



The relevance of the quality of the parent-child relationship in awards of adult child maintenance

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This paper considers the relevance of the adult-child relationship to awards of adult child maintenance. Aside from step-child maintenance, this is the only area of maintenance law where the quality of the relationship between the potential payer and the person for whom they are paying maintenance is considered relevant. This paper traces the history of this approach against the backdrop of legislative changes to the relevant provisions and considers whether any compelling rationale has been provided for taking this matter into account. The paper concludes that no such rationale has been articulated and argues there are good reasons for abandoning this approach, not the least of which is the reliance of such an approach on an apportionment of fault between parent and child as to the poor quality of the relationship.

Introduction

Adult child maintenance cases are not common in Australian family law courts;¹ indeed, it appears many parents are not aware an application can be brought for maintenance for a child over 18.² Moreover, awards can only be made in two prescribed circumstances (Family Law Act 1975 (Cth) (FLA) s 66L) and the most common of those circumstances — the completion of the child's education — will necessarily only secure maintenance for a limited period, making the cost of litigation hard to justify. However, there is a further potential disincentive to bringing an action; unlike spousal maintenance and child support for minors,³ the family law courts have accepted for many years that the quality of the parent-child relationship, and the reason for a poor quality relationship, may be relevant to an award of adult child maintenance, both as to entitlement and quantum. That is, the fact of a poor relationship between the potential payer and the adult child has the potential to reduce the likelihood of an award, or the amount ordered to be paid. And yet, if an

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1 A search of AustLII reveals only nine Full Court decisions touching on s 66L, none of which address it in any detail. Only one of those cases mentions the topic of this article (the relevance of the adult-child relationship) and merely recites that at first instance in that case, little weight was given to the lack of a relationship: *Wadsworth & Wadsworth* [2008] FamCAFC 149; BC200850021 at [30] (the case dealt with a very different issue).

2 B Smyth, 'Child support for young adult children in Australia' (2002) *International Journal of Law, Policy and the Family* 22 at 32.

3 The one exception is step-child maintenance (Family Law Act 1975 (Cth) (FLA) ss 66M and 66N), discussed later in the article.

application for adult child maintenance is required to encourage a parent to provide necessary financial support for a dependent child, it seems quite likely that the relationship between the parent and child will be less than rosy.⁴ This does not augur well for applicants.

The question of the financial support of young Australian adults is an important one. In 2010 there were over half a million tertiary students in Australia aged between 15 and 24, the numbers having increased dramatically since 2005.⁵ Successive governments acknowledge that higher education is a key to our economic success as a nation; it is a normal part of an educational pathway for many and increasingly necessary to find employment. Further, children moving into apprenticeships are paid extremely low wages. Rental costs are high, particularly in some capital cities. In the 2006/07 year the median age of young women and men leaving home was around 20 with most staying due to financial reasons and most engaged in full-time study. Many of those who leave return to live with their parents within a few years.⁶ Indeed, over half of young people aged 18–24 live with one or both parents.⁷ Jeffrey and McDowell maintain ‘that the transition from school to further education or work is a time when young people are vulnerable . . .’.⁸ When considering children of separated parents, Australian research shows that potentially eligible children over 18 of separated parents rarely receive child maintenance from their non-resident parent.⁹

Why has greater consideration not been given in Australia to the issue of the support of dependent children post the age of 18? In 2000, Smyth published a paper with the aim, he said, of trying to stimulate discussion of this issue.¹⁰ Not only has such discussion not eventuated, judicial officers continue to limit the access of young adult children to financial support on the basis of poor relationships with parents from whom they have become estranged but without any detailed consideration of the rationale for this approach. While we may arbitrarily choose 18 as the legal age of majority, it says nothing of the question of parent-child dependency. Indeed, Serbian and Italian laws

4 See Smyth, above n 2, at 27.

5 ABS, *Year Book Australia*, 2012, 1301.0, at <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Higher%20education~107>> (accessed 24 September 2013).

6 ABS, *Home and Away: The Living Arrangements of Young People*, *Australian Social Trends*, June 2009, 4102.0, at <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features50June+2009>> (accessed 24 September 2013).

7 Australian Institute of Health and Welfare (AIHW), *Young Australians: Their Health and Wellbeing 2011*, AIHW, 2011, p 10.

8 C Jeffrey and L McDowell, ‘Youth in a Comparative Perspective: global change, local lives’ (2004) 36(2) *Youth & Society* 131. For an interesting discussion of these issues, see J Black and R Pryor, *Child Support Policy Research Project — Policy Paper 3: Young Adult Children and the Child Support System*, 2011, at <<http://www.ds.org.au/wp-content/uploads/policy-paper-3-final.pdf>> (accessed 24 September 2013). It is worth noting in this context that benefits payable to young adults (eg, Austudy, Youth Allowance and even Newstart Allowance) are limited in various ways between the ages of 18 and 25, with a degree of parental financial dependence assumed in some instances, regardless of the actual financial support provided. For further details of these benefits, see the Commonwealth Department of Human Services website at <<http://www.human.services.gov.au/customer/dhs/centrelink>> (accessed 26 August 2014).

9 Smyth, above n 2.

10 *Ibid.*, at 22.

recognise much greater parental obligations of support to foster education up to the age of 26.¹¹ This may be a bridge too far for Australian legislators, but one could at least expect a strong and defensible judicial rationale for disentitling young dependent adults from available parental support that would otherwise be payable under s 66L.

In this article we analyse the basis for considering the parent-child relationship in adult child maintenance claims. We first set out the legislative context (including changes over time to the relevant provisions) and explore the case law to date. In this context, we show there is no rationale provided for this exceptional approach to the assessment of maintenance and explain why we consider an analogy drawn with family provision claims in one adult child maintenance case¹² is unsustainable. We argue that, for a range of reasons, the different treatment of adult child maintenance cases in this regard should be reconsidered, touching on the question of whether the courts' present approach is consistent with the no-fault philosophy of modern Australian family law. We conclude that a more principled approach would be to abandon any reference to this factor in adult child maintenance decision-making.

The legislative context and case law interpretation

The current statutory framework

In modern times, any discussion of parental obligations of financial support for their minor children naturally focuses on the provisions of child support legislation. That legislation provides no direct basis for decision-makers to take account of the quality of parent-child relationships when determining the appropriate level of child support a parent should pay.¹³ Section 117(4)(g) of the Child Support (Assessment) Act 1989 (Cth) does require that any 'hardship' that would be caused to the child, parents (or other carer), or other dependants of the liable parent be taken into account; but there has been no judicial suggestion this refers to anything other than financial hardship.¹⁴ Certainly, case law applying s 117 shows clearly that the parent-child relationship is irrelevant in the making of an order.¹⁵

The introduction of the child support scheme left little scope for the direct operation of the child maintenance provisions of the FLA in relation to minor children.¹⁶ However, that scheme only applies to children under 18¹⁷ and the FLA provisions governing adult child maintenance continue to operate.

11 Black and Pryor, above n 8, p 31.

12 A family provision claim is where an eligible applicant seeks a (greater) share of a deceased estate and is based on relatively consistent state legislation.

13 This becomes relevant of course only when a departure order is sought under s 117 of the Child Support (Assessment) Act 1989 (Cth), as formula based child support is calculated by reference to only a very few matters.

14 See *Gyselman and Gyselman* [1991] FMCA 93, (1992) FLC 92-279, (1991) 103 FLR 156 at [141] and *Archer and Archer and Anor (SSAT Appeal)* [2013] FCCA 226; BC201309693 at [32].

15 See, eg, *Stirling v Dobson* (2011) FLC 98-056; [2011] FMCAfam 52; BC201100158 at [43]-[44].

16 See further L Young, G Monahan, A Sifris and R Carroll, *Family Law in Australia*, 8th ed, LexisNexis, Sydney, 2013, at [11.5].

Section 66C(1) of the FLA provides that parents have the primary duty to maintain their children.¹⁸ Subsection (2) highlights that this duty is primary in nature and limited only by the duties parents have to maintain themselves and any other children.¹⁹ The section does not limit this duty to maintain to children under the age of 18. Section 66L further provides in relation to the maintenance of adult children:

- (1) A court must not make a child maintenance order in relation to a child who is 18 or over unless the court is satisfied that the provision of the maintenance is necessary:
 - (a) to enable the child to complete his or her education; or
 - (b) because of a mental or physical disability of the child.

The statute therefore creates a rule with two aspects in regard to awarding adult child maintenance: that the adult child requires the financial support because of one of two limited circumstances (completing their education or due to disability) *and* that the court is satisfied that adult child maintenance is ‘necessary’ in these situations. This section provides no further specific guidance as to how the discretion is to be exercised in adult child maintenance cases.

It is well established that the FLA provisions governing the exercise of discretion in relation to child maintenance for minors apply equally to decisions made in relation to adult child maintenance.²⁰ Section 66G gives the court the power to make ‘such child maintenance order as it thinks proper’; this is very similar to the wording of the discretionary power of the court under the FLA to make spousal maintenance orders (s 74(1)). However, this power is ‘subject to this Division’, and later sections go on to guide how this discretion is to be exercised.

Section 66H provides that in child maintenance proceedings, the court must:

- (a) consider the financial support necessary for the maintenance of the child (this is expanded on in section 66J); and
- (b) determine the financial contribution, or respective financial contributions, towards the financial support necessary for the maintenance of the child, that should be made by a party, or by parties, to the proceedings (this is expanded on in section 66K).

Section 66J deals with the factors relevant to determining whether maintenance is necessary (emphasis added):

- (1) In considering the financial support *necessary* for the maintenance of a child, the court *must* take into account these (*and no other*) matters:
 - (a) the matters mentioned in section 66B; and
 - (b) the proper needs of the child (this is expanded on in subsection (2));and

17 Child support can be extended beyond the age of 18 to the end of the secondary school year in which a child turns 18: Child Support (Assessment) Act 1989 (Cth) s 151B.

18 This section is replicated in the Child Support (Assessment) Act 1989 (Cth) s 3.

19 FLA s 66C(2)(b)(ii).

20 *Smith; St James; Smith v Wickstein* (1996) 21 Fam LR 118; FLC 92-714 at 83,592-3; 135 FLR 296. Note the discussion therein of some judicial disagreement prior to this Full Court decision as to the correct position under the pre-1995 legislation.

- (c) the income, earning capacity, property and financial resources of the child (this is expanded on in subsection (3)).²¹

There is no catch-all provision, such as ‘any other fact or circumstance the court considers relevant’. Section 66B is the objects section to the Division and provides:

- (1) The principal object of this Division is to ensure that children receive a proper level of financial support from their parents.
- (2) Particular objects of this Division include ensuring:
 - (a) that children have their proper needs met from reasonable and adequate shares in the income, earning capacity, property and financial resources of both of their parents; and
 - (b) that parents share equitably in the support of their children.

Section 66K addresses the factors relevant to determining what contribution, if any, a parent should make. It is this section that most obviously provides scope for the decision-maker to take account of the parent-child relationship in the exercise of discretion:²²

- (1) In determining the financial contribution, or respective financial contributions, towards the financial support necessary for the maintenance of a child that should be made by a party, or by parties, to the proceedings, the court must take into account these (and no other) matters:
 - ...
 - (e) any special circumstances which, if not taken into account in the particular case, would result in injustice or undue hardship to any person.²³

This ‘special circumstance’ provision relates, therefore, not to the question of whether the maintenance is necessary, but rather whether, and to what extent, the parent in question should make a contribution to those needs. In line with the interpretation of s 75(2)(o), one might think that, as with child support, undue hardship relates to *financial* hardship (as opposed to, for example, emotional hardship).²⁴ However, Carmody J has held that the special circumstances need not have ‘an economic aspect of significance’.²⁵ Notably, this provision applies generally to child maintenance under the FLA, that is, it is not limited in any way to adult child maintenance; however in the case of minor child maintenance, the question of the adult-child relationship has not been considered relevant.

Case law interpretation

What then has been the judicial justification for consideration of the parent-child relationship in adult child maintenance cases when it is not considered relevant to the award of child maintenance for minors?

21 FLA s 66H.

22 *Re AM (Adult Child Maintenance)* (2006) 35 Fam LR 319; FLC 93-262; 198 FLR 221; [2006] FamCA 351 at [161].

23 FLA s 66K(1)(e).

24 A similar view is expressed in A Dickey, *Family Law*, 4th ed, Lawbook Co, Pyrmont, 2002, p 571 but he notes *Mercer* by way presumably of an exception in relation to adult children.

25 *Re AM (Adult Child Maintenance)* (2006) 35 Fam LR 319; FLC 93-262; 198 FLR 221; [2006] FamCA 351 at [161].

The issue of the parent-child relationship was raised shortly after the FLA was enacted and a number of key cases decided over the following two decades continue to shape the understanding and application of s 66L, notwithstanding that the legislation has changed over this period.

Originally, the power to make an order for adult child maintenance under the FLA was found in s 76. This was the general provision dealing with maintenance for children, and included a subs (3) very similar in terms to s 66L:

- (3) The court may —
 . . . [make an adult child maintenance order] . . . if the court is satisfied that the provision of the maintenance is necessary to enable the child to complete his education including vocational training or apprenticeship) or because he is mentally or physically handicapped . . .

The general matters relevant to the making of an order for child maintenance were the matters listed in s 75 (which also applied to spousal maintenance) and specific matters relevant to the child listed in s 76.²⁶ Subsection 75(2) provided a list of mandatory considerations to be taken into account ‘in exercising jurisdiction under’ that Part of the Act, and included ‘any fact or circumstance which, in the opinion of the court, the justice of the case’ required: s 75(2)(o).

In the 1976 case of *In the Marriage of Mercer*,²⁷ as to the meaning of ‘necessary’ in s 76, Watson J held the relevant considerations were the three matters set out in s 76(3) together with s 75(2)(o).²⁸ It appears to be in the context of this latter provision that Watson J made the oft-quoted comment that ‘an adult son cannot demand a slice of the paternal cake with one breath and spew out filial abnegation with the next’.²⁹

Mercer was handed down in April 1976, before there had been any significant consideration of the role marital fault was to play in the application of the various provisions of the then very new FLA. In November 1976 the Full Court considered this question in the context of s 75(2)(o), in the spousal maintenance case of *Soblusky and Soblusky*.³⁰ First, the Full Court rejected an argument that the general provision giving the court power to make ‘such order as it thinks proper’ in relation to both spousal and child maintenance (then s 74 and now s 66G in relation to children) permitted a consideration of conduct unrelated to the need for support and the capacity to pay.³¹ In other words, a consideration of marital fault was not permitted based on the inclusion of the word ‘proper’ in that section. Likewise, the Full Court rejected the argument that s 75(2)(o) could be used to introduce notions of marital fault generally into the assessment of maintenance, holding rather that the section related to ‘facts or circumstances of a broadly financial nature’.³²

26 The child’s financial situation, the financial needs of the child and the manner in which the child was being, and the parents expected the child to be, educated or trained: FLA ss 76(1)(c)–(e).

27 (1976) 9 ALR 237; 1 Fam LR 11,179; (1976) FLC 90-033.

28 *Ibid*, at FLC 75,130.

29 *Ibid*, at FLC 75,131.

30 (1976) 12 ALR 699; 28 FLR 81; 2 Fam LR 11,528; (1976) FLC 90-124.

31 (1976) 9 ALR 237; 1 Fam LR 11,179; (1976) FLC 90-033 at 75,580.

32 *Ibid*, at FLC 75,586–7. There is a suggestion in the discussion in *Soblusky* (1976) 12 ALR

Without referring to *Soblusky*, in a decision handed down early in 1977 (*In the Marriage of Oliver*),³³ Asche J discussed the question of the relevance of the parent-child relationship to adult child maintenance, referring to Watson J's comments in *Mercer*:

I certainly do not disagree . . . [that] . . . there may be circumstances where the conduct of a child might make it incorrect for a court to make an order for maintenance . . . I do not think it is a necessary element of awarding maintenance that there should be a warm relationship between the parent and the child . . . it would encourage the child who behaved with smarmy obsequiousness to his parent as against the child who remained frank and honest to his relationship.³⁴

Justice Asche's comment is an early recognition that one must exercise caution in placing weight on the nature of this relationship. Approving Asche J's sentiments, in 1978 Fogarty J in *Marriage of Gamble* commented that if the degree of deference shown by an adult child were the measure of liability 'then the subsection would in most cases have little application'.³⁵ Justice Smithers, having reviewed these authorities in the 1981 case of *In the Marriage of H*,³⁶ concluded that it was open to the court to consider the nature of the relationship but added 'it is not appropriate normally to distinguish between the children in this connection or to examine their conduct or attitudes'.³⁷

So, while the parent-child relationship was accepted by the judges in all of these cases as being a potentially relevant consideration (at that time it seems in relation to whether the maintenance was *reasonably necessary*), the consensus was that there would need to be special features to a case before one would take the matter into account, and a routine inquiry into the relationship would not be appropriate. In addition to overlooking the impact of *Soblusky*, none of the decisions referred to above explored in detail *why* the justice of the case requires this to be a consideration, when the same does not apply for minor children. Nor was there any clear explanation provided of what would give rise to the special case where the matter should be considered; if a poor relationship is alleged by the parent, then surely the only option is to examine the child's conduct and attitudes.

In 1988 the legislation was substantially amended to a form more similar to the current child maintenance provisions. These amendments included severing the link to s 75(2)(o).³⁸ Despite these changes, it was determined that, because the wording of the new s 66H(1)(a) dealing with adult child maintenance was very similar to the repealed s 76(3), there should be no

699; 28 FLR 81; 2 Fam LR 11,528; (1976) FLC 90-124 that s 43 might open the door to a court considering, under s 75(2)(o), the specific matters set out in s 43. Even in the form it took at that time, it is impossible to see how s 43 could be enlisted in support of an argument to consider fault based matters, given its focus on promoting reconciliation, protection of the family and the welfare of children.

33 (1977) 4 Fam LR 252; (1977) FLC 90-227.

34 *Ibid*, at Fam LR 255.

35 (1978) 32 FLR 198; 4 Fam LN N28; (1978) FLC 90-452 at 77,304.

36 (1981) 7 Fam LR 451; (1981) FLC 91-083.

37 *Ibid*, at Fam LR 465.

38 Family Law Amendment Act (Cth) 1987 which came into force in 1988.

change in the interpretation of the appropriate approach.³⁹ In the 1992 case of *Re C (No 2)*,⁴⁰ Fogarty J suggested that discussions about the role of the filial relationship in matters of adult child maintenance were perhaps a thing of the past⁴¹ and found they would not be relevant in this case anyway, where ‘the absence of any such relationship is not in any way the choice of the child’.⁴² However, Fogarty J underestimated judicial attachment to this approach.

In the still oft-quoted case of *In the Marriage of Cosgrove (No 1)*⁴³ (also decided under s 66H(1)(a)) Warnick J made the following comments about the provisions at that time as they applied to adult children:

- Even if maintenance is necessary to enable a child to complete their education or because of disability, a discretion remains as to whether to make any order;⁴⁴
- The ‘special circumstances’ that might result in ‘injustice or undue hardship’ to any person (s 66E(1)(d), now s 66K(1)(e)) ‘may well tend to differ, dependent upon whether’ the child is a minor or an adult;⁴⁵
- Case law established certain factors (a non-exhaustive list) which bore on the question of the exercise of this discretion;
- The breadth of this discretion is confirmed by the majority’s statement in *Tuck’s* case⁴⁶ that the word ‘necessary’ invites consideration of the ‘parties’ financial circumstances and *other relevant factors*’;⁴⁷
- The list of factors relevant to the exercise of discretion includes ‘the filial relationship between the child and the person from whom maintenance is sought’.⁴⁸ In this regard, Warnick J adopted the reasoning of Asche SJ in *Oliver*, concluding that he would:

abhor any practice which might develop in which an examination of the relationship between the child and respondent became standard practice . . . [however he did] not consider it can be said that in no circumstances could the attitude of the child to the respondent constitute a special circumstance which might affect the justice of the case in terms of s 66E(1)(d) [now s 66K(1)(e)] or otherwise be relevant to the exercise of the ultimate discretion.⁴⁹

39 See, eg, the Full Court decision *In the Marriage of Henderson* (1989) 13 Fam LR 40 at 43; (1989) FLC 92-011. The Explanatory Memorandum for the Bill notes at [119] that the new provision ‘re-enacts the substance of . . . [ss] 76(2) and 76(3)’: at <http://www.austlii.edu.au/au/legis/cth/bill_em/flab1987204/memo_0.html> (accessed 7 October 2013). There is however a significant difference between the provisions as discussed further below.

40 (1992) 106 FLR 82; 15 Fam LR 355; (1992) FLC 92-284.

41 *Ibid.*, at FLC 79,110.

42 *Ibid.*

43 (1995) 134 FLR 374; 20 Fam LR 751; (1996) FLC 92-700.

44 *Ibid.*, FLC at 83,387, relying on the earlier authority of *Tynan and Tynan* (1992) 16 Fam LR 621; (1993) FLC 92-385. Though note that there has been some judicial discussion as to the basis of the discretion.

45 *Ibid.*, at FLC 83,389.

46 *In the Marriage of Tuck* (1979) 7 Fam LR 492; (1981) FLC 91-021.

47 *Ibid.* (emphasis added). Though in *Tuck’s* case there is no discussion of the parent-child relationship.

48 *Ibid.*, at FLC 83,391.

49 *Ibid.*, at FLC 83,392. The later change to the current statutory formulation has not resulted in any suggestion of a different approach.

The legislation changed to its current form as a result of the substitution of a new Pt VII by the Family Law Reform Act (Cth) 1995, however there appears to have been no intention to change the provisions on adult child maintenance as evidenced by the fact there is no discussion of the matter in the Explanatory Memorandum. As noted above, Carmody J has since held that 'special circumstances' under s 66K(1)(e) are not limited to financial matters, as is the case with s 75(2)(o): *Re AM (Adult Child Maintenance)*. In response to a submission to the contrary, his Honour said simply:

I disagree. There may be many more general considerations such as those mentioned . . . above [which included the adult-child relationship] which, if ignored, would cause injustice or undue hardship in an adult child maintenance claim.⁵⁰

One feature of the historical development of case law concerning these provisions is that nothing much has been made of any changes to the statute over time (or the move away from fault heralded by *Soblusky*); however, as discussed below, the provisions are now different in significant ways from their first iteration and this arguably affects their interpretation. Notably, originally it was the question of whether the maintenance was reasonably necessary which provided the opportunity to raise the parent-child relationship, whereas now it is the question of whether there is a special circumstance in the case that needs to be taken into account to ensure a person does not suffer injustice or undue hardship.

So, the case law establishes that while a positive parent-child relationship is not a pre-condition to the award of adult child maintenance, a poor relationship may act as a bar, though this may be overcome if the child has not overtly rejected the parent. This approach is well highlighted by the more recent case of *WLD & WPA*,⁵¹ where the applicant mother sought adult child maintenance from the father for their two adult daughters, L and H, while they finished university. L and H had very different views of the father, from whom they were both estranged since separation. L, the eldest, did not have any kind of affectionate relationship with her father and she did not want any further contact with him. Federal Magistrate Scarlett indicated that he assumed this was because L was hurt by the parents' separation and this was a coping mechanism.⁵² However H, the younger daughter, was apparently distressed at the breakdown in her relationship with her father and wanted to try to rebuild the relationship. Neither child felt emotionally strong enough to attend court, although the mother gave evidence that both children supported the application. The father's income was much greater than that of the mother; the father had voluntarily paid the mother \$1315 a month in maintenance from about the time of separation in 1999 for about a year and then voluntarily reduced that amount to \$500 on the basis that he needed to save a deposit to take on a mortgage. It was the mother's case that it was the father who had failed to pursue contact with his daughters after separation; the father's evidence on this is not clear from the judgment other than a record of a statement in his affidavit that the 'children have ceased contact with me' which

50 (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351 at [161].

51 [2002] FMCAfam 253.

52 *Ibid.*, at [31].

is unclear as to timing or any reason for the lack of contact.⁵³

Federal Magistrate Scarlett, referring to *Mercer* and *Oliver* and having noted ‘the court may take into account the nature of the relationship between parent and child’,⁵⁴ found that the filial relationship between L and the respondent had broken down completely and L had no interest in rekindling the relationship with her father. The application was refused in relation to L with only this comment: ‘If she, as an adult, chooses not to have any relationship with her father, why then should he contribute to her upkeep?’⁵⁵ On the other hand, because of the evidence as to H’s desire to re-establish a relationship with her father, she was awarded maintenance.⁵⁶

This outcome is interesting in light of the comments of Fogarty J in *Marriage of H* and Warnick J in *Cosgrove*. First, the children are treated differently and the child who fails to put aside her issues with her father is financially disadvantaged. Second, notwithstanding the apparent relevance of causation, there is no detailed investigation of the reason for the breakdown in the relationship.

Similarly, in *M & M*,⁵⁷ also decided by Scarlett FM, maintenance was refused for an adult child where the parties separated before birth and the child had never met his father. The mother was antagonistic towards the father, on the basis he had ‘abandoned’ them, and his Honour was satisfied the child had taken on his mother’s views. Without exploring why the father had not more actively pursued a relationship with his son, his Honour said:

This young man knows who his father is and has not sought to have contact with him. The respondent paid child maintenance, albeit at a very low rate, until his son reached the age of 18 years. The son has not sought to have any relationship with his father, and I am not satisfied that he can look to his father for financial assistance now that he is an adult.⁵⁸

Compare however the later case of the same name, *M v M*.⁵⁹ Contact between the applicant daughter and her father had broken down after, among other things, various disagreements about his willingness to contribute to specific costs during her minority. The daughter had sent some text messages to her father to the effect that he could forget he was her father as he cared more about his new partner; the father said his children from his former relationship were often disparaging about his new partner. The father’s evidence was that this was the trigger for the estrangement claimed and, much in keeping with Scarlett FM’s view, he argued the child’s unilateral decision to reject him disentitled her to any support as an adult. After considering the role both the father and mother undoubtedly played in the estrangement, and the need on the part of the father to have more empathy for the child’s situation, Emmett

53 Ibid, at [28].

54 Ibid, at [28].

55 Ibid, at [28].

56 Scarlett FM ordered that the maintenance be paid directly to H, not to her applicant mother.

57 [2002] FMCAfam 337.

58 Ibid, at [44].

59 [2004] FMCAfam 714.

FM concluded that the evidence did not establish the estrangement was the 'sole fault' of the child and as such she was not disentitled from an award of maintenance.⁶⁰

In some decisions it has been the quantum of maintenance awarded that has been affected by a poor filial relationship.⁶¹ In *Re AM*,⁶² the question of the relevance of the adult-child relationship arose in the context of a case where the applicant child was relying on her disability, rather than completion of education, as a ground. Justice Carmody affirmed the obiter comment in *Cosgrove* that there could be cases where the filial relationship is relevant in deciding whether to award maintenance, even if the requirements of s 66L have been met.⁶³ However, his Honour also agreed with Asche J in *Oliver* that it should not be standard practice that the filial relationship be analysed in every application for adult child maintenance. Justice Carmody finally noted that, if it were relevant, the parent-child relationship is 'obviously relevant to both quantum and contribution issues'.⁶⁴ This makes sense given that s 66K deals with the question of the contribution, if any, a parent should make, rather than the question of whether the maintenance is reasonably necessary, which arises under s 66L. The outcome in this case was that, due to her relatively poor relationship with her father,⁶⁵ he was ordered to pay a lesser amount of adult child maintenance than was her mother, who was in a weaker financial position as compared with the father. We return to this case later, as it highlights the effect such decision-making can have for the carer parent.

So, a somewhat confused picture emerges. Based on the case law, and notwithstanding arguably significant intervening statutory amendment and cases such as *Soblusky*, the adult-child relationship can be relevant to the award of adult child maintenance, both in terms of entitlement and quantum. However, given the continued reliance on early case law, there is some confusion as to whether or not this relates to the question of whether the maintenance is 'reasonably necessary'. While a number of judges have emphasised the need to be cautious in rewarding children who act to promote a relationship with their parent over those who do not, this is precisely what will happen if a child appears to reject a parent and no clear investigation is made as to the root cause of the poor relationship. The level of assessment of the cause of relationship breakdown varies and the question of onus of proof has not been addressed. Further, while many judges opine that this should not be a regular enquiry in such an application, it is hard to see how it can be avoided where the respondent raises the issue.

Critique of the present approach

There are a number of levels on which this approach can be challenged. First, there is the question of precisely what the statute permits; that is, its proper,

⁶⁰ Ibid, at [33].

⁶¹ See the comments of Lindsay FM in *Wadsworth & Wadsworth* [2008] FMCAfam 140; BC200801054.

⁶² (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351.

⁶³ Ibid, at [131].

⁶⁴ Ibid, at [134].

⁶⁵ In fact there is no detailed discussion of the relationship evidence in this case at all, though it is apparent from the judgment that the relationship was 'strained' (see *ibid*, at [134]).

current interpretation. It would seem no case for considering the parent-child relationship can be made on the basis of the word ‘proper’ being included in s 66G (*Soblusky*). Moreover, a direct provision has now been included that provides an obvious basis for this being a relevant consideration: s 66K(1)(e).⁶⁶ Early case law was based on provisions that did not include the equivalent of s 66K(1)(e) but relied rather on general maintenance provisions with a general catch-all clause. However, those early adult child maintenance decisions did not factor in Full Court decisions on s 75(2)(o) such as *Soblusky* that eschewed an interpretation permitting considerations of fault unrelated to financial matters. Further, while the two sets of amendments to the maintenance provisions since that time may have been *intended* to replicate the substance of the 1976 provisions, they did not. Unlike the first iteration of the adult child maintenance provision, s 66K(1)(e) is located in a section dealing with the contribution that a parent should make, rather than with whether the maintenance is ‘necessary’. Section 66K(1)(e) does not forestall a finding that no contribution at all should be made, and this section clearly permits a discretion not to award maintenance, or to reduce the award, based on ‘special circumstances’ giving rise to ‘injustice’ or ‘undue hardship’.

Justice Carmody’s conclusion in *Re AM (Adult Child Maintenance)* that ‘special circumstances’ are not limited to financial matters may be sustainable, as there are unusual matters that might arise in adult child maintenance cases (for example, the very question that arose in *Re AM (Adult Child Maintenance)* — namely, the consequence of an adult child’s disability arising after the age of 18). However, *even if* this section permits a consideration of matters beyond the purely financial, that does not, without more, justify taking into account the relationship between parent and child.

Further, there is a question here as to the onus of proof in relation to s 66K(1)(e). Based on the case law, investigations into parent-child relationships should be exceptional and this is consistent with the terms of the section which requires a ‘special circumstance’. This special circumstance must, in these cases, cause an injustice or undue hardship *to the parent*. Why therefore does the onus not lie on the parent to show they were *not* the cause of the breakdown in the relationship? Surely they must establish the ‘special circumstance’ to invoke its consideration in reducing their contribution; this can only be ascertained by looking more deeply into the basis of the estrangement. Instead, in *WLD & WPA* it seems the failure of the daughter to provide evidence on the point was fatal.⁶⁷ It is difficult to see how simply raising a poor relationship without further evidence as to cause can satisfy a court to the requisite standard that injustice or undue hardship will be caused to the parent. It appears that the present approach permits the respondent parent to highlight the poor relationship with the effect of shifting the onus back to the applicant to show that the estrangement is not the child’s fault.

There is also the notable distinction between the adult child maintenance provisions, and those governing step-child maintenance. Under s 66M(3)(c)

⁶⁶ This seems to be accepted by Carmody J in *Re AM (Adult Child Maintenance)* (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351.

⁶⁷ Scarlett FM specifically refers to the impact of the children not giving evidence in this case: [2002] FMCAfam 253 at [11].

the court is required to consider 'the relationship that has existed between the step-parent and the child' in deciding whether to make an order for maintenance. These words are presumably deliberately absent from s 66L. Indeed, the provisions governing step-child maintenance awards as set out in ss 66M and 66N are quite distinct from those governing the support by parents of their (legal) children. For example, the making of any step-child maintenance order will always take into account the extent to which the legal parents can, and are, supporting the child (s 66N(b)). It is to be expected that very different considerations apply to the making of an order that a parent support *someone else's* child.

Second, there is a danger the enquiry into the parent child relationship reflects a fault-based approach (with a strong connection to marital fault) inconsistent with the general no-fault philosophy of the FLA. While a full history of the role of fault in proceedings under the FLA is beyond the scope of this article, it is worth pausing to consider what lies behind this exceptional treatment of adult children. Federal Magistrate Emmett squarely cast the question in terms of whether or not the estrangement was the child's fault; this can only mean, as opposed to the fault of the parent(s). On the one hand, there seems no justification for the narrow approach of Scarlett FM, namely, to engage in only a cursory examination of whether a child is at fault in choosing to abandon a relationship. This is not consistent with other judicial statements to the effect that the parental role in the state of affairs must be considered. However, if a true investigation of the root cause of the poor relationship is undertaken, then there is a very grave danger we have arrived back at a form of investigation of marital fault, only in the context of a child maintenance award. The question of the role of the child, and both parents, in causing the poor relationship will invariably be interlinked and is very likely to be bound up with the circumstances surrounding, and following, separation. Searching for blame would in most cases be a long and complex assessment of more than 18 years of a relationship, with a heavy focus on the parental relationship. This would be expensive and completely out of keeping with other maintenance proceedings. Indeed, one might well question how blame for a poor relationship can reasonably be allocated as between parent and child.

Third, why is this approach applied to adult and not minor children? The mere fact that the children in question are adults does not justify this difference. No such approach is adopted in relation to spousal maintenance where the nature of the relationship and fault in relation thereto are irrelevant.⁶⁸ In spousal maintenance cases the relationship will invariably be poor, as evidenced by their presence in court; if it were otherwise, it would leave those provisions little operation⁶⁹ and would result in a return to questions of marital fault. It is difficult to fathom why the court would assume that parent-child relationships of parties engaged in litigation would, or indeed should, necessarily be any better than spousal relationships. As Carmody J

⁶⁸ *In the Marriage of Soblusky* (1976) 12 ALR 699; 28 FLR 81; 2 Fam LR 11,528; (1976) FLC 90-124.

⁶⁹ As Fogarty J noted in relation to adult child maintenance applications in *Marriage of Gamble*; see text accompanying n 34 above.

noted in *Re Am (Adult Child Maintenance)*⁷⁰ in the context of an application for adult child maintenance based on disability:

Most married parents in an intact family situation would voluntarily care for and support a permanently disabled child. The same will not always be true in familial relationships damaged or destroyed by separation or divorce.⁷¹

It is hard to see how a poor relationship between a child and parent post-separation can be classified as a 'special circumstance'; it would seem to be quite a common state of affairs.

As the preceding discussion illuminates, no rationale has been provided, nor readily presents itself, for the special treatment of adult children in this regard. Given that the key and only statutory distinction made between adult children and minor children in the FLA maintenance provisions is that adult child maintenance must be for specified purposes,⁷² there should be some clearly articulated basis provided for the different treatment of adult and minor children in relation to the consideration of the parent-child relationship. It is not sufficient simply to state the difference lies in the child being an adult; such a tautological response is already accounted for by the legislation in the sense that the fact of majority limits the purposes for which maintenance can be claimed.

The family provision analogy

In *Re AM (Adult Child Maintenance)*,⁷³ Justice Carmody suggested that there may be some parallel between adult child maintenance applications and family provision claims:

The principles that apply to deciding needs based claims against a deceased estate are not dissimilar to those applicable to a living estate. The general rule is that the testator has a duty to provide for his children and other entitled persons, provided that they are not morally or otherwise undeserving.⁷⁴

Somewhat confusingly, however, Carmody J also said, after making the above comment, that separated couples will not necessarily volunteer to support their adult disabled children in the same way as intact couples:

However, neither marital status nor the attitude of the parent to the child or the responsibilities of parenthood affects the level of need and should not make any difference to the provision of financial support either.

But my own views on filial morality are entirely irrelevant and must be put aside.⁷⁵

70 (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351.

71 Ibid, at [179].

72 It may be argued that the discretionary nature of the award of maintenance is another difference. However, as Carmody J notes in *Re AM (Adult Child Maintenance)* (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351 at [126], the basis of this discretion is unclear. However, to the extent that it arises from ss 66G or 66K, those same provisions apply to minor children. The only other basis Carmody J posits, without more, is the 'exceptional nature' of s 66L itself: *ibid*, at [126].

73 (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351.

74 Ibid, at [139].

75 (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351 at [179]-[180].

Therefore, it is not entirely clear what role Carmody J sees ‘morality’ playing in the application of the adult child maintenance provisions. His Honour is, of course, correct that morality is relevant to family provision claims. The purpose of family provision legislation is to ‘subject freedom of testamentary disposition to discretionary curial intervention in certain classes of cases, where moral rights and obligations of support were disregarded’.⁷⁶ The enquiry as to an applicant’s conduct in a family provision claim concerns the question of whether the applicant’s behaviour can be seen to render them morally undeserving.⁷⁷ The court measures the applicant’s behaviour against prevailing community standards of acceptable family conduct:

It is often impossible to work out whether the degree of separation between parent and child . . . is solely the fault of either or whether it has come about by factors too strong for either to control or somewhere in between.

The important matter is not fault, but, whether in all the circumstances it would be expected by the community that the testator would have to make a greater benefaction than he in fact did to constitute proper or adequate provision for the plaintiff.⁷⁸

Thus, family provision law applies only to *moral*, as opposed to *legal*, obligations. The same cannot be said for claims of child maintenance; and the High Court has recently cautioned (in the context of discussing what ‘just and equitable’ means in s 79 property proceedings) against importing notions of morality into family law decision-making in the absence of any legislative foundation.⁷⁹

Further, it must be remembered that in adult child maintenance proceedings there is often someone else who will be left to meet the legal duty of financial support if the respondent parent does not pay — usually the carer parent. Conversely, much of the discussion about family provision considers the mischief of effectively making the state responsible for the support of the potential claimant, if the deceased is allowed to ignore their moral duty. The different situation in child maintenance proceedings is reflected in the FLA provisions, which focus on the equitable sharing of the parental duty to maintain — this does not feature as a consideration in the same way in family provision decision-making.

Moreover, the principles developed in the law of succession as to when a child will be unsuccessful in a family provision claim due to a poor relationship with their deceased parent are significantly different from those in adult child maintenance case law. The court will certainly consider the nature and cause of any estrangement between the applicant and the deceased in a family provision claim, however *the mere fact* of an estrangement is relevant ‘even if the applicant bears no responsibility’ for it.⁸⁰ This is apparently not the case for adult child maintenance claims. Further, family provision

⁷⁶ *Barns v Barns* (2003) 214 CLR 169; 196 ALR 65; [2003] HCA 9; BC200300694 at [2].

⁷⁷ *Ford v Simes* [2008] NSWSC 1120; BC200811328 at [71]–[72].

⁷⁸ *Walker v Walker* (unreported, NSW SC, Young J, 17 May 1996) at [27].

⁷⁹ *Stanford v Stanford* (2012) 247 CLR 108; 293 ALR 70; [2012] HCA 52; BC201208691 at [52].

⁸⁰ R Croucher and P Vines, *Succession: Families, Property and Death*, 4th ed, LexisNexis, Sydney, 2013, at [15.21], citing *Keep v Bourke* [2012] NSWCA 64; BC201202032.

legislation specifically invites the court to consider the ‘character and conduct’ of any applicant for family provision,⁸¹ whereas there is no specific reference to this in the FLA. As a result, family provision cases in this area often consider causation in some depth; however, as Croucher and Vines note, even in that context, ‘[c]are should be taken not to oversimplify the complex and nuanced relationships within a family by yielding to the temptation to condemn categorically the behaviour of one party or the other’.⁸² Therefore, a degree of understanding and forgiveness has come to be expected of testators.⁸³ The approach of judicial officers of the family law courts is inconsistent in this regard. Family provision cases also show that long estrangements of some decades have considerable impact on family provision claims whereas relatively short estrangements may have little impact.⁸⁴ Again, this does not accord with the treatment of adult child maintenance cases, where the length of an estrangement has not featured as a significant factor.

If we can draw anything from the area of family provision, it is that, if the adult-child relationship is to be considered, due consideration must be given to the cause of any estrangement and, as Emmett FM noted, a little more empathy and understanding from parents who are estranged from their children should be expected. However, this brings us full circle back to the question of fault, and it does so in the absence of any legislative prescription, contrary to the situation in family provision law. Therefore, there is little to be gained from any analogy with the law on family provision and so we are left without any rationale for this unusual approach adopted by the family law courts in relation to the awarding of adult child maintenance.

Conclusion

In this article we have traced the history of the legislation and case law in relation to the significance of the adult-child relationship to the award of adult child maintenance. We have argued that the long-standing — and exceptional — approach of the family law courts in this area is not founded on any articulated rationale, has no clear legislative basis and has been applied in inconsistent ways. No doubt there is an intuitive attractiveness to barring the maintenance claims of seemingly ungrateful adult children. Indeed, there may be a robust argument that could be made in support of the present approach, at least as to the question of whether this matter should be considered at all. However, even if there is, we cannot see how this leads anywhere other than to a kind of fault-based analysis that the court has to date generally eschewed; at the very least such an approach demands clear justification.

The preceding discussion suggests there are many good reasons to abandon this anomalous principle:

81 Eg, Inheritance (Family and Dependents Provision) Act (WA) 1972 s 6(3); Succession Act (NSW) 2006 s 60(2)(m).

82 Croucher and Vines, above n 80, at [15.21].

83 See, eg, *Foley v Ellis* [2008] NSWCA 288; BC200809815.

84 Compare, eg, *Ford v Simes* [2008] NSWSC 1120; BC200811328 and *Curran v Duncan* [2006] WASC 9; BC200600166.

- It was developed under prior, and different provisions, without proper regard to how those provisions were being interpreted more generally in relation to fault-based enquiries.
- It is not required by the current legislation and sits uncomfortably with interpretations developed in child support and spousal maintenance law.
- No rationale has been articulated, or is discernible,⁸⁵ for treating adult child maintenance differently in this regard from spousal maintenance and child support.
- It invites odious comparisons between children and discriminates between them according to how they cope with an often difficult parental separation.
- It is applied inconsistently.
- Even if it were applied consistently, and the causes of the poor relationship were properly explored, it would herald a (very expensive) return to fault-based discourse. This would further discourage applications of this kind, which are already very uncommon. This is concerning given the impact this already has on the ability of children of separated parents to fulfil their potential in comparison to those in intact families.⁸⁶
- It has the potential to severely disadvantage primary caregivers who — by reason only of a better relationship with the parties' adult children — may end up bearing the brunt of post-secondary education (or indeed disability) induced dependency even if their financial circumstances are less secure.

The case of *Re AM (Adult Child Maintenance)*⁸⁷ is particularly telling in relation to the last point. The adult child here claimed her needs were \$2256 a week. She also sought a lump sum for alterations to her home to enable her to remain there. The mother, who supported the daughter's application, was joined in the proceedings and offered to pay \$1000 a week plus a lump sum or at least half of any child maintenance order. The father denied liability based on the late onset of the child's medical condition (that is, it manifested itself after she turned 18) however he had been voluntarily paying \$1000 a month and alternatively claimed this met any liability he might have. He further disputed liability on the basis of 'disentitling' grounds. It was found that the child's needs were \$1500 a week. The applicant and her mother argued that under s 66K(1)(e) the 'special circumstances' must cause economic injustice or hardship. Justice Carmody rejected this interpretation, adopting the traditional approach to these cases. The reasoning of his Honour, which follows, highlights the potential impact of this approach on carer parents:

If the [mother's] . . . offer to pay \$1000 a week . . . was accepted, there would be a shortfall of \$500 left for the [father] . . . to contribute.

⁸⁵ Note however the discussion above about step-child maintenance.

⁸⁶ See the discussion of these issues in Smyth, above n 2.

⁸⁷ (2006) 198 FLR 221; 35 Fam LR 319; (2006) FLC 93-262; [2006] FamCA 351.

However, I think *fairness* requires some adjustment in recognition of the past sacrifices made by the [mother] . . . in caring and financially supporting the applicant. The [mother] . . . should, therefore, contribute \$975 a week compared to the [father's] . . . \$525.

The sum of \$1200 . . . a month may be sufficient to discharge a moral duty to provide for a disabled daughter, but it is inadequate . . . to satisfy a legal liability arising under the Act.

I am mindful that this result will be more demanding on the [mother] . . . than the [father] . . . The [mother] . . . will be fully extended while the [father] . . . will not. Her proportionate contribution would be much greater than his. *This is regrettable but it reflects the history of financial relations within the family* and it is still less than what she is willing and able to pay, while the size of the [father's] . . . contribution . . . is more than he currently pays and nearly double what he concedes.

My obligation is to share the burden equitably not equally. I know the [father] . . . can pay much more *but capacity is not the only consideration*. The [mother] . . . will be stretched to the limit in meeting this order but *that is the way she has structured her finances in the past five years anyway*.

Equity is not equivalence. It is characterised by what is fair and reasonable in all the circumstances.⁸⁸

It is difficult to see what underpins this notion of fairness. The acknowledged failure by the father to meet his full legal duty of support to his daughter, the fact that this resulted in (presumably expensive) legal proceedings for all concerned and adversely affected his relationship with his daughter, as well as effectively forcing the mother to pick up his share of the burden, all became factors *that weighed in his favour*. Justice Carmody was simply trying to apply this fraught principle and there is nothing in his Honour's judgment that is out of step with prior decisions. However, this discussion and the outcome highlight the lack of any coherent rationale underlying this anomalous approach and its discriminatory effect in the case of the two parents concerned. At the very least, if the court wishes to leave the door open in terms of what counts as 'special circumstances', greater consideration needs to be given to the question of the relevance of the adult-child relationship in adult child maintenance applications, and a coherent rationale provided as to why this one area attracts this approach. For example, why not apply s 75(2)(o) in the same way? What is the magical difference between the behaviour of a 17-year-old in high school⁸⁹ and an 18-year-old at university? How is this approach different from a fault-based enquiry of old?

It seems unlikely that many of these cases will reach the Full Court and so the opportunity for judicial reconsideration is limited. However, this is nonetheless a principle in dire need of reconsideration.

⁸⁸ Ibid, at [162]–[167] (emphasis added).

⁸⁹ See, eg, the conduct of the children in *Stirling v Dobson* (2011) FLC 98-056; [2011] FMCAfam 52; BC201100158 at [43]–[44].