IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY No. S6 of 2019

BETWEEN:

MASSON

Appellant

and

PARSONS

First Respondent

PARSONS

Second Respondent

INDEPENDENT CHILDREN'S LAWYER

Third Respondent

FIRST AND SECOND RESPONDENTS' ORAL ARGUMENT

Part I:

1. This outline is in a form suitable for publication on the internet.

Part II:

1. Subsecs 14(2) and (4) of the *Status of Children Act 1996* (NSW) are relevantly directed to powers of a court (RS [9]-[11])

2. That subsecs 14(2) and (4) of the *Status of Children Act 1996* (NSW) might operate on persons independently of what a court does is not determinative of its character when applied by a court.

3. In their application by a court, subsecs 14(2) and (4) regulate the exercise of jurisdiction in the sense explained in *Rizeq v Western Australia* (2017) 262 CLR 1 and, accordingly, require subsec 79(1) to fill the gap in State constitutional incapacity.

4. In any event, the fact that the law might not be characterised in that sense does not result in the conclusion that subsecs 14(2) and (4) are inapplicable (see Submissions of the Commonwealth Attorney-General (intervening) CS [22]). The consequence after *Rizeq* is that subsecs 14(2) and (4) might apply of their own force – subject to sec 109 inconsistency. For the reasons that follow under section 2, no such inconsistency arises. **[RS [13]-[14]]**

2. Nothing in the *Family Law Act 1975* (Cth) 'otherwise provides' (RS [27]-[50])

5. The Full Court of the Family Court below was correct to conclude that subsecs 14(2) and (4) were applied by subsec 79(1) of the *Judiciary Act 1903* (Cth) to the proceeding before it and, consequently, the appellant was irrebuttably presumed not to be a parent.

6. When the operation of subsec 79(1) is properly understood, the *Family Law Act* does not displace the application of subsecs 14(2) and (4).

    a. Subsection 79(1) applies subsecs 14(2) and (4) until displaced by a law that "otherwise provides".

    b. The irreconcilability test to be applied to the words "otherwise provides" is clear and settled. It is not to be understood as akin to a search for indirect inconsistency under sec 109 of the Constitution:

        - *Northern Territory of Australia v GPAO* (1999) 196 CLR 553 at 588 [80]-[81]

    c. In circumstances of artificial conception, the word "parent" in the *Family Law Act*, for example in secs 65C, 65D, 65DAA, 66B and 66C, must be read in light of the context supplied by sec 60H. The legislative history shows that the Commonwealth Parliament dealt with parentage rights and duties (other than for the birth mother) in circumstances of artificial conception exclusively in sec 60H. **[RS [16]-[26]]**

        - *Family Law Amendment Act 1983* (Cth) (Act No 72 of 1983) sec 4
        - *Family Law Amendment Act 1987* (Cth) (Act No 181 of 1987) secs 6, 24
        - *Family Law Reform Act 1995* (Cth) (Act No 167 of 1995) sec 31
        - *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) (Act No 115 of 2008) secs 6, 7

    d. That sec 60H was intended to enact, for the purposes of parentage, the rights and duties of certain specified persons in circumstances of artificial conception is clear from the text and structure of the provisions in Pt VII, Div 1, Subdiv C, including the use of the words "other intended parent" as a shorthand for persons other than the birth mother who are vested with rights and duties under paras 60H(1)(a) and (b)(i), and the possibility in subsec 60H(3) that a sperm donor might be a parent by Commonwealth prescription.

    e. When properly understood, the *Family Law Act* otherwise provides only when sec 60H creates parentage rights and duties that displace the rights and duties that arise from subsecs 14(2) and (4). Until that occurs, there is no irreconcilability which is required for the *Family Law Act* to otherwise provide.

f. Subsec 79(1) is also not displaced by the presumptions in Pt VII, Div 12, Subdiv D of the *Family Law Act,* none of which is directed to artificial conception.

g. Section 60H creates the potential for a sperm donor to be a parent by means of picking up by prescription a State law to that effect. (No such State law has ever existed.) That mere unrealised potential does not provide otherwise from subsecs 14(2) and (4), given the absence of any competing substantive effect.

3. Outside the operation of paras 60H(1)(a) and (b)(i), sec 60H operates exhaustively to leave it to the Commonwealth to determine by prescription when rights and duties are to be created in circumstances of artificial conception. (RS [51]-56])

7. If contrary to the contentions under section 2, the *Family Law Act* is seen as displacing the operation of subsecs 14(2) and (4), the first and second respondents' alternative submission is that, outside the operation of paras 60H(1)(a) and (b)(i), sec 60H operates exhaustively to leave it to the Commonwealth to determine by prescription when those rights and duties are to be created. There is thus no room for the appellant to be considered a "parent" for the purposes of the *Family Law Act*.

8. If subsecs 14(2) and (4) are not within the *Rizeq* scope of subsec 79(1), there would be no inconsistency under s 109 in any event once the *Family Law Act* is properly understood.

Dated: 16 April 2019

Bret Walker