs.”

Simon & Harvey [2012] FamCA 401

This matter involved an application by the mother to vary orders made in 2005 that she spend supervised time with her younger child. The mother sought that the requirement for supervision be discharged. Evidence was before the court, by way of family reports, that the mother suffered from an intellectual disability, a severe speech impediment and a hearing defect. There was also evidence of past allegations of abuse and neglect of the children made against the mother, of involvement by child welfare authorities, and of the children having been placed in foster care on earlier occasions, prior to them living with the father.

At trial, the mother asserted that there was no medical evidence before the Court as to whether she had an intellectual disability and the extent of any such disability. Taking into account earlier family reports and his own questioning of the mother, the trial judge, Kent J, said he was “comfortably satisfied” that the mother had some intellectual disability, although he found that its extent was unclear. Kent J found that there was “an abundance of evidence, historical and otherwise, to indicate very significant limitations in the Mother’s capacity to provide for the physical, intellectual and emotional needs of her children if her time with them is on an unsupervised basis” (at [77]). Kent J referred to evidence from 2008 when the child spent supervised overnight time with the mother and to the report of the supervisor of the visit, which provided “no comfort” to Kent J that the mother had any improved capacity to provide care than that which existed when the order for supervision was made in 2005.

In conclusion, Kent J said (at [95]):

I find that there is little factual or objective information to support the Mother’s claims that a change in the time arrangements and the requirement for supervision would be in the child’s best interests. To the contrary, I find that such a change would be adverse to the child’s best interests. In this respect, I accept [the] assessment that removing the structure and support of supervised time might be setting the Mother up to fail, given the limitations consistently identified in respect of her interactions and relationships with each of her children.

Accordingly, Kent J declined to accede to the mother’s application for unsupervised time.

Heath & Heath [2007] FamCA 148

This matter involved a dispute between the parents of three young children as to with whom the children should live and how much time should be spent (if any) with the parent with whom the children were not principally residing. During the

course of the trial, the issues in dispute were whether two, or all three, children should live with the mother and whether time spent with the father should be supervised. Allegations of family violence, sexual abuse and emotional neglect were in issue.

The trial judge, Brown J, referred to expert medical evidence in which the mother was described as having a mild intellectual disability resulting in “dull normal intelligence, together with dependent personality features.” The evidence was also that the mother had an adjustment disorder with associated anxiety and depressive features. The assessing doctor’s evidence was that the mother would need to be guided from time to time in discharging her parental obligations but was capable of providing a reasonable level of parental care. Brown J’s observation of the mother in the witness box was consistent with that evidence. Brown J said that “in general, [the mother] understood questions and did her best to respond although she became confused at times and it was easy to see how she could be led to give a particular answer if a question were posed in a particular way.”

The expert medical evidence with respect to the father was that he had been diagnosed with a personality disorder and mild adjustment problems, mild anxiety and depression, which were not amenable to treatment. Brown J found that the father has no insight into the effect of long-standing family dysfunction on the three children. In considering the capacity of each of the children’s parents to meet their needs, Brown J said (at [57]) “[t]he evidence is that, despite her intellectual disability, the wife has the capacity to parent the children well, and that she is open to accepting advice and support from community services.”

Brown J ordered that the three children live with the mother, that the children spend supervised time with the father and that the mother have sole long term decision making responsibility for the children’s health, education and residence, with responsibility for other decisions being exercised jointly with the father.

In conclusion, I note that the article in *The Age* states that the decision involving care arrangements for Rebecca’s child cannot be appealed and, more generally, that consent orders cannot be the subject of legal challenge. That is not the case. There is no barrier, statutory or otherwise, to a party appealing a parenting order made by consent, or to applying for variation of the order if there has been a change in circumstances. That article also asserts that “Rebecca’s advisers believed they could not resist a decision in favour of her former partner’s family and accepted a consent order...based on potential legal liability and restrictions on the role of a litigation guardian...”. As I earlier stated, if the proceedings had been heard in the Family Court, rule 6.13(1)(d) would have required the case guardian to file an affidavit setting out the facts relied on to satisfy the court that the order was in Rebecca’s best interests.

Examples of cases: property, spousal maintenance and adult child maintenance

The ALRC has included ‘spousal maintenance’ and ‘property orders’ as issues upon which stakeholder feedback could be sought and provided. I consider ‘adult child maintenance’ is also an issue with potential relevance to the ALRC’s inquiry.

At this juncture I merely wish to draw the ALRC’s attention to the relevant legislative provisions concerning the making of property and spousal maintenance orders (de jure and de facto), and those which pertain to adult child maintenance. I will also refer to some decisions in which a party’s physical and/or mental health was in issue and how those health issues were accommodated. My discussion is confined to adult parties with a disability, although if the ALRC is interested in obtaining information about financial provision for parents with care-giving responsibilities for young people with physical and mental health conditions, I would be happy to provide additional material upon request. Although it was written in 1993, the ALRC may also be assisted by an article entitled ‘Disability and the Financial Impact of Matrimonial Breakdown’ by Kay Maxwell, published in (1993) 23 *Queensland Law Society Journal* 565. For convenience, a copy of the article is attached.

Property and spousal maintenance

Part VIII of the Act enables a court exercising jurisdiction under the Act to make orders with respect to property, spousal maintenance and maintenance agreements of parties to a marriage, save for financial matters or financial resources covered by a binding financial agreement.¹⁶ Part VIIIAB concerns property, financial resources, maintenance and financial agreements between de facto couples.

Property

Although parties with a disability are entitled to the same considerations under section 79 (de jure couples) and section 90SM (de facto couples) as any other litigant, there are certain matters that are likely to assume particular significance. These arise most prominently in the assessment of what are essentially prospective factors, which are usually taken into account after consideration is given to the composition and value of the parties’ asset pool and their respective contributions to that pool. These factors include the age and state of health of the parties, the physical and mental capacity for gainful employment and the parties’ needs. Issues of disability may also arise in other areas, such as (as will be discussed by reference to Full Court and High Court judgments in *Stanford*) the physical separation of parties because of health reasons and the jurisdiction of the court to make a property settlement order in such circumstances, the assessment of the parties’ respective contributions, and consideration of the justice and equity of the proposed order.

As prospective factors arising under section 75(2) and section 90SF(3) are also an integral part of applications for spousal maintenance, I intend to discuss them when I turn to the topic of spousal maintenance itself.

¹⁶ Ibid s 71A.

The following two cases provide examples of some of the issues that can arise in the assessment of contributions when one of the parties has a disability.

- *O'Brien & O'Brien* (1983) FLC 91-316 at 78,148: where, upon the husband becoming permanently disabled in a motor vehicle accident, including suffering post traumatic cerebral disorder, the wife's homemaker contribution in the three year period between the accident and the receipt of damages arising from a civil suit was assessed as being "significantly greater" than the financial contribution of the husband. The trial judge found that not only did the wife have the responsibility of managing the house and caring for the children, she also had the "heavy burden" of caring for and nursing the husband, on account of which she ceased part-time employment.
- *Coad* [2011] FamCA 622: where the husband's attempted murder of the wife was found to have resulted in "sustained residual and life long disabilities" which caused her pain, interfered with her capacity to work and "presumably" made it more difficult for her to care for the child. The trial judge was satisfied that the injuries inflicted on the wife by the husband made the discharge of her obligation to care for the child more onerous than it would otherwise have been. Accordingly, in her assessment of the parties' post-separation contributions, the trial judge found that wife's contributions significantly exceeded those of the husband and were made under "extraordinarily difficult circumstances in the months following the husband's attack on her and, thereafter, with permanent disabilities...". The assessment of contributions, which would otherwise have favoured the husband, favoured the wife 60% to 40% as a result of her post separation contributions.

The two Full Court decisions in *Stanford & Stanford* ((2012) FLC 93-495; (2011) FLC 93-483) (Bryant CJ, May and Moncrieff JJ), and the High Court decision (2012) 247 CLR 108), are of particular interest in the context of the ALRC inquiry. The appeal before the Full Court and in turn before the High Court raised what the Full Court described as (2011 FLC 93-483 at 85,964):

...the question as to whether and if so in what circumstances, the Court should make an order for property settlement pursuant to s 79 of the *Family Law Act 1975* (Cth)...where a marriage is still intact but where a physical separation has been forced upon the parties by reason of one of the parties' health.

The question has particular relevance in contemporary Australian society. The parties are aged. The wife must have high care in a nursing home because of her frailty, both physical and mental. The husband wishes to remain in their home which is within his ability. The wife's family wish that the house be sold so that

money can be spent on care for their mother. The evidence before the Magistrate was this would only be possible if the house was sold.

In *Stanford*, the husband and wife had a long-standing marriage and had lived in the same home together for in excess of 35 years. They were aged 89 (wife) and 87 (husband) years respectively at the date of hearing. In 2008 the wife suffered a stroke and was admitted to residential care. The wife also suffered from dementia. Although physical separation was forced upon them, it was the husband's case that the parties were still in a marital relationship. The husband continued to provide for the wife and had placed \$40,000 into an account for her use, as well as visiting her three times a week at the care facility.

The husband wished to remain in the matrimonial home. The wife (through her daughter as case guardian) initiated proceedings for property settlement seeking the sale of the former matrimonial home and equal division of the assets between the parties, on the basis that the proceeds of sale could be spent on care for the wife. The order made by a magistrate of the Family Court of Western Australia necessitated the sale of the property. The father appealed.

The Full Court allowed the appeal and set aside the magistrate's decision. On the issue of the power to make a property settlement order in respect of an intact marriage, the Full Court (as confirmed on appeal to the High Court) found that there was no real doubt that the court has jurisdiction to make property settlement orders where the parties have not separated.

The Full Court concluded that the magistrate had erred in a number of respects. The Full Court observed that the magistrate had not sufficiently considered the effect of her orders on the husband, including the sale of the home in which he lived, and the fact that it was an intact marriage, in considering what was "just and equitable". In particular, the Full Court found that the wife did not have a need for a property settlement as such and that her reasonable needs could be met in other ways, particularly by way of a maintenance order.

The Full Court said in conclusion (at 85,992):

In our view it is important...to be clear that there is no requirement that the Court make a final order for property settlement in such cases that would alter the interests of parties in property on a final basis especially when the marriage itself is not at an end. There are a number of provisions in the Act...which give the court power to make interim orders, make orders for maintenance and to adjourn the proceedings rather than to determine them on a final basis if the justice and equity of the case requires it.

On appeal, the High Court said that the Full Court was right to conclude that the magistrate had erred in making the property settlement order that was made, and was

right to find that the magistrate did not consider factors that bore on whether it was just and equitable to make a property settlement order.¹⁷

Spousal maintenance

The Act provides that each party to a marriage is obliged by s 72 and s 90SF to maintain their spouse, to the extent they are reasonably able to do so, if the other party is unable to adequately support themselves because of:

- having the care and control of a child aged under 18;
- age or physical or mental incapacity for appropriate gainful employment; or
- any other adequate reason.

The court can have regard to the list of matters contained in section 75(2) and section 90SF(3) in determining what maintenance order can be made. These factors are also considered in property settlement proceedings.

Sub-section 75(2)(a) and sub-section 90SF(3)(a) concern the age and state of health of the parties. Sub-section 75(2)(b) and sub-section 90SF(3)(b) concern physical and mental capacity for appropriate gainful employment. There is substantial overlap between the two provisions.

Some examples of cases involving the state of health of the parties and physical and mental capacity for gainful employment follow.

In *Tye and Tye (No 2)* (1976) FLC 90-048, the parties had been in a relationship for five years and were married for approximately two of those years. The marriage ended suddenly. The shock of the separation, in part, caused the wife to enter a “severe anxiety state” and to nearly have a nervous breakdown. The wife was unable to work as a result. The trial judge found that the wife did not, at the time of hearing, have a mental capacity for gainful employment. The trial judge ordered periodic maintenance for the time the wife expected to be unable to work and for a further period in which to obtain employment. Lump sum maintenance was also awarded, in part for the wife’s medical expenses. The husband’s appeal against the order was dismissed.

In *Barkley & Barkley* (1977) FLC 90-216, the wife was born with a 30% to 40% hearing deficiency in one ear. Following an assault by the husband, the wife lost all hearing in her other ear. An operation to improve her hearing was deemed to be too risky. The trial judge found that the wife’s loss of hearing should be taken into account as an aspect of her state of health and as an element of her physical and mental capacity for appropriate gainful employment. The trial judge found that the wife’s “defective hearing” could seriously affect her earning capacity in the future. Counsel for the husband contended that there was no evidence before

¹⁷ The appeal to the High Court was allowed on grounds largely unrelated to issues discussed in this submission and concerned the effect of the subsequent death of the wife and the requirements of section 79(8) of the Act.

the court that the wife's hearing loss had affected her earning capacity or the extent to which it had been affected. The trial judge said:

If the law requires evidence to show that in a labour market where jobs are scarce a half-deaf person is not as readily employable as a person of sound hearing then the law is indeed asinine.¹⁸

In *Finnis & Finnis* (1978) FLC 90-437, the parties were married for 32 years. The wife had suffered many serious illnesses throughout the marriage and was in a poor state of health. The wife sought that the husband transfer his interest in the former matrimonial home to her, as well as his interest in the furniture, and a lump sum payment. The trial judge found that the wife was in a poor state of health and that the type of epilepsy from which she suffered was likely to cause periodic memory deterioration and disorders of awareness. The trial judge found that the state of the wife's health was such that she would be unable to engage in any gainful occupation following the expiration of her employment as an academic tutor. In discussing the wife's application for the husband's interest in the former matrimonial home to be transferred to her, the trial judge said that, given the uncertainty about the wife's future health and her "advancing years", the house was too spacious for the wife and "it will not be long before it will be a burden upon her." However, in light of various factors including the wife having resided in the home for 23 years, the proximity of friends and family, and that the husband had no need for a home of his own, the trial judge found it just and equitable in all the circumstances to transfer the husband's interest in the property to the wife.

In *Dow-Sainter & Dow-Sainter* (1980) FLC 90-890, after 13 years of marriage, the wife was diagnosed with multiple sclerosis. By the time the marriage ended in 1979, the wife had impaired functioning in both legs. The trial judge found that the wife was for all practical purposes incapable of earning a wage and that she should live in a house involving minimal use of stairs. The trial judge ordered that the former matrimonial home be sold and that the wife receive two-thirds of the proceeds of sale. The wife's application for lump sum maintenance was adjourned sine die. The wife appealed. The Full Court found that the house was appropriate for the wife's needs as it did not have stairs and was accessible to shops and transport. The Full Court also found that, in light of the wife's inability to earn an income due to her medical condition, it was appropriate for the husband to make a payment to her by way of lump sum maintenance. The Full Court allowed the appeal and, upon re-exercise, transferred the whole of the husband's interest in the former matrimonial home to the wife by way of property settlement and lump sum maintenance.

¹⁸ At 76,325.

Adult child maintenance

Section 66L(1) of the Act provides that the court must not make an order for the maintenance of a child who is 18 or over unless it is satisfied that the maintenance is necessary either:

- (a) to enable the child to complete their education; or
- (b) because of a mental or physical disability of the child.

The matters that are to be taken into account in determining what is necessary are set out in s 66J. Section 66J requires consideration of the income, earning capacity, property and financial resources the child has and the “proper needs” of the child. Section 66J(2) requires the court, in taking account of the proper needs of the child, to have regard to:

- (a) the age of the child;
- (b) the manner in which the child was “educated or trained”; and
- (c) any special needs of the child.

Section 66VA(a) provides that a child maintenance order stops being in force if the child, inter alia, ceases to have a disability.

There is a greater onus of proving that maintenance is necessary if it is because of the child’s mental or physical disability rather than in order to enable the child to complete their education.¹⁹

Following are two cases in which awards of adult child maintenance were made.

Re: AM (2006) FLC 93-262

In *Re: AM* there was an application by a 28 year old for periodic and lump sum maintenance. The evidence was that the applicant suffered from a rheumatic condition called urticarial vasculitis arthritis, a rare degenerative and possibly permanent disease. The first respondent, the father of the applicant, denied legal liability for maintenance on the basis that the applicant’s condition had not manifested itself until after the applicant had turned 18 years of age, at which date the father said his legal duty to provide financial support ceased. The father asserted that he was meeting any moral or social burdens stemming from the applicant’s condition by way of voluntary support payments. The trial judge, Carmody J, found that the language of section 66L was “plain and unambiguous.” Carmody J said that if the drafters intended for the section to apply only to childhood disabilities, the section would state that in clear terms. Carmody J further said that there was no reason why section 66L should not apply to temporary as well as permanent disabilities, and to partial as well as total disabilities. Carmody J ordered that the respondent father pay maintenance of \$525 per week and the respondent mother pay \$975 per week for five years, with a prospect of a further review.

¹⁹ See *FM & FM (1997) FLC 92-738*.

Should the ALRC be assisted by commentary on the decision, the following two articles may be of interest:

- ‘Is There a Need for Nexus of Disability and Dependence in Adult Child Maintenance Cases’ (2007) 28(2) *Queensland Lawyer* 70
- ‘The ‘Nexus of Dependency’ and Adult Child Maintenance’ (2009) 83(11) *Law Institute Journal* 41

Jamine & Jamine and Anor (No 2) [2011] FamCA 843

In *Jamine* the parties’ adult daughter, aged 25 years at the date of hearing, suffered from Downes Syndrome and required “significant levels of assistance in virtually every activity that adults without disabilities accept as the norm.” The medical evidence from an expert witness was that the daughter would encounter future problems including early Alzheimer’s Disease, cataracts, haematological malignancies and spinal cord compression. The daughter had no income save for her disability support pension (which is disregarded for the purpose of maintenance proceedings) and was unlikely to be in receipt of income in the future. The daughter was being cared for by her mother, who applied for adult child maintenance payable from the parties’ joint assets, capitalised for a 12 year period.

The trial judge, Cronin J, said the phrase “necessary” in section 66L (at [184]):

...must be interpreted to mean that the child cannot support themselves to some measurable standard because of their physical or mental disability without maintenance. For example, there will be adults in the community with a mental or physical disability who are employed in industry or commerce where they are paid. That income must be considered in the context of what is necessary. So too must property and financial resources be considered.

On the question of proper needs, Cronin J said (at [189]):

“Proper needs” must mean more than just expenditure currently being incurred. It must include questions about what is required to be done to ensure that the “special needs” (referred to in s 66J) of a child are met taking into account the manner in which, in this case [the daughter], has been raised and cared for by her parents.

Cronin J found that, in the circumstances, the maintenance of the adult child should be shared equally. He ordered that the sum of \$147,000 be paid out of the parties’ assets and held on trust for the maintenance of the daughter, to be drawn at the annual rate of \$16,334.

Sterilisation of children and young people with an intellectual disability

I have read the transcript of the podcast interview of Professor Croucher by Ms Sabina Wyn, the Executive Director of the Australian Law Reform Commission. I note that Professor Croucher identified sterilisation as a “very difficult issue” arising in the inquiry.

On 22 February 2013 I made a submission to the Senate Community Affairs Committee as part of its inquiry into involuntary or coerced sterilisation of people with disabilities in Australia (submission no. 36). I did so because of the welfare jurisdiction exercised by the Court and its role in providing authorisation for certain medical procedures to be performed, including undertaking surgery to render a child or young person with an intellectual disability infertile.

I trust the views I expressed in my submission will be of assistance to the ALRC. A copy can be found at the Committee’s website:

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Submissions

Conclusion

I reiterate that the problems currently associated with the funding and appointment of case guardians in family law proceedings require urgent address. Although I recognise that it is a matter for the ALRC itself, I urge the ALRC to recommend to government that dialogue be entered into between the Commonwealth Attorney-General and the State and Territory governments as to establishing a fund from which to meet case guardians’ legal costs where the party for whom the case guardian is appointed is unable to do so. I also urge the ALRC to recommend that the Commonwealth Attorney-General give immediate attention to establishing an efficient and timely process through which to respond to requests made pursuant to rule 6.11.