



Office of the Public Advocate

Whatever happened to the village? The removal of children from parents with a disability

Report 1: Family law – the hidden issues

December 2013

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1. Introduction

“You cannot solve a problem using the same level of thinking that created it. You have to rise above it to the next level”.

Dr. Martin Luther King Jnr. quoted this statement by Albert Einstein in relation to civil rights in America. It is as relevant to the removal of children from parents with disabilities in Australia today as it was to civil rights for African-Americans in the USA in the 1950s and 1960s. Australia’s current legislation and policy disproportionately takes children away from their parents when their parent has a disability. This is doing great harm to children and parents and to the social fabric of the Australian community. A change of thinking and policy direction is essential.

The Public Advocate supports the rights to people with a disability to lead full independent lives in the community to the greatest extent possible. The Public Advocate supports the rights of parents with a disability to live with and raise their children and to receive encouragement and assistance from the community to parent successfully. The Public Advocate also supports the rights of all children to be raised by their natural parents wherever possible, whether or not they or their parents have a disability.¹

In the view and experience of the Public Advocate, current policy in Australia appears to be based on the following broad propositions:

1. People with disabilities cannot be competent parents.
2. It is rarely in the best interests of a child to be raised by parents with a disability.
3. If a case has been made for removal of a child, then alternative care is seen as better for the child and a less risky solution for the child and for the decision-maker. It also requires no follow-up supervision.
4. A child is an individual bearer of rights whose rights and interests are not necessarily embedded within his or her family.
5. Within both family law and child protection legislation and policy in Australia, only the child who is the subject of the application has rights. Parents have duties and responsibilities. Siblings who are not the subject of the application do not have rights and their interests are only relevant to the extent that they concur with those of the child who is the subject of the application.
6. The impact on a family of removing a child from his/her parents is not a consideration in family law or child protection legislation and practice and is not a factor in deciding the best interests of the child in either jurisdiction.

Australia has signed and ratified the *Convention on the Rights of Persons with Disabilities* 2006 (CRPD) and the *Convention on the Rights of the Child* 1989 (CRC). The recommendations of this report are made for the purpose of proposing changes to legislation, policy and practice that would assist Australia to comply with the conventions to which it is signatory in relation to parents with a disability and their children in family law.

The *Family Law Act 1975* (the Act) brought major reform to the area of divorce and separation. No-fault divorce was instituted and greater attention was given to children after separation. Over the years since 1975, there have been multiple amendments to the Act. At the time of her address to the 12th Family Law Conference in 2006, the Chief Justice calculated that there had been 69 amendments.² These amendments have largely been a response to social changes in the Australian community. Key areas of social change in the years since 1975 have been the increased participation of women in the workforce, changing understandings of fatherhood, an increased recognition and intolerance of family violence and child abuse and an increased emphasis on the rights of the child.³

The major area of social change that is not reflected in the Act is the change in attitude towards people with disabilities. Over the past thirty years, Australia has gradually begun to accept that people with disabilities are entitled to be treated with dignity and respect, be included in the community and have full human rights with others. This culminated in Australia signing and ratifying the CRPD.

The CRPD provides for parental rights, including the rights of parents and children not to be separated against their will on the basis of a parent's disability. However, the provisions of the CRPD in relation to parenting have not yet been translated into Australian law and policy on family law or child protection. It is commendable that, under the National Disability Insurance Scheme (NDIS), parents with disability will be eligible for support to fulfil their parenting roles.

The formal removal of children from the care of their parents in Australia occurs mainly through the operation of the child protection system of each Australian state.⁴ Under child protection legislation, the State is authorised to intervene into the life of the family to protect the child from harm. If a child is ultimately placed in permanent care as a result of this intervention, the legal relationship between the child and the parents is effectively severed. The operation of the child protection system is subject to public and media scrutiny and has been extensively reviewed over many years.

By contrast, little is known about the circumstances under which children are removed from the care of parents with a disability through the family law system. It is largely hidden from public and government scrutiny because it is viewed as a private, civil matter within a family. In addition, many children of parents with disabilities are raised by wider family members under informal arrangements. Little, if anything, is known about these arrangements and whether they are freely entered into by the parent with a disability.

The *Family Law Act* is federal legislation. Under the Act, orders are made about parenting responsibility, residence and contact between a child and the adults who have a parenting relationship with the child. This will usually be in the context of a dispute between separated parents. In these cases, the disability of one parent can be used by the parent without a disability to argue that the child's residence and contact with the disabled parent should be changed or limited. In the case of a single parent with a disability, the dispute may be between the parent and another member of the child's extended family, such as a grandparent, with similar outcomes.

Whilst recognizing that the State and the Courts may need to intervene in the life of a family in a number of ways to secure the rights and best interests of a child, this report focuses on those interventions that result in the removal of a child from the home of their parent or parents against their will under the family law system. The report draws on the experience of the Public Advocate and other disability advocacy organizations in recent years.

The removal of children from parents with a disability under the child protection system will be the subject of a second report that will be released in 2014.

2. Recommendations

Recommendation 1: Disability not a barrier to parenting

- (a) That consideration is given to how the full range of rights and interests of children under international law can best be incorporated into the *Family Law Act*.
- (b) That a rebuttable section is included in the *Family Law Act* that disability is not, *per se*, a barrier to parenting.
- (c) That the *Family Law Act* is amended to state that the disability of one or both of the parents cannot be grounds for determining the best interests of the child with regards to residence, contact and parental responsibility.

Recommendation 2: Assessment of parental capacity

- (a) That where a parent has a disability, separate best-practice assessments of his or her functional parental capacity are ordered by the Court in addition to the Family Report.
- (b) That family consultants receive specialist education in the area of disability and parenting.

Recommendation 3: Preference to natural parent

- (a) That the *Family Law Act* is amended to give preference to a natural parent in determining who shall have residence and parenting responsibility for a child.
- (b) That where the parent has a disability, before making orders that persons other than natural parents have parental responsibility for a child, the court must be satisfied that the parent is unable to adequately parent the child.

Recommendation 4: Court processes

That courts make appropriate accommodation for persons with disabilities in the court processes and not draw adverse inferences about parenting capacity from those accommodations.

Recommendation 5: Litigation or case guardianship

- (a) That the *Family Law Rules 2004* are identified as the rules governing matters dealt with in the Federal Circuit Court under the *Family Law Act*, to the extent of any inconsistency between them and the Federal Circuit Court rules.
- (b) That parenting orders made with the consent of a litigation guardian be subject to judicial review in accordance with United Nations Conventions.
- (c) That litigation guardians are sought from organisations with experience in disability as well as from family members.
- (d) That where family members are appointed as litigation guardians, they are provided with support and advice from organisations with expertise in disability and litigation guardianship.
- (e) That organisations providing litigation guardianship or support and advice are adequately resourced to do so.
- (f) That guidelines for case guardianship/litigation guardianship are developed by an appropriate body.
- (g) That case guardians/litigation guardians are indemnified by the Court against applications for costs against them or against the person with a disability, unless they have not acted in good faith.

Recommendation 6: Advocacy

- (a) That government-funded disability advocacy is made available to parents with a disability with cases in the family law system through either disability advocacy organisations or an independent statutory body.
- (b) That the *Family Law Act* is amended to provide for the involvement of an advocate in the legal processes in these circumstances.

3. United Nations Conventions

Australia is signatory to the *Convention on the Rights of Persons with Disabilities* (CRPD) and the *Convention on the Rights of the Child* (CRC). Both conventions establish rights for parents with a disability and for their children.

3.1 Convention on the Rights of Persons with Disabilities

Key articles of the CRPD of particular relevance to the issues considered in this report are Articles 6, 13, 19 and 23.

Article 23 is of greatest relevance to this report. It commits States to ensuring that children are not separated from their parents on the basis of a disability of either the child or one or both of the parents. Article 23 also commits States to taking measures to eliminate discrimination against persons with disabilities in matters relating to parenthood and to giving persons with disabilities assistance in the performance of their child-rearing responsibilities.

Article 6 recognises that women and girls with disabilities are subject to multiple discrimination and that States will take measures to ensure their human rights.

Article 13 commits States to ensuring access to justice for persons with a disability on an equal basis with others, including the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants in legal proceedings, including the preliminary and investigative stages.

Article 19 recognises the rights of persons with disabilities to live in the community and to have access to a range of assistance to support living and inclusion in the community.

3.2 Convention on the Rights of the Child

The key articles of the CRC are article 7(1) and article 9(1). Article 7(1) gives children the right as far as possible to know and be cared for by his or her parents.

Article 9(1) provides that children shall not be separated from their parents against their will except when this is necessary in the best interests of the child as decided by competent authorities and subject to judicial review. An example of where it might be in the best interests of the child to be separated from his or her parents is where there is abuse or neglect of the child by the parents.

Selected articles from both the CRPD and the CRC are contained in the Appendix.

4. Family Law

4.1 Legislative and policy context

There is little Australian research on the removal of children from parents with a disability through the family law system. Only a very small percentage of applications go through to judgment and there is no research about the basis of consent orders under the Act. Statistics about the outcome of applications where one party has a disability are not collected. This is contrary to article 31(1) of the CRPD that requires States to gather and disseminate the statistical material necessary to frame legislation and policy in order for States to meet their obligations under the Convention.

In addition, disability organizations report that the children of many parents with disabilities are raised by wider family members with the matter never being taken to court.

More information is available from international sources, in particular the 2012 American report: *Rocking the Cradle: ensuring the rights of parents with a disability and their children*.⁵ This extensive report documents significant discrimination against parents with a disability in both the family law and child protection systems of the USA.

Conceptually, the family law system differs from the child protection system. In child protection, the state is authorised to intervene on behalf of the child in situations where abuse and neglect are alleged to be present. In cases where a child moves into permanent care as a result of this intervention, the parenting relationship between child and parent is severed in law and reality and the child will see his family only a few times a year. Theoretically, child protection is held to a higher standard than family law. Before any orders can be made, child protection authorities must show that the child has suffered significant harm or is likely to suffer significant harm (physical, sexual and/or psychological) and is in need of the protection of the court.⁶

In family law, the state is not intervening in the life of a family to remove a child to the care of the State. Rather, the courts are effectively arbitrating between members of a family to determine the best interests of the child where family cannot agree. It is considered a civil matter and, as such, there is no investigatory or service system associated with the investigation and implementation of Family Court orders as there is with child protection under the *Children Youth and Families Act 2005* (Victoria).

4.2 The operation of the Family Law Act in relation to a parent with disability

The provisions of the Act in relation to parenting place parents with a disability at a significant disadvantage, with a greater likelihood that they will lose the primary care of their child compared to parents without a disability.

With decisions made on the basis of competing claims between two natural parents, the disability of a parent can be regarded, under the Act, as a trait or characteristic that weakens their case. The parent with a disability can be judged or assumed to be less able than the parent without a disability to meet the physical, developmental and emotional needs of her children and more likely to cause or allow them to come to harm.

As there is no protection in the Act for a parent with a disability, the disability of one parent can be the determining factor in the court deciding that the child should live with the other parent.⁷ This is contrary to Article 23(4) of the CRPD:

In no case shall a child be separated from parents on the basis of the disability of the child or either or both of his parents.

Whilst the Act deals with the interests of children largely in the context of relationship breakdown, extended family members or members of the community who can demonstrate that they have a “parenting relationship” with the child may also make applications for parental responsibility and residence.

The objects of part 7 of the Act in relation to children are set out in section 60B:

The objects of this Part are to ensure that the best interests of children are met by:

- (a) ensuring that children have the benefit of both their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and
- (b) protecting children from physical or psychological harm from being exposed to or subject to abuse, neglect or family violence; and

- (c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and
- (d) ensuring that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.

Under the Act, the child's best interests are paramount in determining any parenting order (s60CA). In determining the best interests of the child, the court must consider two primary considerations:

- the benefit to the child of having a meaningful relationship with both of the child's parents (s60CC(2)(a)); and
- the need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence. (S60CC2b)).

In considering the best interests of the child, the court is to give greater weight to the need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence (s60CC(2)(a)(b)).

Additional considerations are set out in s60CC(a) to (m). They include the nature of the child's relationship with each of the parents and other persons such as the grandparents; the effect on the child of separation from either of their parents or other persons with whom the child has been living; and the capacity of each of the child's parents and other persons such as the grandparents to meet the physical and emotional needs of the child.

The best interests of the child have been the paramount consideration of the legislation for many years, not only in Australia, but also in most Western countries. They are enshrined in the CRC and have been the basis of most social welfare policy for both children and for adults with disability. Best interests has come to be interpreted as applying primarily to a child's right to protection and safety. The term implies that there is an objective standard against which the situation of a particular child can be measured and it is therefore vulnerable to prejudices and biases.⁸ It also has an individualistic focus that does not easily accommodate consideration of the extent to which a child's rights and interests are embedded in their family, with all its variety and complexity. In international law and conventions, however, children's rights and interests encompass all their rights, including their rights to family and culture. If Australian law continues to use "best interests" to describe the human rights of children, it is important that the comprehensive meaning and interpretation of the term is applied.

In response to these issues, and with a greater concentration on human rights and autonomy in legislation and policy, there has been a shift away from the terminology of "best interests" in areas such as adult guardianship. The National Disability Insurance Scheme uses the term "personal and social wellbeing" to describe the duty that a nominee owes to a participant in the scheme:

It is the duty of a nominee of a participant to ascertain the wishes of the participant and to act in a manner that promotes the personal and social wellbeing of the participant.⁹

The Public Advocate suggests that attention needs to be paid to the meaning that is currently being given to the term "best interests of the child" to consider how a more nuanced understanding of the child's interests within their individual family situation can be promoted.¹⁰

Jane

Jane is in her early thirties. She has a mild intellectual disability with a psychiatric overlay. She has three children: one is an adult and the others are a girl, aged ten and a boy, aged three. The father of the two younger children is John. Throughout the relationship, John was abusive, controlling and exploitative of Jane. When their three-

year-old son was born and Jane was in hospital, John took their daughter and moved out of the house they were living in, taking their possessions with him. Child protection were involved and assessed John as being a “better parent” than Jane and both children remain living with John. Orders were made by consent in the Federal Magistrates Court for the older child to live with John and spend time with Jane. These arrangements were unsuccessful with John supervising the contact with both children after the withdrawal of the Department of Human Services and using the contact time to control, intimidate and exploit Jane. John then cancelled all access. Jane has currently not seen either of her children for ten months. The court has ordered psychiatric reports for both parents and a family report. The next court date is in April 2014, by which time Jane may not have seen either of her children for fifteen months. The matters at issue are the rights of the children to know and be cared for by their mother (not on a full-time basis) and the rights of the mother to be free from abuse and intimidation during these times.

Recommendation 1

(a) That consideration is given to how the full range of rights and interests of children under international law can best be incorporated into *Family Law Act*.

4.2.1 Family Violence and the prediction of risk

The *Family Law Act 1975* established the Family Law Court of Australia. It also established irretrievable breakdown as the sole grounds for divorce. Between 1975 and the 2006 amendments,¹¹ there were significant social changes in Australia in regard to families. The 2006 amendments prioritised the importance of a child having a meaningful relationship with both parents and the protection of a child from abuse. Section 60CC included a provision that the court consider the extent to which a parent would facilitate the relationship between the child and the other parent in deciding the best interests of the child. This became known as “the friendly parent” provision.

Where a mother made allegations that her partner had been violent towards her, there was a risk that, if the court did not believe her, she would be seen as not facilitating the relationship between a child and his or her father and not being a “friendly parent”. In this situation the child could be placed with the other parent, against whom the allegations had been made.

Understandings of family violence have been changing in recent years to include in the definition exposing a child to witnessing or being in a violent situation. Prior to this, violence against a partner was not necessarily seen as having an impact on parenting performance.

Kate

Kate lives in a regional city. She eventually left her partner after their child was born, saying that the relationship had been violent. He holds a responsible position and is well-regarded in the community. Both Kate and her partner are well-educated, however Kate had a period of depression fifteen years ago. Her former partner successfully argued in court that Kate’s medical history meant that she was mentally unstable and would be a risk to her child. He also denied that he had ever been violent towards her and presented as a credible witness. Their child now lives with his father. Kate has sought to take the issue back to court over a number of years. However, she does not have the financial resources to do so and is unable to obtain legal aid to make an application.

In 2011, changes were made to family law to deal with situations where one of the partners is alleged to have been violent and to reflect these changes in thinking about child abuse. The changes were made after several research reports into the way in which family law system deals with family violence indicated that “more could be done to protect children and other family members from violence and child abuse within the family law system”.¹² The *Family Law*

Legislation Amendment (Family Violence and Other Measures) Act 2011 took effect from 7 June 2012.

These changes to the Act prioritise the safety of children in determining a child's best interests. They may, however, be making it more difficult for mothers with a disability to keep their children living with them for the reasons outlined below.

The stated intention of the amendments is to provide better protection for children and families at risk of violence and abuse. The amendments seek to achieve this objective by:

- prioritising the safety of children in parenting matters;
- changing the definitions of 'abuse' and 'family violence' to better capture harmful behaviour;
- strengthening advisers' obligations by requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children;
- ensuring that courts have better access to evidence of abuse and family violence by improving reporting requirements; and
- making it easier for state and territory child protection authorities to participate in family law proceedings where appropriate.¹³

The amendments achieve greater consistency between family law and state child protection legislation by prioritising the safety of the child from harm over the child's relationship with his or her parents in determining a child's best interests. This is potentially a highly significant change in the context of parents with disabilities.

Whilst the amendments are intended to deal largely with violent ex-partners, those working in the disability area know that, in the child protection system, women with disabilities are considered to be more likely than other women to fall victim to men who prey upon them and exploit their vulnerability.¹⁴ This frequently translates into judgments within child protection about the likelihood of future risk. A mother with a disability is typically portrayed as passive, dependent and dominated by a male partner or "string of partners".¹⁵ Mothers may be thought of as victims but are rarely seen as blameless.¹⁶ In addition, the majority of reports of sexual assaults on people with cognitive impairment do not successfully navigate through the justice system and do not conclude with the conviction of the perpetrator.¹⁷ The Office of the Public Advocate in Victoria first raised these issues in a report titled "Silent Victims" in 1998.

JH and RH [2005] FMCAfam 584

In this case, the mother has an intellectual disability and both mother and father are from a Middle-Eastern background. A key issue in the case was the mother's allegation that the father had been violent towards her during their marriage.¹⁸ This allegation of violence was tested under cross-examination by the father's counsel. Ryan FM concluded:

"Three times the father's counsel asked the mother to describe what occurred when the father allegedly threw her against a wall. Her first two answers were non-responsive, interspersed with long pauses, during which the mother appeared to be trying to think up an answer ... Other than an occurrence at separation ... the mother was unable to give the surrounding circumstances of any individual event of domestic violence. ... The only consistency I could discern is a generalised allegation of violence, the details of which the mother cannot articulate. As she is able to give considerable detail to what I will refer to as "the shoe incident", I am not persuaded that the mother's inability to give greater details about other violence and abuse allegations arises from her disability. On balance, I am satisfied that the mother's oral and written evidence concerning domestic violence is greatly exaggerated".¹⁹

The court had earlier heard evidence that the “shoe incident” had been reported to the Police and was the basis for an apprehended domestic violence order to which the father had consented. The earlier incidents of violence had not been reported to the Police and the court believed that the mother’s family had influenced her in making the allegations. Ryan FM was also critical of the domestic violence counsellor who believed the mother without establishing the facts of the case by interviewing the father herself and for offering her opinion that the mother was capable of caring for the child. He concluded: “I accept that on one occasion, at separation, the father assaulted the mother. I reject the mother’s assertion of systematic and continual abuse and domestic violence”.²⁰

The Federal Attorney-General’s Department advice about whether victims of family violence will be guilty of abuse if their child has been “exposed” to violence is that the amendments are not intended to further punish victims of family violence, but will help to encourage disclosures of family violence. They will “ensure that appropriate action is taken to prioritise the safety of children”.²¹

The Public Advocate is concerned that the amendments may have the consequence of further penalising mothers with disability in the making of parenting orders, based on perceptions about the inability of women with disabilities to keep their children safe, rather than on the actuality of the particular situation. Article 16 of the CRPD commits States to a range of actions relating to freedom from exploitation, violence and abuse of people with disabilities. Article 16 must be reflected in the family law system to ensure that the court does not unwittingly breach the rights of mothers with a disability in prioritising the safety of their children.

4.2.2 Emphasis on independent parenting

Most parents do not parent alone. They rely upon their family, friends, wider networks and various community and government supports to create a healthy, stimulating and nurturing environment for their child. These supports will change over time depending on the family circumstances and preferences. This reality is rarely acknowledged in family court matters where a parent has a disability.

The *Family Law Act* is concerned with individuals, normally the mother, the father and the children. In making parenting orders, the court is effectively determining the best interests of the child by considering which of the applicants is better able to meet the needs of the child. While the steps taken by a parent to set up supports to assist them to parent more effectively may be considered favourably in determining the child’s best interests, the court ultimately relies on the ability of the parent to meet the child’s needs independently if necessary. It may see the existence of supports as evidence that the parent is unable to parent independently.

JH and RH [2005] FMCAfam 584 (see 4.2.1)

The child of JH and RH, Ahmed, lived with both his parents before separation. During this time, the evidence was that the father sought to distance the mother from her family because of the poor relationship between him and his wife’s family. With the breakdown of the marriage, Ahmed remained living with his father and paternal grandmother. Application was made by the mother for Ahmed to move to live with her and the maternal grandmother. Federal Magistrate Ryan concluded:

“On balance I am satisfied that between them the father and his mother are better able to provide consistently appropriately skilled care than the mother and her family. If for some reason something happened to the maternal grandmother the mother would have to seek out other supports in order to provide for Ahmed. If perchance something happened to the paternal grandmother the father is able to meet the child’s needs without reliance on others. Long term this places him in a superior position than the mother in terms of ensuring consistency in the child’s care”.²²

Ryan FM further concludes:

“Throughout Ahmed’s life the father has maintained a strong commitment to his son’s welfare and, unaided, is able to meet the child’s physical, emotional and intellectual needs ... The key advantage to changing residence is that Ahmed will have the opportunity to live with his mother and maternal grandmother, both of whom love him dearly. This is counterbalanced by the mother’s limitations meeting the child’s long term needs and disruption to a residence arrangement that long term ensures those needs will be met”²³.

Supports for parents with a disability, both personal family support and community support, are voluntary. There are good reasons for this, related to dignity, autonomy and human rights. A parent can cancel the service or seek to change to another agency that suits her better. She may move house to another region or state and have to re-apply for support services. From the service providers’ side, there is no guarantee that government-funded disability supports will continue for a parent until their child reaches the age of eighteen or that eligibility criteria will remain the same. Within the framework of the Act, these uncertainties and the voluntary nature of participation in community supports and services can make courts cautious about making final orders that children live with a parent where disability is present. This is contrary to Article 23(2) that states:

States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

It is also contrary to Article 19(b) of the CRPD that requires:

Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community.

Uncertainty about supports or lack of supports may also impact on court decisions about the contact between a parent and child. Even where sole parental responsibility is given to one party, it is rare that the parenting relationship with the other parent is severed and significant time with the other parent is usually ordered. However, orders may not always be operable and this is contrary to article 23 of the CRPD that states that a child should not be separated from his or her parents on the basis of the parent’s disability. The case of David illustrates such a situation.

David

David suffered a brain injury as the result of an accident at work. The stress of the situation ultimately led to the breakdown of his marriage to Lisa. The children remained living with Lisa. Following a dispute about parenting arrangements, the parenting orders made by the court gave David supervised contact with his children for up to four hours per week. Supervised contact centres are not available in their area and, in any case, there is a long waiting list and they are usually a short term option leading to unsupervised contact. David has no relatives able to provide supervision and he cannot afford to pay for private supervised contact. David has seen his children twice in the past year.

Recommendation 1 (continued): Disability not a barrier to parenting

(b) That a rebuttable section be included in the *Family Law Act* that disability is not, per se, a barrier to parenting.

(c) That the *Family Law Act* is amended to state that the disability of one or both of the parents cannot be grounds for determining the best interests of the child with regards to residence, contact and parental responsibility.

4.3 Family consultants and court-ordered assessments

Under the Act, the Court may seek the advice of a family consultant of the court about the services appropriate to the needs of the parties (s11E). Upon receiving that advice, the court may order the parties to attend, or arrange for the child to attend, appointments with a family consultant (s11F).

The court relies heavily on the reports of family consultants who make recommendations about the best interests of the child based on interviews and observation of the competing parties, alone and with the child in an office or clinical setting. Very few family reports writers have specialist expertise in disability or are aware of best practice in assessing the parenting capacity of people with disabilities.

Under the changes to the Act that came into effect in June 2012, the obligations of family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children have been strengthened. This places family consultants in a position of predicting the likelihood of future harm and arguably making it less likely that a family consultant will recommend that children remain with a parent with a disability.

Where cognitive disability is present, the court may also order an assessment by a psychologist who, more often than not, relies upon testing of overall cognitive capacity (“IQ-based” tests). Whilst research confirms that a diagnosis of disability is not a good predictor of parenting capacity,²⁴ a diagnosis of disability may be accepted by the court as evidence of parental incapacity. Functional, best-practice, home-based assessments of parenting capacity are not conducted either by the psychologist or the family consultant.

The parent with a disability must fund any additional specialist reports she may obtain to support her case. A disproportionate number of parents with disabilities are reliant upon legal aid funding for their case and it is difficult to obtain funding for additional specialist reports through legal aid. Many solicitors assume that the funding will not be available and therefore do not even make the application. If a specialist report is obtained, it can only be admitted if the report is placed on affidavit and can be tested under cross-examination in court. The cost of the professional’s appearance must also be borne by the person with a disability. In addition, specialist reports may be given low weight by the court because they are not “independent” and because they do not compare the parenting capacity of the person with disability with that of the other parent or applicant. This approach is contrary to Article 13(1) of the CRPD that states:

States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

Recommendation 2: Assessment of parental capacity

(a) That where a parent has a disability, separate best-practice assessments of functional parental capacity are ordered by the court in addition to the family report.

(b) That family consultants receive specialist education in the area of disability and parenting.

4.4 Family Law applications by persons other than natural parents

Anecdotal evidence suggests that mothers with disability, more frequently than parents without a disability, find themselves in the Family Court defending an application by a grandparent or other extended family member for a parenting order for her child. A parenting order may be applied for by:

- either or both parents of the child
- the child
- a grandparent, or
- any other person concerned with the care, welfare or development of the child.²⁵

Both the *Convention on the Rights of the Child* (CRC) and the *Convention on the Rights of Persons with Disabilities* (CRPD) state:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.²⁶

The CRC further states that a child has, “as far as possible the right to know and be cared for by his or her parents”.²⁷ It gives an example of when it may be in the best interests of the child to be separated from his or her parents:

Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.²⁸

In relation to the separation of a child from his or her parents, the CRPD states:

In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.²⁹

The *Family Law Act* allows for parental responsibility and residence to be given to any person who can establish that he or she has a parenting relationship with the child. Thus, a mother who has received support to parent her children from her family or her partner's family can find that the family member relies upon that relationship later to make application to the court for residence and parental responsibility of her child.

In determining the best interests of the child, the court, as a primary consideration, must consider the benefit to the child of “having a meaningful relationship with both parents”. This does **not** mean that a child should, wherever possible, live with a parent and be cared for them in preference to another person as provided for in both Conventions. The Act falls short of the provisions of the Conventions in this regard.

The legal position was summarised by Federal Magistrate Walters in *WKM & LD [2002] FMCAfam391* in his discussion:

I understand that, while the fact of parenthood is an important and significant factor in considering S's best interests, that fact (of itself) neither establishes a presumption in favour of a natural parent nor generates a preferential position in favour of that parent from which the decision making process commences.³⁰

Under the current Act, once a parenting relationship has been established between the child and an adult, a natural parent is not given preference over a person with a more remote

relationship with the child. The decision-making proceeds on the basis of a comparison of who is better able to fulfil the criteria for determining the best interests of the child.

Consequently, and most disturbingly, a parent with a disability may lose care and parental responsibility of their child where there are no protective concerns and no evidence of abuse or neglect. This is clearly contrary to the CRC that states that children have a right to be raised by their parents except where it is not in the child's best interests, such as in circumstances where abuse or neglect are present.³¹ It would also be contrary to the CRPD if the parent's disability has resulted in her being less able to fulfil the legislative criteria whereby the court determines her child's best interests.

It is not satisfactory to argue that parental rights should be set aside when it comes to decisions about children's best interests. Zanghellini suggests that, rather than concentrating on rights, it is preferable to speak of parents having a fundamental interest in raising their children. She refers to the case of the stolen generations as an illustration of why it is normatively undesirable to do away with the concept of parental rights altogether:

Our outrage at the practice stems not only from the knowledge that removing the children harmed them and devastated Aboriginal societies but also from our feeling that it harmed (that is it violated cognisable and fundamental interests of) the parents of the children. The moral intuition underlying this feeling is that the interest in parenting, although not of absolute importance, is important enough to ground parental rights: that is, it is important enough to hold others under certain duties to respect the relationship between children and the interest holders ... Furthermore, it would be all but barbarous to discount parental interests when reaching decisions about (the allocation of parental authority).³²

It is not suggested that the *Family Law Act* ignores the fundamental interests or rights of parents in relation to their children generally. However, when the parent has a disability, that fundamental interest is too often set aside, as it was with the stolen generations, on the altar of culturally shaped ideas and prejudices about disability and the child's best interests.

Zanghellini provides a feminist analysis of parental responsibility and argues that parental responsibility is not just a factor of biology but is about caregiving and intention to parent. She concludes that caregiving and intentionality should take priority over biology in deciding questions about parental responsibility and children's best interests. She argues that these are characteristics that apply to women more than to men and that fathers should not be entitled to have parental responsibility simply by virtue of biology. It should be earned by commitment to the child and by caregiving.

On the other hand, the ethicist Margaret Somerville argues in *The Ethical Imagination* for a basic presumption in favour of "the natural" and that the burden of proof lies with those proposing to move away from "the natural". She argues that society needs to rediscover a respect for "the natural". The context of her article is marriage, children and the biological differences between men and women.³³

Neither of these writers are thinking in terms of parents with a disability and Zanghellini challenges Somerville's basic presumption from the perspective of same-sex relationships and the non-nuclear family. However, the arguments of both writers lead to a conclusion that a child should not be taken away from his or her parent (most particularly from the mother) unless there is an overwhelming need to do so and a real risk to the child. Recommendation 3 reflects this argument as well as reflecting article 7(1) and 9(1) of the CRC and article 23(4) of the CRPD.

Tomkins and Ward & Ward and Richards (No.2) [2009] FMCAfam 13

In this case, a mother with significant physical disabilities was defending an application for orders giving parental responsibility and residence of her four- year-old twins to the twins' former de-facto aunt with whom they had lived since they were five weeks old. The court heard evidence that, had these arrangements not been made, the twins would most likely have been taken into foster care.

The court heard evidence that the children's primary attachment was to Ms. Tomkins and that the children had cried when they were brought into the room where the mother was for the purposes of the family report. It was accepted by all parties that the mother would require close to "24/7" support if the twins were to live with her and with their older brother. The court accepted the opinion of a psychologist that the attachment the twins had to Ms Tomkins could not be transferred to their mother because so many extra people would be involved in their lives. The court also heard evidence from a psychologist that the ability of a primary carer to be present for many more hours a day than the mother was much more important than biological identity for their psychological development. Their need for biological identity could be met by knowing and having contact with their mother. The court concluded: "Clearly, Ms. Tomkins is the twins' psychological parent".³⁴

There was, in this case, the likelihood that if the children were returned to their mother without "24/7" support or something close to it, they would be taken into foster care by Queensland Department of Community Services. It seems that the court's determination of best interests would likely have resulted in the twins remaining with Ms Tomkins, even if there was a preference in the Act for a natural parent.

It is significant, however, that the court placed so little weight on the value of the children living with their natural parent or their brother in comparison to their psychological bond with their primary carer in determining the children's best interests.

Rebecca

Rebecca (who has a borderline intellectual disability) and her daughter, Melinda, lived with Rebecca's grandparents for almost five years before moving to live with Rebecca's mother. Melinda commenced school at her new home and was doing well. There had been no reports to child protection authorities and no concerns that Melinda was being abused or neglected. All professionals acknowledge that there was a strong maternal bond between mother and daughter. Rebecca's grandparents argued that there was an equally strong bond between them and Melinda. They made an application to the Federal Circuit Court for Melinda to live with them, spending time with her mother during holidays and weekends. Rebecca eventually lost the care of her daughter to her grandparents under consent orders even though there were no protective concerns about Melinda's well-being.

Recommendation 3: Preference to natural parent

- (a) That the *Family Law Act* is amended to give preference to a natural parent in determining who shall have parenting responsibility and residence for a child.
- (b) That, where the parent has a disability, before making orders that persons other than the natural parent have parental responsibility for a child, the court must be satisfied that the parent is unable to adequately parent the child.

4.5 Court processes

Decisions about children's futures should not be based on the ability of a parent to stand up to arduous and stressful court processes.

Where there is a parenting dispute, it is usually many months, and often years, before legal processes are concluded and final orders made by the court. During this time, a parent will need to attend numerous appointments and court hearings, even if the matter does not go through to a contested final hearing. These appointments and the attendances at court involve the person going into unfamiliar and alien situations and frequently involve considerable travel and disruption to everyday routines. The requirements are more onerous where one of the parents has a disability, be it cognitive, physical or psychiatric. Throughout, the parent lives in a state of tension and uncertainty. She will be required to tell her story and convince many new and different people, including her own solicitor and barrister, about the strengths of her case. In response, her legal representatives will be advising her about the likelihood of being successful and "managing her expectations", including the impact that her disability may have on the outcome. This process can leave a parent with a disability feeling unsupported and without hope.

During court hearings, a parent is required to be present at all times and during all stages of the process. She or he must be ready at any time to provide instructions to his or her legal representative. She or he must be able to sit and concentrate in the hearing room for long periods of time, without visibly or verbally responding to negative things that are said about her. Parents are under observation at all times and they are judged on their "behaviour" in the Court. Parents with disabilities are held to a higher standard than parents without disabilities.³⁵ The case study of David (see 4.7) also shows how he is being held to a higher standard than would a person without a disability.

A great deal of weight is placed on the evidence given to the court by the parent. This evidence is then tested under cross-examination. This is a stressful and arduous process for any person, but particularly so when the person has a disability. It is not essential for a person to give evidence and be cross-examined, and it is possible to give evidence-in-chief, for the judge or magistrate to talk with the person in chambers or for the judge to intervene if a person is unfairly questioned. However, the legal advice usually given is that not giving evidence on the stand will severely weaken a person's case because the judge or magistrate needs to hear directly from the person in order to make decisions. The judge or magistrate may intervene if the questioning is unfair but is not required to do so.

Few people with a disability are able to perform well under cross-examination. This is not, however, an indication of their ability to parent effectively. There is no nexus between the ability to withstand the stressful court processes and the ability to parent.

JH and RH [2005] FMCAfam 584 (see 4.2.1 and 4.2.2)

In the case, the court observed that "unfortunately the mother could not manage to give a reasonable account of her circumstances or deal with cross-examination. **Time and time again**, she required basic propositions to be repeated. **Again and again** she was unable to answer questions and even when she did answer questions, there were long delays between the question and the answer. Answers to questions, when proffered, were often non-responsive and it was frequently impossible to discern a nexus between the question and the answer".³⁶ (emphasis added)

The judgment does not record for how long the mother was cross-examined through an Arabic interpreter. The use of the words "time and time again" and "again and again" suggest that she may have been cross-examined by the opposing counsel at length in an aggressive manner. The court concluded that the mother was exaggerating her case for forensic advantage.

Notwithstanding the merits of their case, a person with a disability may be strongly advised by her solicitor to consent to negotiated parenting orders if the solicitor considers that he or she will not be able to stand up to the pressures of the legal processes or the pressures of a contested hearing. This is contrary to Article 13 of the CRPD that “ensure(s) effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings”. The Public Advocate considers that the ability of a parent to withstand the stress of court proceedings should not be the determinant of their child’s future.

Recommendation 4: Court processes.

That courts make appropriate accommodation for persons with disabilities in the court processes and not draw adverse inferences about parenting capacity from those accommodations.

4.6 Case guardianship or litigation guardianship

The Court may appoint a litigation guardian or case guardian when a party to the proceedings does not have the capacity to provide instructions to the solicitor or does not understand the nature and effect of the court proceedings.³⁷ Litigation or case guardians are usually appointed from amongst the family members of the person with a disability. The operation of the case guardianship and litigation guardianship system in family law raises some serious issues about access to justice for people with disabilities.

Family law cases about parenting are now usually heard in the Federal Circuit Court (formerly known as the Federal Magistrates’ Court). The *Family Law Rules 2004* refer to case guardians. The rules of the Federal Circuit Court refer to litigation guardians. However, it is clear that the same functional person is referred to.

There are two sets of rules potentially applying to family law matters heard in the Federal Circuit Court. Under the Federal Circuit Court rules, a person who needs a litigation guardian may only become a party to proceedings through his or her litigation guardian. The litigation guardian is required to act in accordance with the rules. The rules are procedural and give no guidance as to the way in which a litigation guardian should conduct himself or herself or whether they are permitted or required to act in the interests of the person for whom they are appointed.

Under the *Family Law Rules*, the term case guardian is used to refer to a litigation guardian. These rules require the case guardian to do anything required by the rules to be done by a party. They also allow the case guardian to do anything permitted by the rules for the benefit of the party. Importantly, if a consent order is sought (other than an order relating to practice or procedure), the case guardian must file an affidavit setting out the facts relied on to satisfy the court that the order is in the party’s best interests.³⁸ Under these rules, therefore, the case guardian must act for the benefit of the person and file an affidavit stating why any proposed consent order is in their best interests. The two sets of rules have different emphases and the existence of two sets of rules is, in itself, confusing.

The *Federal Circuit Court Rules* (1.05(2)) state that where the rules of the court are insufficient or inappropriate, the Court may apply the *Federal Court Rules* or the *Family Court Rules* “in whole or in part, or modified or dispensed with, as necessary”. Part 1.05(3)(a) states that, without limiting subrule 1.05(2), the *Family Law Rules* apply, with necessary changes, to family law and child support proceedings. This indicates that whether the *Federal Circuit Court Rules* are seen as insufficient or inappropriate is a matter to be decided by the court in the particular case. The Public Advocate considers that the *Family Law Rules* should take precedence over the *Federal Circuit Court Rules*.

Beyond these two sets of rules, there is little information available to a litigation guardian to provide guidance about the role. In Victoria, a guideline was published by the Office of the Public Advocate to assist in determining whether OPA should act as litigation guardian.³⁹ The document summarised the duties of a guardian but does not give guidance about the principles that should guide the role. The document has since been withdrawn. It is the experience of the Office of the Public Advocate that very few legal practitioners in family court matters have experience of working with a case guardian.

Another significant concern is that orders made by consent of the person or their litigation guardian cannot normally be appealed. Article 23(4) of the CRPD and Article 9(1) of the CRC state that the decisions about the separation of children from parents with disabilities must be made by “competent authorities subject to judicial review”.

Rebecca (see also 4.4)

A litigation guardian was appointed by the Federal Circuit Court for Rebecca in relation to an application made by an extended family member for parental responsibility of her daughter, aged seven years. The litigation guardian was advised by Rebecca’s legal representatives that she could not consider Rebecca’s best interests in deciding whether to accept a consent order. She was also advised that she could not do anything for the benefit of Rebecca in preparing the case. Instead, she was advised that a litigation guardian is required to consider the state of the evidence and act as a dispassionate assessor of that evidence, taking no active part in the case. No affidavit was filed in Rebecca’s case when orders were made by consent and none of the legally trained professionals in the Court was aware of the *Family Law Act Rules*. Rebecca cannot appeal against the orders because the orders were made by consent.

There is case law in relation to some of these questions about litigation guardianship.⁴⁰ Under the *Family Law Rules* there is a requirement that the case guardian be able to “fairly and competently conduct the case”. J Cronin said in *White & Green and Ors* [2009] FamCA 237 in relation to the meaning of this and the question of whether “objectivity” is required of the case guardian:

In my view, the responsibility of the case guardian is to act fairly towards the wife and in a competent manner. That must mean the case guardian takes into account what is best for the wife from a subjective point of view knowing all of the facts. It would be absurd for example, if a litigant without a case guardian was required to act without bias because each litigant sees the case through their own subjective eyes.

It also needs to be made clear that a litigation guardian, or case guardian, has an active role in the case. The duties of a case guardian were discussed in *Read v Read* [1944] SASR 26 at pp 28–29. This passage was quoted favourably by the Full Court of the Family Court in *Kannis & Kannis* (2003) FLC 93-135 (at paragraph 78 and paragraph 261):

[A] person who accepts the duties of guardian ad litem does not do so ... as a matter of form. A guardian ad litem ... 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 ...

From the litigation guardian’s evidence I conclude that she perceived herself as playing an entirely passive role as litigation guardian.

Recommendation 5: Litigation or case guardianship

(a) That the *Family Law Rules* are identified as the rules governing matters dealt with in the Federal Circuit Court under the *Family Law Act*, to the extent of any inconsistency between them and the *Federal Circuit Court Rules*.

- (b) That parenting orders made by the consent of a litigation guardian should be subject to judicial review.
- (c) That litigation guardians are sought from organisations with experience in disability as well as from family members.
- (d) That where family members are appointed as litigation guardians, they are provided with support and advice from organisations with expertise in disability and litigation guardianship.
- (e) That organisations providing litigation guardianship or support and advice should be adequately resourced to do so.

4.6.1 Payment of litigation guardians and liability of litigation guardians

In most cases, family members act as litigation guardian without receiving payment for the role. A litigation guardian is entitled to be paid a professional fee from the estate of the person if the court so orders. However, the majority of parents with a disability defending actions under the *Family Law Act* are funded by legal aid and have few personal resources. Legal aid does not fund the costs of the litigation guardian so a professional litigation guardian must either be paid by their organization or seek payment through the Commonwealth Attorney-General's Office. There is no established program in Victoria to facilitate this. The difficulty of finding a litigation guardian prepared to fulfil this onerous and difficult role constitutes a serious barrier to justice for people in need of a litigation guardian to take or defend an action.

A litigation guardian who is unsuccessful or who acts outside their role may be personally liable for any costs awarded against them. A litigation guardian may have to defend an application for costs made against them. This was the situation in a Victorian Court of Appeal case, *State Trustees Ltd v Andrew Christodoulou*.⁴¹ This action, or the threat of such action, may be used as a strategy by the opposing party. With the lack of clarity about the role of a litigation guardian, both in case law and legal practice, this is a significant disadvantage to a person with a disability in need of a litigation guardian in a court proceeding. It may also constitute a conflict of interest between the litigation guardian and the person with a disability.

The potential cost liability of a litigation guardian has been observed by some commentators to have discouraged people and organisations from voluntarily accepting the role.⁴² If this is the case, the operation of litigation guardianship breaches the rights of people with a disability under Article 13 of the CRPD that ensures “effective access to justice for people with a disability on an equal basis to others”.

Recommendation 5 (continued) Litigation and case guardianship

- (f) That guidelines for case guardianship and litigation guardianship are developed by an appropriate body.
- (g) That case guardians/litigation guardians are indemnified by the court against applications for costs against them or against the person with a disability, unless the guardian has not acted in good faith.

4.7 Advocacy

Most applications concerning parenting take many months, or even years, before final orders are made. As referred to above, the stress of the process can be immense for any parent. It is extremely difficult for a parent with a disability to obtain advocacy to assist her or him in the process and support him or her over such an extended period.

The Public Advocate considers that the advocacy provided by a solicitor or barrister representing a client with a disability in court proceedings is insufficient to “level the playing field” for such a parent in the family law system. Most legal professionals do not have expertise or knowledge about disability issues and cannot be expected to have the specialist knowledge of the disability issues that is required. Even if the solicitor or barrister is capable of assisting the person with a disability to prepare, manage and cope with their case, the time and therefore the

cost of this support is likely to be significantly greater than for a person without a disability. In addition, an Independent Children's Lawyer also needs an understanding of disability and its possible impact on parenting in each case.

If the Federal Circuit Court is not to discriminate against parents with a disability and their children, parents with a disability must have access to independently funded disability advocates who can work with them, their legal representatives and any Independent Children's Lawyer throughout the case. The *Family Law Act* should be amended to provide for such support and for standing under the Act to act as an advocate.

Michael

Michael is the father of Daniel, aged 5 years. Under orders of the Family Court, Daniel lives with his maternal grandmother. Michael has a disability and is determined to have as much involvement in his son's life as possible. In order to persuade the court that it is in the interests of his child for him to be involved in his child's life, he has completed parenting courses and counselling. He has been key in establishing an advocacy group in the town where he lives and in the establishment of a parenting group across Victoria. He has been chosen by the Department of Human Services (DHS) as a disability representative on several bodies. He has done more, and been required to do more, than a parent without a disability in order to be present in his son's life. A recent family report has recommended that Daniel spend more time with his father and overnight contact has just commenced. The case will go back to round-table mediation early in 2014 to review the arrangements. Throughout the past five years, Michael has had advice, support and encouragement from advocacy organizations, community services and through DHS disability programs that are not available in other regions. He says that he would not have been able to keep going and achieve what he has without that support.

Recommendation 6: Advocacy

(a) That government-funded disability advocacy is made available to parents with a disability with cases in the family law system through disability advocacy organisations or an independent statutory body.

(b) That the *Family Law Act* is amended to provide for the involvement of an advocate in the legal processes in these circumstances.

5. Conclusion

Legal systems that seek the best interests of Australia's children need to enable rather than disable families.⁴³

The international community has recognised the right of people with disabilities to have families, the right of their children to remain with their parents unless they are at genuine risk of abuse and neglect and the obligation of the state to provide these families with adequate support. Australia also has a responsibility, as a society and as a member of the international community, to safeguard every child's welfare and to act in their best interests.

The two are not incompatible when a parent has a disability.

This report raises important issues about the operation of the family law system in Australia. The failure to implement the *Convention on the Rights of Persons with Disabilities* and the *Convention on the Rights of the Child* in Australian family law is resulting in breaches of the human rights of parents with a disability and their children.

Australian parents with disabilities do not accept that this country can sign and ratify Conventions that promise so much and acknowledge that there has been serious discrimination

against people with disabilities, but then allow that discrimination against them as parents to continue.

The Public Advocate of Victoria urges the Australian government to accept the recommendations of this report.

Appendix

United Nations Convention on the Rights of Persons with Disabilities 2006

Article 4:

General obligations

1. States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake:

(a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention;

(b) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities;

Article 6 (1):

States Parties recognise that women and girls with disabilities are subject to multiple discrimination, and in this regards shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms.

Article 13:

Access to justice

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.

2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

Article 16:

Freedom from exploitation, violence and abuse

4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.

5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 19:

Living independently and being included in the community

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others,

and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

Article 23:

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

(a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognised;

2. States Parties shall ensure the rights and responsibilities of persons with disabilities, with regard to guardianship, wardship, trusteeship, adoption of children or similar institutions, where these concepts exist in national legislation; in all cases the best interests of the child shall be paramount. States Parties shall render appropriate assistance to persons with disabilities in the performance of their child-rearing responsibilities.

4. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. In no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

Article 28:

Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability. States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.

Article 31:

Statistics and data collection

1. States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention.....

2. The information collected in accordance with this article shall be disaggregated, as appropriate, and used to help assess the implementation of

States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.
3. States Parties shall assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

United Nations Convention on the Rights of the Child 1989

Article 7(1):

The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

Article 9(1):

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

¹ Office of the Public Advocate: *Position statement on the removal of children from their parents with a disability*” 2012. <http://www.publicadvocate.vic.gov.au/research/302/>

² “History of Family Law” in AIFS: Evaluating the 2006 reforms. A-6.

³ *Ibid.*

⁴ The removal of children from the care of parents with a disability through the child protection system in Victoria will be the subject of Report 2 of the Office of the Public Advocate. “Whatever happened to the Village?”

⁵ National Council on Disability: *Rocking the Cradle: ensuring the rights of parents with a disability and their children* Washington DC, 2012.

⁶ *Children Youth and Families Act 2005* (Vic) s162 (1)(c)(d)(e)

⁷ It is not necessarily the fact of disability itself, but the judgments that are made without assessment and evidence of the impact of disability on the parent’s ability to meet the needs of the children.

⁸ Appell,A and Boyer,B “Parental Rights vs.Best Interests of the Child: a false dichotomy in the context of adoption”. *Duke Journal of Gender and Law Policy* Vol 2:63. 1995.Page 80

⁹ *National Disability Insurance Scheme Act 2013* s80(1).

¹⁰ These issues are considered in the context of adoption in Appell,A and Boyer,B. op.cit .

¹¹ *Family Law Amendment (Shared Parental Responsibility) Act 2006*

¹² Attorney General’s Department, “Family Violence Act – Frequently asked questions”. P4.

¹³ Family Law Courts: *Family Violence Best Practice Principles* Edition 3.1 April 2013

¹⁴ Miller,R, speaking on Insight, SBS Television 23 April, 2013. “*What’s best for the child*”.

¹⁵ Llewellyn, G and Spencer, M: *Parents with intellectual disability* ACHRA Presentation 19 March 2013, slide 9. See also McConnell,D Llewelyn,G “Stereotypes, parents with intellectual disability and child protection” in *Journal of Social Welfare and Family Law* 24(3) 2002. Pages 303-308

¹⁶ *ibid*

¹⁷ Camilleri, M, *Enabling Justice*. Paper presented to National Victims of Crime Conference 23-24 September, 2008. Page 3.

¹⁸ *JH and RH* [2005] FMCAfam 584 para 37

¹⁹ *ibid* para 40.

²⁰ *ibid* para 47.

²¹ Attorney General’s Department: *Family Violence Act – Frequently Asked Questions* p9.

²² *JH and RH* [2005] FMCAfam 584 para 67.

²³ *Ibid* para 74

²⁴ Willems, D. L., De Vries, J.-N., Isarin, J. & Reinders, J. S. (2007) 'Parenting by persons with intellectual disability: an explorative study in the Netherlands' *Journal of Intellectual Disability Research*, 51, 537–544.

See also Australian Family and Disability Studies Research Collaboration, 2008.

²⁵ *If you can't agree on arrangements*. www.familylawcourts.gov.au

²⁶ CRC Article 9(1), CRPD Article 23(4)

²⁷ CRC Article 7(1)

²⁸ CRC Article 9(1)

²⁹ CRPD Article 23(4)

³⁰ *WKM & LD* FMCAfam391 paragraph 155 (f)

³¹ *United Nations Convention on the Rights of the Child* 1989. Article 9(1).

³² Zanghellini, Alcardo: "Who Is Entitled to Parental Responsibility? Biology, Caregiving, Intention and the Family Law Act 1975 (Cth): A Jurisprudential Feminist Analysis" in *Monash University Law Review* Vol 35(1) 2009 page 150

³³ Somerville, M: *The Ethical Imagination: journeys of the human spirit*. MUP, Melbourne, 2006 page 107.

³⁴ *Tomkins and Ward & Ward and Richards* (No.2) [2009] FMCAfam 13 para 232

³⁵ *Women with Disabilities Australia: Parenting Issues for Women with Disabilities in Australia*. May 2009. page 20

³⁶ *JH and RH* [2005] FMCAfam 584 para 32

³⁷ *Family Law Rules* 2004 Reg 6.08 Federal Circuit Court Rules 2001. Reg. 11.08 (1)

³⁸ Pilch Senior Rights legal clinic: *Incapacity and the justice system in Victoria* Discussion paper for Roundtable 25 September 2013, p6.

³⁹ This guideline was withdrawn when OPA made the decision that it is not resourced to take on this role.

⁴⁰ The information about case law is taken from Campbell, Jackie: *Family Law proceedings involving parties with diminished capacity*. Paper presented at the Succession Law Conference, Law Institute of Victoria, Melbourne, 7 September 2012.

⁴¹ *State Trustees Ltd. vs Andrew Christodoulou* [2010] VSCA 86

⁴² Victorian Law Reform Commission, *Guardianship*, Final Report (2012) , p573.

⁴³ Cocks, K: *Human rights of parents with intellectual disability*. Speech given at : The bold network and QUT Symposium: realising the hopes and dreams of parents with intellectual disability. 19 November 2012. <http://www.adcq.qld.gov.au/about-us/the-commissioner/speeches>