INCAPACITY AND THE JUSTICE SYSTEM IN VICTORIA[1]

DISCUSSION PAPER

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1 INTRODUCTION

PILCH believes that access to the justice system is central to the effective promotion and protection of human rights including the right to equality before the law.[2] This was also the view of the Hon Robert McLelland MP, former Commonwealth Attorney General who noted that access to justice is "a basic human right that is central to the rule of law".[3]

The right to equal recognition before the law is enshrined in the International Covenant on Civil and Political Rights (ICCPR)[4], the UN Convention on the Rights of Persons with Disabilities (CRPD)[5] and the *Charter of Human Rights and Responsibilities Act* (Vic) 2006[6].

However, in our experience and the experience of other practitioners who work with clients who lack legal capacity, the Victorian justice system does not always effectively promote access to justice.

This discussion paper arises from a paper titled "Incapacity – Barrier to Access to Justice?"[7] delivered at the 2012 2nd World Congress on Adult Guardianship and subsequent informal discussions between representatives from PILCH, the Office of the Public Advocate (OPA), the Law Institute of Victoria and others (the Working Group).

The purpose of this discussion paper is to outline the current legal position in Victoria and to consider whether law reform is desirable to ensure access to the justice system and equality before the law for those who lack capacity.

The paper considers a number of ways in which the legal system's response to incapacity[8] might limit access to justice in Victoria.

First, lawyers are subject to competing ethical obligations which may impact their ability to act for a person whose capacity is in doubt.

Second, the potential liability of litigation guardians may operate to discourage people from voluntarily acting in this role when it is required.

Finally, in Part 4, the paper considers whether the rights of persons lacking capacity are otherwise adequately promoted and protected to ensure access to the justice system in Victoria.

2 CAN A LAWYER ACT FOR A CLIENT WHOSE CAPACITY IS IN DOUBT?

A lawyer's concerns about his or her client's capacity may constitute a barrier to access to justice in circumstances where the client refuses or is unable to consent to investigations in relation to their capacity. Similarly, a lawyer may feel compelled to elect to cease acting for a client who lacks capacity if that person is unable to or refuses to consent to an application for the appointment of a substitute decision maker.

In these circumstances, the solicitor is bound by his or her duty of confidentiality from revealing any information obtained within the context of the solicitor client relationship to a third party without the client's consent.

On the other hand, the lawyer has a duty to advance and protect their client's interests.

This clash of duties may result in the lawyer ceasing to act for the client, leaving the client with no real means of access to the justice system.

2.1 The law in Victoria

2.1.1 If legal proceedings are on foot

This potential conflict has been resolved in circumstances where there are proceedings on foot. If a lawyer has doubts about their client's capacity in these circumstances, the lawyer is under a duty to raise those concerns with the court notwithstanding their duty of confidentiality to the client.

In the recent Victorian Supreme Court case of *Pistorino v Connell & Ors*[9], the court applied the test in *Goddard Elliott v Fritsch*[10] and stated at [6] that:

> *Mrs Pistorino's legal practitioners have a clear and unambiguous duty to raise with the court the issue of her capacity to conduct this and related litigation. Once the matter is raised the court will inquire into the question. The focus of the enquiry is relevantly upon the capacity of Mrs Pistorino to give clear instructions and to understand and act on the advice which she is given. In the exercise of jurisdiction the court is acting both to protect the interests of the person with a relevant disability and to protect the court's own processes.*

It is clear from this decision that if proceedings are on foot and the lawyer acting for one of the litigants has unresolved concerns about their client's capacity to instruct, the lawyer is under a duty to raise those concerns with the court.

In the event that the court finds that the client does not have legal capacity, it may be necessary to appoint a litigation guardian to conduct the litigation on behalf of the client. We discuss some issues in relation to the appointment of a litigation guardian below.

2.1.2 If proceedings have not yet commenced

The obligations of a lawyer are less clear when a lawyer doubts their client's capacity but proceedings are not yet on foot.

Victorian solicitors are bound by the *Professional Practice and Conduct Rules* 2005 (the Rules). Victorian barristers are subject to the Victorian Bar Rules[11] which contain similar obligations to the Rules. The Rules impose a duty of confidentiality and a duty to seek to advance and protect the client's interests.

An express duty of confidentiality is contained in the Rules at rule 3 which states that a "practitioner must never disclose to any person, who is not a partner; proprietor; director or employee of the practitioner's firm, any information which is confidential to a client and acquired by the practitioner's firm during the client's engagement".

One exception to this duty of confidentiality is if the client authorises the disclosure.

The duty of confidentiality may conflict with the duty owed to the client to advance and protect the client's interests, expressed in rule 12 of the Rules.

Both the duty of confidentiality and duty to act in the clients' best interests are repeated at rule 1.1 of the Rules which states that a "practitioner must, in the course of engaging in legal practice, act honestly and fairly in clients' best interests and maintain clients' confidences".

A 2008 Law Institute of Victoria Ethics Committee Ruling suggests that where a lawyer has doubts about their client's capacity they should seek medical advice and where the client refuses to consent to a medical assessment they *may* cease to act for the client, giving reasons.[12]

Further, if the lawyer is of the view that the client does not have capacity, they may make an application to have a guardian appointed unless the client objects to the application in which case they *should* cease to act, giving reasons.[13] In these circumstances, the client is likely to have no real means of accessing the justice system or realising their right to equality before the law.

2.2 The law in New South Wales

There is New South Wales authority for a qualification to the obligation of confidentiality in these circumstances. The 2001 New South Wales decision of *R v P*[14] concerned a solicitor who brought an application for a Protective Order against his client's wishes. The Court held that there was no absolute rule against a solicitor bringing an application for the appointment of a guardian or administrator against their client's express wishes.[15] The Court further stated that there was no misuse of confidential information in the circumstances.[16]

However, Hodgson JA noted that the bringing of such applications by a solicitor is extremely undesirable.[17] Solicitors should only bring such applications as a last resort where all other avenues, including the possibility of other persons bringing such actions, have been explored.[18]

This position is reflected in the Law Society of New South Wales Guide published in 2009 titled '*When a client's capacity is in doubt: A practical Guide for Solicitors*'. The guide explicitly states that the case of R v P is a 'qualification to the duty of confidentiality owed by solicitors to clients'.[19]

2.3 The law in the United States of America

On the other hand, the law in the United States of America provides an express exemption to the lawyers' duty of confidentiality.

The American Bar Association, *Model Rules of Professional Conduct* (American Bar Association rules), includes a general confidentiality rule with broader exemptions than exist in Victoria. An exemption applies in circumstances in which a lawyer reasonably believes that the client has diminished capacity.

In order for the exemption to apply, the lawyer must reasonably believe that the client has diminished capacity and that the client is at risk of substantial physical, financial or other harm unless action is taken.[20] In these circumstances the American Bar Association rules permit the lawyer to take reasonably necessary protective action.[21] This may include consulting with third parties who have the ability to take action to protect the client and in appropriate cases, seeking the appointment of a guardian.[22]

When taking protective action, the lawyer is impliedly authorised to reveal information about the client to the extent reasonably necessary to protect the client's interests.

However, commentary on the American Bar Association rules notes that the lawyer's position in such cases is still an unavoidably difficult one.[24]

2.4 The law in South Australia

The general position articulated by the Law Society of South Australia (Law Society) is that where a lawyer doubts his or her client's capacity to instruct, the lawyer cannot seek legal protection for the client as this would entail revealing confidential information about the client to a third party.[25]

There is, however, a limited mandate for a lawyer to act when their client is of "unsound mind".

Section 40(3) of the *Legal Practitioners Act 1981* (SA) permits a practitioner under an existing retainer to take action to protect their client's interests where the lawyer is unable to obtain further instructions as a result of their client's unsound mind "for the purpose of completing those proceedings or that business."[26]

Whilst the extent of the operation of this section is unclear, the terms of the section suggest that it could be relied on to take interim procedural or protective steps in relation to a current dispute or transaction.[27] It is unclear whether it could extend to steps such as accepting an offer of compromise without further instructions from the client.[28]

Whilst it is the position of the Law Society that a lawyer cannot institute guardianship proceedings against the instructions of their client without breaching both the duty of confidentiality and the duty of loyalty to advance the client's interests[29], it nevertheless recommends that lawyers in this situation should not cease to act. Rather they should remain with the client even if nothing can be done.

The Law Society also notes that a permanent impasse will be rare and that practices including openly discussing concerns about capacity and recommending third party assessment and support will usually permit instructions to be obtained.[30]

2.5 Is law reform desirable?

If there is no clear exception to the lawyers' duty of confidentiality, lawyers may cease acting for disadvantaged clients. This may result in a client moving from lawyer to lawyer or worse, being left unrepresented.

However, if a statutory exception were to be introduced, there may be a risk that lawyers would more readily make applications for the appointment of a substitute decision maker. Applications could potentially be made without the lawyer first trying to adequately support the client to enable the client to provide instructions themselves.

Question 1: Is law reform to introduce a statutory qualification to the duty of confidentiality to enable lawyers to take action (in certain prescribed circumstances) where their client's capacity is in doubt desirable?

3 POTENTIAL LIABLITY OF LITIGATION GUARDIANS

3.1 Does the requirement that a VCAT appointed substitute decision maker must also be appointed as a litigation guardian in order to conduct proceedings external to VCAT, impede access to justice?

The recent Victorian Court of Appeal case of *State Trustees Ltd v Andrew Christodoulou*[31] "suggests that an administrator may be required to seek appointment as a litigation guardian to exercise the power granted by the Guardianship and Administration Act to conduct litigation in the name of a represented person"[32].

In that case, the Court of Appeal held that the *Supreme Court (General Civil Procedure) Rules* 2005 (the SC Rules) applied despite the provisions of the *Guardianship and Administration Act 1958* (Vic) (the G&A Act) under which State Trustees was appointed to make the plaintiff's legal and financial decisions. Consequently, it was argued that State Trustees should have taken the necessary steps under the SC Rules to have been appointed as litigation guardian. The fact that they did not take this step did not prevent the Court exercising its discretion to make an adverse costs order against State Trustees.

State Trustees has since indicated that it is not willing to undertake litigation on behalf of their clients following this decision.[33] The State Trustees submission to the Victorian Law Reform Commission (VLRC)

Guardianship review supported the introduction of legislation that would clarify the position in relation to guardians and administrators.[34]

The VLRC noted that there is broad acceptance of the principle that guardians or administrators should not be liable for the costs except where they have acted improperly.[35]

Question 2: Is it desirable to reform the relevant legislation to provide that it is not necessary for a guardian or administrator to seek formal appointment as a litigation guardian when conducting proceedings on behalf of a represented person within the confines of their authority?[36]

Question 3: Is it desirable to reform the law to provide that a guardian or administrator who conducts legal proceedings on behalf of a represented person should not be personally liable for costs except where they have been negligent or engaged in misconduct?[37]

3.2 Does the potential costs liability of litigation guardians limit access to justice?

A litigation guardian acting on behalf of a plaintiff in a proceeding is personally liable for an adverse costs order.[38] Where a cost order is made against a litigation guardian and the litigation guardian has acted properly, they are entitled to be indemnified by the plaintiff for the costs.[39] One reason given for the requirement that a plaintiff under a disability is to act by a litigation guardian is to provide security for the defendant's costs.[40]

In the English decision of *Morgan v Morgan*[41] it was held that a guardian defending proceedings should not be required to pay the plaintiff's costs unless there was evidence of gross misconduct. This position has been adopted in Australia in *Australian & New Zealand Banking Group Limited v Dzienciol*[42]. The Court held that it had discretionary power to award costs against a litigation guardian but that costs should not be ordered where the guardian was defending a proceeding on the represented person's behalf unless there has been some misconduct. The Court's reasoning was that a defendant had no control over their involvement in proceedings and should not be liable for costs unless the defendant essentially becomes, the attacker, for example, in counterclaim situations.

The litigation guardian's interest in the cost consequences of a proceeding could in some cases be considered an adverse interest to the interests of the represented person. Litigation guardians may be more likely to avoid litigation or to settle or abandon a claim based on fear of an adverse cost order. If this is the case, rule 15.03(1) of the SC rules, which requires that a person to be appointed litigation guardian have no adverse interest to the person under a disability, cannot sensibly apply.

The potential cost liability of a litigation guardian has also been observed by several commentators to have discouraged people (and organisations) from voluntarily accepting the role[43].

Question 4: Does the potential liability of litigation guardians constitute a barrier to access to justice?

Question 5: Is it necessary or desirable to legislate that a litigation guardian is entitled to an indemnity from the estate of the represented person? Is this sufficient in cases where the estate of the represented person is insufficient to cover the legal costs? Are there other options?

4 ARE THE RIGHTS OF PEOPLE WITH A DISABLITY ADEQUATELY PROMOTED AND PROTECTED WITHIN THE JUSTICE SYSTEM IN VICTORIA?

4.1 Does the process for the appointment of a litigation guardian promote and protect the rights of people with a disability?

Litigation guardians are currently appointed by the court in which the proceedings are taking place pursuant to the relevant court rules. For example, Order 15 of the SC Rules requires a person under a disability (being either a minor or handicapped person incapable of managing his or her affairs in relation to the proceeding due to injury, disease, senility, illness or physical or mental infirmity) to commence or defend proceedings by way of litigation guardian.

The SC Rules do not set out a specific test for establishing that a person is incapable of managing his or her affairs. However, the case law considers the concept of capacity in some detail.

The leading case is the High Court decision of *Gibbons v Wright*[44]. In that decision the High Court considered capacity in the context of a power of attorney and, more generally in relation to all transactions involving signed documents. The court held that the law:

> *"… requires in respect of every transaction a capacity in each party to understand the general nature of what he is doing by participating in that transaction. The requirement is satisfied, where a transaction is contained in a written instrument, if each party is capable of understanding the general purport of the instrument when it is explained to him. It is prudent to identify that the person is able to understand the nature of the contract, its purpose, its possible outcomes, and the risks, which may be many."*

The relevant test in Victoria for capacity to instruct a lawyer is the recent Supreme Court decision of *Goddard Elliott (a firm) v Fritsch*[45]. In this case, Bell J made a number of important findings and observations:

> *"…the focus should be on the capacity of the client to understand they have a legal problem, to seek legal assistance about the problem, to give clear instructions to their lawyers and to understand and act on the advice which they are given…"*

Participants of the Working Group are aware of cases where litigation guardians have been appointed on the application of a solicitor without the court testing the evidence to establish that the litigant was in fact a person under a disability.

VCAT has expertise in assessing whether a person is under a disability and whether that person needs a substitute decision maker. The G&A Act provides a comprehensive framework in which VCAT exercise the powers under the G&A Act.

The Magistrates Court, County Court and Supreme Court are able to refer the issue of whether a party before the court may need to have a guardian or administrator or both appointed under the G&A Act to VCAT for a determination pursuant to section 66 of the G&A Act. However, following the decision of Christodoulou[46], the guardian and/or administrator appointed by VCAT may also be required to be appointed litigation guardian in the relevant proceedings.

Participants of the Working Group also expressed concern that some practitioners equate a finding that a person lacks the mental capacity to participate in legal proceedings to that person lacking the mental capacity to perform the usual activities of daily life. This is contrary to law. In the case of *Goddard Elliott (a firm) v Fritsch*[47] Justice Bell noted "a person can lack the mental capacity to participate in legal proceedings yet be capable of performing the usual activities of daily life".

Question 6: What are the experiences of litigation guardians?

Question 7: What are the experiences of solicitors and barristers who represent clients with a litigation guardian?

Question 8: Does the process for the appointment of a litigation guardian promote and protect the rights of people with a disability? To what extent are appropriate assessments undertaken to investigate incapacity? Is it desirable to refer some/all applications for the appointment of a guardian and/or administrator to VCAT? Would this require law reform to clarify that a guardian or administrator has the power to conduct legal proceedings on behalf of the represented person without the need for the guardian or administrator to be appointed litigation guardian? Is it possible to reform the law to enable a referral to VCAT when the matter is before a Federal court?

Question 9: To what extent do lawyers and the judiciary understand the concept of capacity? Are appropriate assessments undertaken?

4.2 Is there sufficient clarity around the scope of the role of a litigation guardian?

The SC Rules provide some guidance as to the scope of the role of a litigation guardian. Similar rules apply in each of the other States and Territory as well as in the Federal Court and Family Court.

Under the SC Rules, the litigation guardian can take any action that a party would be permitted or required to take under the relevant rules in relation to the proceeding.[48] The SC Rules also require that the litigation guardian act by a solicitor (unless they are a solicitor).[49]

Under the *Family Law Rules 2004*, the term "case guardian" is used to refer to a "litigation guardian". The *Australian Family Law and Practice Commentary* outlines the following functions and powers of a case guardian at [50-247].[50]

The first function is to take all necessary measures for the benefit[51] of the person with a disability in the conduct of the case, i.e. "to conduct litigation and provide appropriate instructions to do so".[52]

The case guardian is to be responsible for the costs of the legal practitioner acting for the person with a disability unless there is express agreement to the contrary. The case guardian has a right of indemnity for those costs from the proceeds of the litigation or otherwise out of the estate of the person with a disability. This right to indemnity is subject to having acted reasonably, and obtained any necessary orders.[53]

One key reason for the appointment of a case guardian is to allow court orders to be made which are binding on the person with a disability.[54]

The case guardian must act in a fiduciary manner to the person with a disability. The case guardian may not profit from the appointment. A professional person can, however, be paid professional fees if the court orders it.[55]

A case guardian is sometimes described as "an officer of the court"[56]. The case guardian is appointed by the court and assumes the court's burden of watching over the interests of the person with a disability.[57]

The case or litigation guardian is empowered and bound by the relevant rules of court. The case or litigation guardian must do anything which the person with a disability must do to comply with the Rules.[58]

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.[59]

As a case guardian may have no personal knowledge of matters, a court will not readily infer an allegation is admitted because it was not answered by affidavit.[60]

The case guardian is to obtain proper legal advice about the nature of the application and to give instructions. The case guardian must understand the advice and consider carefully any proposed settlement. They cannot merely rubber stamp any proposal or advice.[61]

However, the Victoria Legal Aid (VLA) Grants of Legal Assistance – Guide and Application form includes standard conditions of legal assistance which include at condition 5(a) the power of VLA to stop or change the legal assistance provided if the client does not follow the advice of their lawyer. Consequently, a grant of aid may be conditional upon the person in receipt of the grant accepting advice from their lawyer.

Question 10: Is there sufficient clarity around the scope of the role of a litigation guardian?If not, how is this best addressed?

Question 11: If this is best addressed through amending the court rules, to what extent do we want to amend the court rules bearing in mind that we don't want the court rules to be too restrictive? (Note there is an entire Act providing a framework for the appointment of guardians and administrators)

Question 12: Would the judiciary, legal professionals, litigation guardians and represented people benefit from further education in relation to the appointment of and scope of the role of a litigation guardian? How is this best achieved?

Question 13: Does a litigation guardian have conflicting duties to accept the advice of the lawyer funded by VLA and to not merely rubber stamp any proposal or advice from their legal representatives (see *Re Barbour's settlement*)? If yes, how can this be addressed?

4.3 Are there sufficient resources available to litigation guardians?

There are limited publicly available resources available to provide litigation guardians with guidance as to their role.

In Victoria, the OPA has published a guideline to assist it in determining whether it should act as litigation guardian in certain cases. Under the heading "What does a litigation guardian actually do?" the duties of a litigation guardian are summarized.[62]

The Tasmanian Guardianship and Administration Board has produced a document titled *Litigation by Administrators and Guardians: Background Information*. This document was last revised in 2007.[63]

Question 14: Could litigation guardians benefit from the development of a specific resource for litigation guardians in Victoria? If yes, how could this occur? (Funding, content, distribution)

4.4 Is there sufficient protection for a person under a disability to give evidence?

The *Evidence Act 2008* (Vic) (the Evidence Act) provides some protection for witnesses with a disability.

Section 13 of the Evidence Act states that a person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability), the person does not have the capacity to understand a question about the fact, or the person does not have the capacity to give an answer that can be understood to a question about the fact, and that incapacity cannot be overcome (for example, through an interpreter).

Section 41 of the Evidence Act states that the court has the power to disallow an improper question put to a witness in cross examination. Section 42 of the Evidence Act allows the Court to disallow a leading question put to a witness in cross examination. In deciding whether to disallow a question put to a witness, the court can take into consideration any mental, intellectual or physical disability of which the court is, or is made aware and to which the witness is or appears to be subject.

Section 85 of the Evidence Act provides that evidence of an admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected. In deciding whether the evidence of the admission is admissible, the court can take into consideration any relevant condition or characteristic of the person who made the admission, including any mental, intellectual or physical disability to which the person is or appears to be subject.

Question 15: Is this level of protection sufficient? If not, what else is required?

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2 PILCH Submission to the Attorney-General's Department on the *Strategic Framework for Access to Justice in the Federal Justice System*, November 2009, 2 http://www.pilch.org.au/Assets/Files/PILCH%20Submission%20to%20AG%20on%20Strategic%20Framework%20for%20Access%20to%20Justice%20_FINAL_.pdf

3 The Hon Robert McClelland MP, '*Remarks at the Queensland Law Society Symposium*', speech delivered at the Convention Centre, Brisbane, 28 March 2009.

4 International Covenant on Civil and Political Rights, adopted and opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976 and for Australia 13 August 1980), Article 17.

5 United Nations Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, (proclaimed by General Assembly Resolution 61/106 of 13 December 2006 and ratified by Australia on 17 July 2008), Article 12.

6 *Charter of Human Rights and Responsibilities Act* (Vic) 2008, Section 8.

7 Lauren Adamson, *Incapacity – Barrier to Access to Justice?* 2nd World Congress on Adult Guardianship, 15-17 October 2012.

8 There is no single test as to what constitutes legal capacity. However, generally speaking a person must be able to understand the nature and effect of the relevant transaction when it is explained: *Gibbons v Wright* (1954) 91 CLR 423 (per Dixon CJ, Kitto and Taylor JJ; Law Society of New South Wales, *When a client's capacity is in doubt: A Practical Guide for Solicitors*(2012), 2 http://www.lawsociety.com.au/idc/groups/public/documents/internetcontent/023880.pdf .

9 [2012] VSC 438.

10 [2012] VSC 87, [568], [557], [552].

11 Victorian Bar, *The Victorian Bar Incorporated Practice Rules*, (2012) <http://www.vicbar.com.au/uploads//publications/Victorian_Bar_Incorporated_Practice_Rules.pdf>.

12 Law Institute of Victoria, *Ethics Committee Ruling Number R4568*, 28 September 2012, 1 – 4. Note - Ethics Committee Rulings *R3998* and *R4613* relate to confidentiality of documents obtained during the course of the client-lawyer relationship. The rulings are generally consistent with R4568.

13 Ibid.

14 R v P [2001] NSWCA 473.

15 Ibid at 65.

16 Ibid at 66.

17 Ibid at 64.

18 *McD v McD* [1983] 3 NSWLR 81 at 84.

19 Law Society of New South Wales, *When a client's capacity is in doubt: A practical Guide for Solicitors*, 24.

20 American Bar Association, *Model Rules of Professional Conduct*, r1.14.

21 Ibid.

22 Ibid.

23 Ibid.

24 American Bar Association, Centre for Professional Responsibility, *Model Rules of Professional Conduct Comment*, (2012) http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_14_client_with_diminished_capacity/comment_on_rule_1_14.html.

25 Law Society of South Australia, *Client Capacity Committee: Statement of Principles with Guidelines*, (2012), 25 http://www.lawsocietysa.asn.au/PDF/ClientCapacityGuidelines.pdf.

26 Ibid, 27.

27 Ibid.

28 Ibid.

29 Ibid, 26.

30 Ibid, 25.

31 [2010] VSCA 86.

32 Victorian Law Reform Commission, *Guardianship, Final Report* (2012), 570.

33 Victorian Law Reform Commission *Guardianship Consultation Paper 10* (2011), 253.

34 Ibid, 572.

35 Ibid, 573.

36 Ibid, 575.

37 Ibid.

38 *Rawlings v Melbourne Tramway & Omnibus Co Ltd* (1898) 4 ALR 133.

39 *Chapman v Freeman* [1962] VR 259, 260.

40 *Dyke v Stephens* (1885) 30 Ch D 189; *Rhodes v Swithenbank* (1889) 22 QBD 577; *Spellson v George* (1987) 11 NSWLR 300, 313.

41 (1865) 12 LT 199.

42 (2001) WASC 305.

43 *Guardianship: Final Report*, above n 24, 573.

44 (1954) 91 CLR 423.

45 [2012] VSC 87at 557.

46 *State Trustees Ltd v Andrew Christodoulou* [2010] VSCA 86.

47 [2012] VSC 87 at 554.

48 *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 15.02(2).

49 Ibid at r 15.02(3).

50 CCH Australia, *Australian Family Law and Practice Commentary* (at 6 August 2012), [50-247].

51 *Rhodes v Swithenbank* (1889) 22 QBD 577; *Australian Family Law and Practice Commentary*, above n 40.

52 *In the Marriage of Kannis* [2003] FLC 93 -135, 78, 261.

53 *Australian Family Law and Practice Commentary*, above n 40.

54 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62; *Rhodes v Swithenbank* (1889) 22 QBD 577; *Australian Family Law and Practice Commentary*, above n 40.

55 *Australian Family Law and Practice Commentary*, above n 40.

56 *Rhodes v Swithenbank* (1889) 22 QBD 577 at 579; *Ex parte Davis* (1901) 1 SR (NSW) 187,189.

57 Australian Family Law and Practice Commentary, above n 40.

58 Family Law Rules 2004, r 6.13(1)(a) and (b), r 6.13(2) (which specifically applies the duty of disclosure to a case guardian); Federal Magistrates Court Rules 2001, r 11.09(2); *Australian Family Law and Practice Commentary*, above n 40.

59 Family Law Rules r 6.13(1)(d); *Australian Family Law and Practice Commentary*, above n 40.

60 *Australian Family Law and Practice Commentary*, above n 40.

61 *Re Barbour's Settlement Trust FL Rules* [1974] 1 WLR 1198,1199; *Barbour's Settlement Trust, Re; National Westminster Bank Ltd v Barbour* [1974] 1 All ER 1188,1201; *Australian Family Law and Practice Commentary*, above n 40.

62 See Office of the Public Advocate, *Litigation Guardian* (2008) http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG15_Litigation_Guardian_09.pdf for a copy of the guideline.

63 See Guardianship and Administration Board, Tasmania, *Litigation by Administrators and Guardians* (2007) http://www.guardianship.tas.gov.au/__data/assets/pdf_file/0003/79833/Litigation_by_Administrators_and_Guardians_-_Background_In.pdf.