FAMILY LAW ACT 1975 IN THE FAMILY COURT OF AUSTRALIA ATBRISBANE No BR 6795 of1998 BETWEEN: MULVENA APPLICANT AND: MULVENA FIRSTRESPONDENT AND: BUTLER SECONDRESPONDENT AND: EDWARDS THIRDRESPONDENT REASONS FOR JUDGMENT BEFORE RGISTRAR McMANUS Date of Hearing: 17.02.1999 JudgmentDelivered: 25.02.1999 Appearances: The APPLICANT, Mr Mulvena, appearedin person. The FIRST RESPONDENT, Mrs Mulvena, appeared inperson. There was no appearance by or on behalf of the SECOND RESPONDENT, MrButler. Mr Stockall, Solicitor, appeared on behalf of the THIRD RESPONDENT, P.Edwards 1. The applicationsbefore the Court. This is an application by the father, Mr Mulvena,seeking an order that, pursuant to s66M(2) of the Family Law Act1975, he is under a duty to support A., his step - daughter. MrMulvena filed his application in form 7 on 23 June, 1998 and it was madereturnable in Rockhampton on 6 August. The respondentto the application is hispresent wife, the mother of A.. It might have been more appropriate for them tofile a joint application,since they are agreed on the orders sought, but I haveraised this with them and they have sought advice and wish to continue withtheapplications as they stand. On 2 July, Mr Mulvena filed an amendedapplication in which Mr Butler, the father of A., was added as a secondrespondent. Apart fromthat, no other amendments were made. At the same time, MrMulvena filed an application in form 8 and an affidavit. The applicationsandaffidavit filed on 2 July were subsequently served on Mrs Mulvena and Mr Butler.That application sought orders in identicalterms to the amended form7. All applications came before the court on 6 August but there was noappearance, probably because they had not been served on Mr Butler.RegistrarMcGrath then adjourned the applications until 7 October. On that date, there wasan appearance by Mr Mulvena and his wifebut not by Mr Butler. Registrar Dittmanadjourned the applications to 9 December and made an order for service on a MsEdwards. Hefurther directed that service be effected by sending theapplications and the affidavit to the Deputy Child Support Registrar, Queenslandwith a request that they be forwarded to Ms Edwards. The relevance of Ms Edwardsto these applications will appear shortly. Mr Mulvena served thosedocuments and a further affidavit of 21 October on Ms Edwards. When theapplication came before the Courton 9 December, Ms Edwards was represented.Registrar Dittman granted a request

to adjourn the application to 17 February,1999 andmade orders for the filing of documents. On 27 January, Ms Edwardsfiled a response to the application for both interim and finalorders and anaffidavit. In those applications, she asked that the applications be dismissed.Mr and Mrs Mulvena filed a joint affidaviton 19 January and Mrs Mulvena filed afurther affidavit on 5 February. Mr and Mrs Mulvena raised a number ofpreliminary issues. Objection was taken to the late filing of documents by MsEdwards. Sincethe solicitors for Ms Edwards had provided unsealed copies inample time, this objection was not allowed. Some concerns were alsoexpressedabout a DNA test and a Protection Order and the significance of these willappear shortly. However, Mr Mulvena no longerdisputes the test and is awarethat he must go to another court if he wishes to challenge the ProtectionOrder. The amended forms 7 and 8 are in identical terms. I suggested tothe parties that all applications should be dealt with together andthis wasagreed. 2. The facts. Between late 1993 and March,1994, Mr Mulvena had a relationship with Ms Edwards. The length of this isdisputed, Mr Mulvena puttingit at 3 months and Ms Edwards at 6. In any case,nothing turns on this. The relationship seems to have ended unhappily because MsEdwards quickly sought a Protection Order. This was granted on 27 April, 1994.At the time, Ms Edwards was pregnant and she gavebirth to the child, M. on 3August, 1994. In December, 1994, Mr Mulvena met his present wife. She alreadyhad 2 children, B., bornon 29 November, 1985 and A., born on 7 July, 1988. B.lives with his father, Mr Butler. Mr Mulvena says he was not aware MsEdwards had a child and, when first told, he refused to acknowledge paternity ofM.. After DNAtesting in August, 1996 confirmed this, he was assessed as liablefor child support. Mr Mulvena has made some payments but, as theorder of 9December makes clear, he is in arrears. Over the years, Mr Mulvena has hadlittle contact with M., although there havebeen attempts at mediation. Heattributes their lack of success to the hostility of Ms Edwards. She denies thisand says a consentorder was agreed but Mr Mulvena refused to sign it. MrMulvena began, he says, to provide 'financial and emotional support' for A. inDecember, 1994. On 23 January, 1997, he and MrsMulvena began to live together.On 18 October, 1997, they married. They have 2 children, T., born 18 April,1996, and Ms., born 4August, 1998. The younger child was born prematurely andshe has a number of medical problems. Mr Mulvena says this has

been thecause ofadditional emotional and financial stress. On 28 August, 1997, MrMulvena lodged an application for departure from administrative assessment ofchild support. That applicationraised a number of issues but the onespecifically relevant to the application currently before me is that he wasunder a duty tosupport another child or person as provided for in s117(2)(a)(i)of the Child Support (Assessment) Act 1989. That application wasmade for 2 children, A. and a child of an earlier relationship, E.. Thatapplication was rejected on 8 December, 1997 on the grounds that, in the case ofA., he was under no legal duty to maintain herand, in the case of E., there wasno proof of paternity. No application was subsequently made before this courtconcerning E.. It becomes clear from this - and Mr Mulvena makes noattempt to disguise it - that a finding he is under a duty to support A. wouldhave consequences for the amount of child support he is required to pay for M..If he is under a legal duty to support A., that isa further person who must betaken into account in deciding his child support income. As the number ofpersons rises, the child supportpayable falls. The point, although simple tostate, has important consequences for those involved in the payment of childsupport,whether as a liable parent or a payee. Mr Mulvena sets out inhis affidavits why the court should find he is under a duty to support A.. Hesays he has a strong emotionalbond to her and treats her and her 2 sistersalike. He has developed this over the period he has known his present wife andthatis now more than 4 years. In his affidavit of 21 October, 1998, he saysMrs Mulvena is unable to seek child support from her formerhusband. Thereasons for this are omitted from that affidavit but they appear in theaffidavit of 19 January. In that affidavit, Mrs Mulvena recounts ahistory of family violence on the part of her former husband. It is notnecessary to setout the details here and it is sufficient to say that theviolence was frequent and serious. One result has been that her child supportassessment was cancelled for her protection and at least some moneys repaid toMr Butler. That occurred some years ago and it stillremains the case that shereceives no moneys by way of child support from him. Mr Butler does, however,continue to see A. althoughMrs Mulvena does not care for what she sees as hisindifference to her sporting interests. She has tried to persuade him to agreeto let Mr Mulvena adopt A., but he has refused. 3. The relevantlaw. Under s60D, a step - parent is defined as a person who (a) is not a parent of the child; and (b) is or has

been married to a parent of the child; and (c) treats, or at any time during the marriage treated, the child as a memberof the family formed with the parent. Section 66M sets out when a step - parent has a duty to maintaina child. That section states: (1) As stated in section 66D, a step - parent of a child has a duty ofmaintaining a child if, and only if, there is an order in force under thissection. (2) A court having jurisdiction under this Part may, by order, determine thatit is proper for a step - parent to have a duty of maintaininga step -child. (3) In making an order under subsection (2), the court must have regard tothese (and no other) matters: (a) the matters referred to in sections 60F,66B and 66C; and (b) the length and circumstances of the marriage to the relevant parent ofthe child; and (c) the relationship that has existed between the step - parent and thechild; and (d) the arrangements that have existed for the maintenance of the child;and (e) any special circumstances which, if not taken into account in theparticular case, would result in injustice or unduehardship. As the section makes plain, itdoes not stand alone but is linked to ss66D and 66N. The first sectionstates: (1) The step - parent of a child has, subject to this Division, the duty ofmaintaining a child if, and only if, a court, by orderunder section 66Mdetermines that it is proper for the step - parent to have thatduty. (2) Any duty of a step - parent to maintain a step -child: (a) is a secondary duty subject to the primary duty of the parents of thechild to maintain the child; and (b) does not derogate from the primary duty of the parents to maintain thechild. Section 66N states: In determining the financial contribution towards the financial supportnecessary for the maintenance of the child that should bemade by a party to theproceedings who is a step - parent of the child the court must take intoaccount: (a) the matters referred to in sections 60F, 66B, 66C, 66D and 66K;and (b) the extent to which the primary duty of the parents to maintain the childis being, and can be fulfilled. Section 66Cof the Family Law Act imposes a primary duty upon parents tosupport their children. That is a legal duty and has priority over the moralcommitmentsa parent may feel towards the children of any new partner - Inthe marriage of Hagerdorn (1988) 12 Fam LR 569, In the marriage ofRyan (1988) 12 Fam LR 529 and In the marriage of Hartcher and Vick (1991) 15 Fam LR 149. No such duty is placed upon a step - parent in theabsence of an order of the court - Bassingthwaighte v Leane (1993)16 Fam LR 918, Bienke v Bienke - Robson (1997) 23 Fam LR 569

andsee In the marriage of Humphries (1993) 17 Fam LR 120. Thecourt may make such an order if, in the words of s66M(2), it is 'proper'. Indeciding whether to make an order, the court must have regard only to thosematters set out in s66M(3). Once the court makes an order, the step - parent isunder a duty that is subject to the provisions of s66N. That includes the right,from time to time, to review the obligation cast upon the step - parent by theorder - In the marriage of Day (1993) FLC 92 - 333. 4. Application of the law. Sections 66B and 66Censhrine the cardinal principle that parents are primarily responsible for thefinancial support of their children. Under s66M, a secondary duty can be imposedon a step - parent in an appropriate case by order of the court. I amsatisfied Mr Mulvena is a step - parent within the meaning of s60D. He is notthe natural father of A. and he is married to her mother. His evidence is hetreats A. as he does his natural childrenand it is apparent from theproceedings before me that Mrs Mulvena is of the same mind. They interact withrespect to all childrenin a co - operative and sharing manner. Theapplication seeks a determination under s66M(2). In his affidavit of 19 JanuaryMr Mulvena asks that if an order is made, it be backdated to the date of theoriginal assessment but,essentially, the order under s66M(2) is his trueconcern. In making the application in this way, it seems that the applicant isseeking an order in the nature of a declaration.In my judgement, it is notpossible to make a declaration under that section. Section 66M is part ofDivision 7 of the Act. The purpose of the Division is to makeprovision for child maintenance and it places upon parents the primary duty tobe responsiblefor the financial support of their children. The purpose of s66Mis to provide for those cases in which a parent cannot meet this duty and it isappropriate, in the circumstances of the case, toimpose a secondary duty on astep - parent. It can be said, then, that if there is no application for childmaintenance, there canbe no duty imposed under s66M. That is to say, the dutyonly exists in conjunction with an application asserting a right to childmaintenance. This conclusion is supported by the words of s66N whichclearly assume there is an application under Division 7. The same result can bereached by asking what right corresponds tothe duty in s66M and the answer tothat is an application for child maintenance. That is because a determinationunder s66M(2) is preliminary to an enquiry into what financial support, if any,the step parent ought to provide. Therefore, the applicationfails atthis point. If I am wrong in

that view, the application still does not satisfythe provisions of s66M(3). The matters the court must take into accountare only those in s66M(3). This includes the provisions of s60F, s66B and s66C. The first section refers to the definition of a child for the purposes ofcertain Divisions of the Act including Division 7, where s66M isto be found. I have already referred to the principles set out in ss66B and 66C.Mr and Mrs Mulvena were married on 18 October, 1997 and the marriage is now ofsome 16 months duration. It came at the culminationof a period of emotional andfinancial support that began after they met in December, 1994. The affidavit ofMr Mulvena tends toconvey the impression that the relationship blossomed intointensity very quickly and I accept this is how he sees it. However, itseems tohave been more measured and it was not for some years that they moved intogether and later still before they married. The relationship betweenMr Mulvena and A. has now continued for over 4 years and she has half - sistersby her mother and step -father. I accept his evidence about the treatment ofA. and his 2 natural children but it needs to be placed in the context of mycomments about the development of the relationship between Mr and Mrs Mulvena.Moreover, it seems to me that s66M(3)(c) is not to be read in isolation but withthe other requirements of this sub - section. These suggest that s66M(3)(c)looks to something more substantial than the financial and emotional supportprovided to a child as the expected or usual incidentof living with the child'sparent. I note that Mr Butler makes no financial contribution for A. but thefact that this burden hasbeen assumed by Mr Mulvena as an incident of livingwith the mother of the child is not, by itself, sufficient to say a duty oughtto be imposed on him. Moreover, Mr Butler continues to have contact with A.,even if he remains an apparently imperfect father. The duty Mr Mulvenaseeks to assume is also placed upon his wife. In the affidavit of 21 October,1998, it was said that Ms. requiresconstant supervision because of her medicalcondition. In fact, on the day of the hearing, it was necessary for Ms. to bebesideher parents in the courtroom. It was mentioned that this was necessarybecause she is fitted with a device to monitor her continuedbreathing. It isplainly obvious that Mrs Mulvena has no present ability to leave her and seekemployment because of the need toprovide round the clockcare. Section 66M(3)(e) allows the court to take into account any specialcircumstances that might cause injustice or undue hardship in a case. Mr Mulvenarelies on a

number of matters apart from the health of Ms.. While he says he hasno objection in principle to paying child support,it is clear from hisaffidavit of 21 October, 1998 that he sees his obligations as essentially to hispresent wife and family. AlthoughMr Mulvena is on a low income and hasexperienced some unemployment, the same affidavit sets out his concern tobalance his incomewith the maximum entitlements to Family Payment and FamilyAllowance. He says, for instance, that On occasion I have refused overtime and extra work to prevent my family fromloosing (sic) family allowance and parenting allowanceentitlements. The affidavit then sets out a table showingthe decrease in benefits as income increases. The point Mr Mulvena is trying tomake appearsto be this his income varies a great deal at the moment. Asit increases, so does his child support and income tax. At thesame time, FamilyAllowance and Family Payment decrease. However, there are times when theconjunction of these factors can actuallylead to his receiving less money thanif his wage had not increased at all. Therefore, Mr Mulvena attempts to maintainhis wage ata level where the chances this might occur are kept to a minimum. Inthis way, he receives the optimum balance of income and socialwelfare benefits.The catch, of course, is that it is not sufficient to meet his expenses and heneeds to earn a greater income.One way out of this is to reduce the childsupport so that the lesser contribution frees additional moneys that can be usedto maintainhis family. Stated in this way, it becomes apparent that Mr Mulvenais seeking to reduce fluctuations in the moneys coming into hisfamily becausethis makes financial management difficult. However, he is not alone inthis difficulty. Variations in income and welfare benefits are not at alluncommon in applications formaintenance. The incidence of this appears to haveincreased more recently as efforts are made to trim welfare expenditure througha tighter application of the means test. The adjustments Mr and Mrs Mulvena mustmake to juggle income and expenditure without thecertainty of a regularly knownincome are inconvenient and uncomfortable but they are a burden assumed by manywho receive both socialwelfare and an income. In the circumstances, I am unableto say the situation of Mr Mulvena amounts to undue hardship or specialcircumstances. Taking these matters together, I am not satisfied that it isproper to make a determination that Mr Mulvena is under a duty to supportA.. Inany case, I am of the view that there can be no such

determination in theabsence of an application relating to child maintenance. There remainsone further matter for me to consider. Mr Mulvena acknowledges that Mrs Mulvenais a respondent but, he says, she hasno objection to the making of the orderand supports it. In effect, he says, this is an order by consent and I amentitled to makeit on that basis alone. In answer to the argument that MsEdwards would be affected by the order, he says that she is on social welfarebenefits. What she loses in child support is likely to be made up by an increasein her benefits. In any case, any order I mightmake will not entirely free himfrom child support it will only have the effect of reducing hispayments. I do not agreewith these arguments. Section 66M(2) requires acourt to make a 'determination' that a step - parent is to assume this duty andto do so by reference only to those mattersin s66M(3). Whether the partiesconsent or not can only be relevant in the context of the enquiry being made bythe court into the particularprovisions of s66M(3) and it is not conclusive byitself. It certainly cannot be conclusive that Mr and Mrs Mulvena agree betweenthemselves. In my judgement,an order under s66M(2) cannot be made withoutnotice to those who might be affected by it and that includes the Child SupportAgency. In this case, theAgency is aware of the application because it referredMr Mulvena to the court. The second and third points may well state thefactual result of the order being sought but they overlook the intention behindbothDivision 7 and the Child Support Scheme. As far as practicable, it isparents who are financially responsible for their childrenrather than thesocial welfare system. To make the order sought by Mr Mulvena would have theeffect of altering that intention andhave significant consequences for thepayment of child support. Mrs Mulvena says she is aware of others who havesucceeded in obtainingan order in similar circumstances. I can only say I amnot aware of any such order and do not consider it can be made on the factsinthis case. 5. Orders. I am going to order that allapplications be dismissed and removed from the pending cases list atRockhampton. Neither party hasany ability to contribute to an order for costsand I make no order as to that. FAMILY LAW Step-parent Application to be treated as under duty to maintain child Family Law Act1975, s 66M Whether order under s66M can be made by consent Mother not seeking financial support from father Child Support(Assessment) Act 1989, s117(2)(a)(i) Duty to maintain another child orperson The husband sought a declaration under

s66M(2) that he isunder a duty to support his step-daughter. He named the wife as respondentandat the hearing she signified her consent to such an order. The husbandand wife met in December 1994. Since that time the husband was financially andemotionally responsible for the wifesdaughter from a previousrelationship, A, who resides with the parties. The husband has little contactwith his 4 year old son froma previous relationship, M, and while he has beenassessed for child support in relation to that child, he is currently in arrearsof those payments. In January 1997 the husband and wife began to livetogether and were married on 18 October, 1997. There are two children of themarriageaged two years and six months, the younger of whom has significantmedical problems. The husband treats all three children equallyand, as thewife receives no child support from her former husband, the husband meets allexpenses in relation to the child A. On 28 August, 1998, the husbandlodged an application for departure from administrative assessment of childsupport in relation toM on the basis that he was under a duty to supportanother child or person pursuant to s117(2)(a)(i) of the Child Support(Assessment) Act. That application was rejected on the basis, inter alia,that the husband was under no legal duty to maintain the child A. Thehusband acknowledged that a finding that he is under a legal duty to support Awould reduce the amount of child support payablefor M. By order of aRegistrar, the mother of M had been served with the husbands applicationand, at the hearing, she appearedand opposed it. Held,dismissing the husbands application: 1. Parents are primarilyresponsible for the financial support of their children although a secondaryduty can be imposed on a step-parentby order of the Court where appropriate:ss. 66B, 66C and 66M. 2. Although the husbandis a step-parent within the meaning of s.60D there is no power in s.66M toimpose a duty on a step-parent toprovide financial support in the absence of anapplication for child maintenance. That duty exists only in conjunction with anapplicationasserting a right to child maintenance, and there was no suchapplication by the wife in this case. 3. Thefact the husband has assumed the financial responsibility for A is not of itselfsufficient justification for the imposition ofaduty. 4. As there is nothing to suggest thehusbands situation amounts to undue hardship or special circumstancesthere can be no determinationthat the husband is under a duty to supportA. 5. Regardless of whether the parties (inthis case, the husband and wife) consent, an

order under s.66M(3) can only bemade where noticeis provided to those who may be affected byit. 6. Parents rather than the welfare systemare responsible for the support of children and the making of the orders soughtby the husbandwould alter that intention and have significant consequences forthe payment of child support. REPORTABLE