IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S6 of 2019**

BETWEEN:

MASSON
Appellant

and

10 **PARSONS**
First Respondent

PARSONS
Second Respondent

INDEPENDENT CHILDREN'S LAWYER
Third Respondent

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APPELLANT'S REPLY

STEINER LEGAL
PO Box 55
Pyrmont NSW 2009

Telephone: (02) 9555 5595
Fax: N/A
Email: tahlia@steinerlegal.com.au
Ref: Tahlia Bleier

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet. They reply to those of the First and Second Respondents' (**Respondents** and **RS**), the Victorian Attorney-General (**Victoria** and **VS**) and the Commonwealth Attorney General (**Commonwealth** and **CS**).

PART II: REPLY

Attempts to expand the issues in the appeal without following required procedure

2. The Respondents submit that section 60H of the *Family Law Act 1975 (Cth)* (***Family Law Act***) exhaustively prescribes parentage in circumstances of artificial conception: RS at [2], [51]-[56] (see also VS [31]-[32]). They also submit that ss14(2) and (4) of the *Status of Children Act 1996* (NSW) (**SOC Act**) are capable of relevantly applying of their own force: RS [12], [13] (see also VS [33]-[44]). Those arguments were not the basis on which the Full Court determined the appeal and should have been the subject of a notice of contention. Indeed, as the Full Court recorded at CB 116, [27], the position of the Respondents in the appeal was that the "only" issue that required consideration for the purposes of ground 1 was whether the "parenthetical exception in s 79" applied (see also CB 115 [21] and 119, [49], [50]). There are no exceptional circumstances that would warrant departure from the usual rule that a party ought be held to the conduct of their case[1] – particularly given that those arguments lack merit for the reasons identified at [8] and [9] below.

3. More radically, Victoria submits that the common law should be developed to recognise that a sperm donor is not a legal parent: VS [8]-[9], [46]-[63]. This argument, if it can be put at all, similarly requires a form of notice of contention.[2] Further, the argument put is not directed to the constitutional question and "[t]here is a strong argument for the view that the role of an intervener under s 78A is limited to constitutional questions".[3] There are prudential reasons for not hearing from Victoria on this issue. It is a large issue, sought to be raised without notice a matter of weeks prior to the hearing in circumstances where any notice of contention was due on 15 January 2019: note *High Court Rules 2004* (Cth) r 42.08(1) and (5). It is not known whether other parties may have wished to be heard (including parties with a right to be heard, such as other polities) had this issue been agitated below or at any time prior to 22

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[1] *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9; *Water Board v Moustakas* (1988) 180 CLR 491 at 497.
[2] Note *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 544 [155] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
[3] *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* (2012) 249 CLR 398 at [90] (Heydon J)

March 2019. Further, Victoria has not issued notice under s78B of the the *Judiciary Act 1903* (Cth) (***Judiciary Act***) notifying that it asserts that there is no section 109 inconsistency because the term "parent" already corresponds with relevant State laws.

Section 79 does not pick up sections 14(2) and (4) of the *Status of Children Act*

4. The Commonwealth contends that ss14(2) and (4) of the *Status of Children Act 1996* (Cth) (**SOC Act**) are not properly characterized as laying down a norm or a rule. That is wrong for the reasons given in the Appellant's submissions in chief (**AS**) at AS [52]-[57] and for the further reasons given by the Independent Children's Lawyer in its submissions (**CLS**) at [7]-[17] (see also VS [37], [38]). The Respondents notably take a different position to the Commonwealth, accepting that ss14(2) and (4) do have an application independently of anything done by a Court: the Respondents entertain "no doubt" that those provisions "bind of their own force New South Wales Administrators" – RS [10] (cf CS [9]). That concession is properly made in light of what is obvious from the text and context of s 14, including the legislative history (see AS [56]). The fact that the New South Wales Parliament has retained the statutory label "irrebuttable" "presumption" (which also appeared in 6 of the *Artificial Conception Act 1984* (NSW)) does not alter the fact that those "presumptions" apply for purposes that are not limited in their application to Court proceedings (as is apparent from a comparison of the text of ss14(2) and (4) with ss 14(5) and (5A) of the SOC Act).

5. It is nevertheless said by the Respondents that one should conclude that ss14(2) and (4) are State laws upon which s79 potentially operates because it is "not possible to conceive of the statutory prescription of how parentage should be determined…being other than a purported regulation of the exercise of federal jurisdiction by the Family Court": RS [11]. But the Respondents' concession as to the independent operation of s14(2) and (4) supplies an obvious example. The making of parenting orders under Part VII of the *Family Law Act* may well require the Family Court to ascertain who is to be regarded as a "parent" for the purposes of State laws relevant to the welfare of children. In particular, such an inquiry may be necessary to determine which of the parties has (or is subject to) the rights and responsibilities set out in the provisions of the *Education Act 1990* (NSW) referred to at AS [57] and CLS [8], so that orders providing for that aspect of the "care, welfare [and] development of the child"[4] may be crafted and directed accordingly. The determination of that matter in federal jurisdiction neceessarily involves the application of State law in the manner described in *Rizeq*

[4] See s 64B(2)(i) of the Family Law Act.

v Western Australia (2017) 262 CLR 1 (***Rizeq***) at 24 [55], [56] (Bell, Gageler, Keane, Nettle and Gordon JJ). That has nothing to do with the conferral or regulation of the powers that attend the exercise of that jurisdiction or the operation of s79. Rather, as would be the case with a State Court considering the same question, ss14(2) and (4) operate at an anterior point to determine a particular *legal status* giving rise to rights and duties, and in a manner which is separable from the exercise of those powers: cf *Rizeq* at 41-42 [100]. The *different issue* as to whether that statutory declaration of legal status can have any relevance to the *construction of federal law* likewise has nothing to do with the regulation of the powers that attend the exercise of that jurisdiction and cannot attract the operation of s79: see CLS [23], [24].[5]

10 6. The Respondents' submissions on the test to be applied for the purposes of determining whether a law "otherwise provides" (which Victoria adopts – VS [45]) misstate the Appellant's submissions on that issue. The Appellant does not submit that the "applicable test has shifted to include a covering the field type of inconsistency": contra RS [40] and see also RS [42]. As the appellant expressly observed at AS[28], that is a difficult metaphor - referring to Gummow J's reasons in *Momcilovic*.[6] His Honour there observed that that metaphor has served "only to confuse what is a matter of statutory interpretation" (our emphasis). Section 79 similarly poses a question of construction, which is to be approached in the manner identified at AS [30]-[32].

7. The real burden of the Respondent's submissions appears to involve the attempted
20 introduction of a further obscurantist fiction, being the "very strong" presumption that the "legislature did not intend to contradict itself, but intended that both Acts should operate" (RS [39], referring to Fullagar J's dissenting reasons in *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276). As was submitted in chief, there are large difficulties in applying that presumption to an ambulatory law, directed the legislation of *other* polities: AS [33], [34]. The respondents have left that submission unanswered. More than that, such a presumption has never been applied or approved in the context of s 79. As was noted at AS, footnote 13, it is true that in *Putland v R* (2004) 218 CLR 174 at 189 [40], [41] Gummow and Heydon JJ made reference to an earlier passage in Fullagar J's reasons in *Butler*. However, that was for a discrete point. Their Honours did not suggest that the presumption Fullagar J went on to
30 identify was applicable in the (distinctly different) context of s 79. Nor is there otherwise any textual basis for asserting that there is some form of imperative to make "every effort" to

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[5] Noting again that that question was not in fact raised by the Respondents before the Full Court, given that they did not then contend that s14 of the SOC Act applies of its own force.
[6] *Momcilovic v R* (2011) 245 CLR 1 at 111-112 [243]-[244].

achieve reconciliation with a Commonwealth Act notwithstanding the fact that it would, but for that exhortation, otherwise be held to "leave no room" for State law: contra RS [39]. Section 79 is directed to the effect which is to be given to enactments of the State legislature that could otherwise have no operation in the exercise of federal jurisdiction; it is not directed to the effect which is to be given to federal laws.[7]

8. In any event, sections 14(2) and (4) of the SOC Act are irreconcilable on any view of the correct approach to contrareity. Save where expressly provided, the *Family Law Act* uses "parent" in its ordinary sense and it therefore invites reference to all the circumstances. Sections 14(2) and (4) use "parent" in a special sense, deny that reference may be had to all the circumstances and depart from the ordinary meaning. To the extent the issue arises, for essentially those same reasons (and those identified at CS [18]-[22]) those State provisions do not apply of their own force because they are rendered inoperative by s109 of the Constitution.[8]

Section 60H is not "exhaustive" (cf RS [51]-[54]; VS [5]-[6], [31]-[32])

9. The Respondents and Victoria submit that section 60H is exhaustive of parentage in cases of artificial conception (or makes "exclusive provision" as regards those matters). If they are now permitted to agitate that argument, it should be rejected. Section 60H does not in terms state that it is exhaustive (see CS [53]). Nor should such an intention be implied. Section 60H is a form of deeming provision and it should not be construed broadly: *Wellington Capital Limited v ASIC* (2014) 254 CLR 288 at [50]-[51] (Gageler J); *Queensland v Congoo* (2015) 256 CLR 239 at [165] (Gageler J). Further, to imply such an intention would involve discerning a qualification on the term "parent", which otherwise bears its ordinary meaning. That would be contrary to the principle stated in *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310 that "[i]t is... of fundamental importance that limitations and qualifications are not read into a statutory definition unless clearly required by its terms or its context".

The common law should not be developed as contended for by Victoria (cf VS [46]-[69])

10. If Victoria is heard on its submission that the common law should be developed, the submission should be rejected. This submission proceeds from the premise that the Commonwealth Parliament intended "parent" in the *Family Law Act* to bear a common law

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[7] See similarly *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441 at 466 [53] (the Court); *Work Health Authority v Outback Ballooning Pty Limited and Another* (2019) 93 ALJR 212 at 241-242 [132] (Edelman J).
[8] Contra RS [13], [14] and VS [33]-[44].

meaning from time to time. If that were so, it is surprising that there was no mention of the common law in any of the extrinsic materials relating to the enactment of the *Family Law Act* and amendments since then. Indeed, the regulation by *States* of the concept of parentage only serves to emphasise the legislative choice by the Commonwealth Parliament *not* to adopt the measures implemented by the States relied on by Victoria. As pointed out at AS [38], the *Family Law Act* uses express language when it intended parentage to vary by reference to the laws of other polities. Victoria's approach renders that express language superfluous. Further, "[i]t is of fundamental importance that statutory definitions are construed according to their natural and ordinary meaning unless some other course is clearly required": *PMT Partners Pty Ltd (in liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 310 (Brennan CJ, Gaudron and McHugh JJ) (***PMT***). The artificial meaning which Victoria ascribes to "parent" is not "clearly required" (and Victoria does not suggest that it is).

11. Nor should the common law concept of parentage (if there be one) be developed as contended for by Victoria. As the many legislative developments referred to in the submissions evidence, parentage is a contested concept which varies with social conditions and desirable social policy from time to time. It is a matter appropriately left to Parliament, not the courts: note *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at [39]-[41] (French CJ, Bell and Keane JJ) (***Barker***); see also *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 252 CLR 381 at [44] (French CJ) ("a propounded development of legal principle involving large questions of public policy and reconciliation of interests in tension is, for the most part, best left to the legislature"). The common law should generally not be developed in an area of "frequent, detailed and often contentious legislative activity": *Barker* at [118] (Gageler J). The issue is a disputed matter of social policy, not a purely legal problem: *C (a Minor) v Director of Public Prosecutions* [1996] AC 1 at 28 (Lord Lowry). The Appellant's approach does not lead to incoherence: cf VS [53]. "Parent" in the *Family Law* Act bears its ordinary meaning from time to time. The meaning of "parent" in other statutes is a question of the construction of those statutes – and that is so whether one adopts the Appellant's approach or Victoria's approach.

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Michael Kearney SC
Waratah Chambers
(02) 9264 8444

Craig Lenehan
5 St James Hall
(02) 8257 2530

Esther Lawson
Waratah Chambers
(02) 9264 8444

David Hume
6 Selborne Wentworth
(02) 8915 2694