IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P23 of 2012

BETWEEN:

STANFORD
Appellant

and

STANFORD
Respondent

SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR NSW

Part I: Certification for publication on the internet

1. These submissions may be published on the Internet.

Part II: Basis of intervention

2. The Attorney-General for New South Wales ("**New South Wales**") intervenes under s 78A of the *Judiciary Act 1903* (Cth).

Part III: Why leave to intervene should be granted

3. Not applicable.

Part IV: Relevant provisions

4. *Constitution*, ss 51 (xxi), (xxii), Chapter III; *Family Law Act 1975* (Cth) ss 4 (definition of "*matrimonial cause*"), 39, 43, 48(2), 49, 79, 81. These provisions are annexed to the appellant's submissions and are still in force, in that form, as at the date of preparing these submissions.

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Part V: Submissions

Summary

5. In relation to the constitutional issues set out in both the Appellant's current notice under s 78B of the *Judiciary Act 1903* (Cth), and the proposed amended notice of appeal, in summary New South Wales contends that:

   (a) there is evidently a "*matter*" under the Constitution as well as a "*matrimonial cause*" under definition (ca)(i) in s 4 of the *Family Law Act 1975* (Cth) ("**the Act**") notwithstanding the proceedings begun between the husband and the wife were taken or continued by their respective case guardian or legal personal representative;

   (b) that matrimonial cause is one "*arising out of the marital relationship*" as so defined;

   (c) while it remains "*obvious that the section [ie s 79 of the Act] must be read down*" (*Dougherty v Dougherty* (1997) 163 CLR 278 at 285.8) to remain within constitutional limits (whether that is ss 51(xxi), or (xxii) of the *Constitution*), the validity of s 79(8) itself is established as being within those limits; and

   (d) an orthodox construction of s 79 in this appeal "*so that it is consistent with the language and purpose of all the provisions of the statute*" (*Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]) (and, in particular, s 81) makes it unnecessary to resolve here any question as to the scope of the marriage power.

The proceedings, when originally instituted, constituted a "*matrimonial cause*" and a 'matter'

6. Section 39 of the Act relevantly provides:

   (a) that, subject to Part V of the Act, certain "*matrimonial cause[s]*" "*may be instituted under [the] Act in a Court of summary jurisdiction of a State or Territory*": s 39(2); and

(b) that, subject to Part V of the Act and to s 111A (maintenance obligations with New Zealand) "*each court of summary jurisdiction of each State is invested with federal jurisdiction*" with respect to those "*matrimonial cause[s]*": s 39(6).

7. "*[M]atrimonial cause*" is defined by s 4 of the Act. Relevantly for present purposes, "*matrimonial cause*" is defined to include:

> (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them being proceedings:
>
> (i) arising out of the marital relationship;
>
> (ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
>
> (iii) in relation to [certain divorces, annulments and legal separations effected overseas].

8. The appellant appears to contend (see, eg, the appellant's proposed further amended notice of appeal ("**NoA**") at [2(b)]) that there was no "*matrimonial cause*" as defined because, in substance, there was no dispute between the husband and wife relating to property, and the s 78B notice suggests that there was, accordingly, no "*matter*".

9. That contention mischaracterises the nature of the proceedings before the Magistrates Court of Western Australia. Those proceedings were commenced on behalf of the wife against the husband and sought orders under s 79 of the Act regarding the property of the husband and in favour of the wife. The fact that, as a matter of procedure, the proceedings were instituted by a case guardian on behalf of the wife does not affect the fact that, as a matter of substance, the proceedings were commenced on behalf of the wife against the husband.

10. It follows that the proceeding before the Magistrates Court fell within the chapeau of paragraph (ca) of the definition of "*matrimonial cause*" as being "*proceedings between the parties to a marriage*" of the identified kind. The institution of that matrimonial cause gave rise to a "*matter*" under a law of the Commonwealth: *Hooper v Hooper* (1955) 91 CLR 529 at 536.

11. The wording of that chapeau to the present paragraph (ca) of the definition of "*matrimonial cause*" is relevantly identical to the wording considered in *Russell v Russell* (1976) 134 CLR 495, namely "*proceedings with respect to ... the property of the parties to a marriage or of either of them*".

12. In *Russell v Russell*, a majority of this Court held that the then current wording of the definition of "*matrimonial cause*" was invalid insofar as it purported to confer jurisdiction with respect to property matters not ancillary to a proceeding for divorce or for nullity of marriage.

13. As Mason and Deane JJ later explained in *Fisher v Fisher* (1986) 161 CLR 439 at 451.8 (emphasis added):

> The problem with par. (c)(ii) of the definition of "matrimonial cause", as it then stood, was that it referred to proceedings with respect to the property of the parties to a marriage or either of them, **without any limitation of any kind**.

14. The Act has since been amended to add the limitations in subparagraphs (ca) (i), (ii) and (iii) of the definition.

15. The limitation which is relevant for present purposes appears in subparagraph (i): proceedings "*arising out of the marital relationship*".

16. It is clear from the wording of that subparagraph and by contrasting it with the wording of subparagraphs (ii) and (iii) (divorce, validity of marriage and annulment) that subparagraph (i) is intended to generally confer jurisdiction with respect to marital property settlement proceedings, subject only to a requirement that those proceedings are capable of being seen as "*arising out of*" the marital relationship (as opposed to, for example, arising solely from contract, tort, equity or the law of partnership: see, eg, *Dougherty v Dougherty* (1987) 163 CLR 278 at 286.7).

17. This construction appears to be consistent with the relevant second reading speech (attached to the Attorney General for Western Australia's ("**Western Australia**") submissions at 21) in which it was noted (at 1704 col 2.4) that the insertion of the now current wording would (emphasis added):

> 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 material relationship.

18. In this way, New South Wales does not contend that the jurisdiction conferred by the Act is limited to circumstances which can be described as "*marital breakdown*" but (for the reasons discussed below) submits that the existence or otherwise of a "*marital breakdown*" is a matter which bears significance when considering whether and how that jurisdiction should be exercised.

19. Viewed in this manner, on the authorities, the conferral of such jurisdiction is supported by s 51(xxi) of the Constitution: see, eg, *Re F; Ex parte F* (1986) 161 CLR 376 at 389.5-390.8.

20. For the purposes of determining the present appeal, it is unnecessary to consider the broader question of what kinds of disputes between the parties to a marriage might be regarded as falling within the description of "*proceedings ... arising out of the marital relationship*" or what kinds of disputes between parties to a marriage might be regarded as being supportable by the operation of s 51(xxi) of the Constitution.

21. For example, it is presently unnecessary to determine whether the summary of the kinds of claims which might fall beyond the subparagraph (ca)(i) in *Dougherty v Dougherty* (1987) 163 CLR 278 at 286.6 ("*[c]laims grounded solely in contract or tort or equity or otherwise arising by reason of a relationship, e.g. of partnership, where the marriage relationship is purely coincidental*") is an exhaustive statement of the kinds of claims which would fall beyond the scope of that subparagraph and/or beyond the scope of the power of the Commonwealth Parliament to make laws with respect to marriage.

Section 79 empowers courts to make orders in circumstances of physical but not legal separation but only in circumstances where the court considers it appropriate for the financial relationships between the parties to the marriage to be finally determined

22. If the Magistrates Court of Western Australia had jurisdiction to entertain the proceedings commenced on behalf of the wife, the next question is whether, in the exercise of that jurisdiction, the courts below had the power to make the orders they made (or purported to make) under s 79 of the Act in circumstances where the parties to the marriage were physically separated but not legally separated (at least in the sense referred to in ss 48(2) and 49 of the Act).

23. In *Dougherty v Dougherty* (1997) 163 CLR 278 at 285.8, Mason CJ, Wilson and Dawson JJ made the following observation regarding s 79 of the Act:

> It may be said of s. 79 ... that it is obvious that the section must be read down. It purports to confer a wide discretionary power to vary the legal interests in any property of the parties to a marriage or either of them but with no reference at all to

the criteria by which a permissible claim to the exercise of the power may be identified.

24. Equally, as Gummow, Hayne, Heydon and Kiefel JJ said in *Gypsy Jokers Motor Cycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11]:

> The first step in the making of that assessment of the validity of any given law is one of statutory construction.

25. The statutory context in which s 79 appears includes (as the appellant correctly notes (eg at [35]) and the Commonwealth accepts at [46.1]) the general mandate in s 43 of the Act that, in the exercise of jurisdiction under the Act, courts shall "*have regard to ... the need to preserve and protect the institution of marriage ...*".

26. Importantly, the relevant statutory context also includes s 81 of the Act. That section provides as follows (emphasis added):

> In proceedings under this Part [VIII], other than proceedings under section 78 [declaration of interests in property] or proceedings with respect to maintenance payable during the subsistence of a marriage, the court **shall** as far as practicable, make such orders as will **finally determine** the financial relationships between the parties to the marriage and avoid further proceedings between them.

27. In this way, the evident purpose of s 79 of the Act (which is in Part VIII) is, in appropriate circumstances, to effect (as far as practicable) a final determination of the financial relationships between the parties to a marriage. That purpose is confirmed by the scheme of the Act generally including ss 79(1B), (1C), (5) and 79A all of which contemplate that making an order under s 79 is a serious and, subject to adjournment, a final course. Equally, once an order is made under s 79, the power of the court to make such an order is "*exhausted*" so that there is no power to make a further s 79 order in subsequent proceedings between the same parties: *Mullane v Mullane* (1983) 158 CLR 436 at 440.5-440.8, 443.9-441.1.

28. It would be inconsistent with the statutory purpose and previous interpretation of s 79 to construe that section as if it provided the Family Court and other courts with jurisdiction under the Act as general courts of appeal with respect to property related disputes which might arise from time to time within "*happily married*" couples (cf WA's submissions at [57]).

29. Rather, the correct view is that s 79 is ordinarily only exercisable where a marital relationship has come to an end such as where divorce proceedings are pending,

completed or contemplated, or where the parties are legally separated in circumstances where it is appropriate for the parties' financial relationships to be finally determined before divorce proceedings have been completed.

30. Observations to similar effect were made by Mason and Deane JJ in *Fisher v Fisher* (1986) 161 CLR 438 at 453.5:

> For present purposes what is important is that s. 79 authorizes the making of curial orders altering interests in property with a view to finally determining the financial relationship between them: s 81. Orders so made are to endure beyond the termination of the marriage relationship; indeed, they are generally made after that relationship has ended.

31. But there may be circumstances in which it may be appropriate for the financial relationships between the parties to a marriage to be finally determined even though the legal relationship has not (or is not anticipated to) come to an end.

32. Those circumstances will be unusual or even exceptional in light of, for example, the scheme of the Act which contemplates that a valid marriage will remain on foot until the irretrievable breakdown of the marriage evidenced by twelve months legal separation (s 48 of the Act), and the requirement in s 43(1) of the Act for courts to have regard to "*the need to preserve and protect the institution of marriage*".

33. Thus, while it may be accepted that a power is conferred by s 79 to finally determine the financial relationships, arising out of the marital relationship, of parties to a marriage who are physically but not legally separated, mere physical separation will not (without more) ordinarily be enough to justify the exercise of a power under s 79.

34. As Kay J (in dissent) observed in *Sterling and Sterling* [2000] FAMCA 1150 (FamCAFC) at [23] (paragraph break added):

> The attributes of a "normal married life" can still exist even though parties are physically separated in circumstance sometimes within their control and sometimes beyond their control.
>
> Scientists spend years in isolation in Antarctica. Sailors spend months at sea. Prisoners spend years in gaol. Some persons are kidnapped and held as hostage. Some are prohibited from travel due to immigration restrictions or economic circumstances. Yet many of those parties would no doubt still consider that their marriages are subsisting. The attributes of normality in those married relationships have to be measured by different standards to the attributes where the parties are free and able to spend time with each other but chose to go separate ways.

35. Consistent with this, and as Hayne J observed in argument on the successful special leave application in *Sterling v Sterling* ([2001] HCATrans 445), the existing Family Court authorities supporting the existence of power to make orders in case of physical separation (including the decisions below in the present matter) should not be permitted to:

> take on a life of its own where it is enough to demonstrate physical separation, ergo property division ...

36. Rather, s 79 should be understood as conferring power to finally determine the financial relationships between the parties to a marriage, but only where doing so is appropriate in the circumstances of the particular case, which cases can be expected to be unusual, even rare.

The Full Family Court continued to have power to determine the proceedings after the wife's death

37. The above analysis (insofar as it is relevant to questions of jurisdiction and power) is not affected by the fact that the wife died before final orders were made in the Full Family Court.

38. Subsection 79(8) of the Act permits property settlement proceedings which have not been completed when a party to a marriage dies to be continued by or against the legal personal representative of the deceased party.

39. Pursuant to s 79(8)(b) of the Act, orders can be made with respect to property provided that 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*".

40. Justices Mason and Deane summarised the effect of s 79(8) in *Fisher v Fisher* (1986) 161 CLR 438 at 452 (paragraph break added):

> Once it is accepted that the marriage power extends to a law conferring jurisdiction to hear and determine proceedings between the parties to a marriage with respect to their property or that of either of them, being proceedings arising out of the marital relationship, it is obvious that the power also extends to a law enabling such proceedings, when uncompleted, to be continued by or against the legal personal representative of a party who dies after they have been commenced.

> Such a law, enabling the proceedings to be so continued and authorizing the court, by virtue of s. 79(8)(b) and (c), to make an effective order in those proceedings, is necessarily a valid exercise of the marriage power.
>
> It might have been possible to reach a different conclusion if the continuation of the proceedings by or against the legal personal representative in some way or another had endowed the proceedings or their subject-matter with a different character so that it could be said that they did not arise out of the relationship of marriage.

41. Consistent with those observations, the appellant notes (at [89]) that s 79(8) is "*well within constitutional power*" but goes on to contend that, in exercising that power, the Full Family Court "*transgressed the statutory limits of that provision, as construed by reference to the constitutional power under s 51(xxi)*".

42. The alleged transgression appears to be a suggestion that, on the death of the wife, the proceedings became, in substance, inheritance proceedings rather than proceedings regarding a matrimonial cause with the result that there was no power for the Full Family Court to make the orders that it made under s 79(8) of the Act or otherwise continue to determine the matter in respect of which it was previously seized: see, eg, NoA at [4], particular (iii).

43. However, that approach does not correctly characterise what occurred when the wife died.

44. Despite the wife's death, the proceedings continued to be proceedings to create and enforce the wife's rights (if any) under the Act: see, eg, *Fisher v Fisher* (1986) 161 CLR 438 at 453.9 where Mason and Deane JJ note that s 79 performs "*a dual function by creating and enforcing rights in one blow*".

45. Although the wife's potential rights under the Act effectively devolved to her estate on her death, the proceedings remained proceedings to vindicate those rights (if any). In this regard, it is "*immaterial that a person other than a party to the marriage may benefit from an order ...*": *Fisher v Fisher* (1986) 161 CLR 438 at 454.2.

46. Thus, while (as s 79(8)(b)(ii) itself recognises), the wife's death was plainly relevant to the question of what orders (if any) should have been made, the death did not (subject to s 79(8) itself) affect the power to make such orders for the benefit of the wife's estate.

Conclusion

47. If the above analysis is accepted, it follows that the Full Family Court had the jurisdiction and power to make the orders that it did. No contentious constitutional questions need be determined in reaching that conclusion.

48. Instead, the disposition of the present appeal turns on whether the Full Family Court properly exercised its discretion in the circumstances of the particular case, not on broader questions of jurisdiction or power.

49. New South Wales does not make any submissions on the question of whether the Family Court properly exercised its discretionary powers.

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Part VI: Time Estimate

50. The Attorney General for New South Wales estimates that no more than twenty minutes will be required for the presentation of his oral argument.

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