IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **NO S 6 OF 2019**

BETWEEN: **MASSON**

Appellant

AND: **PARSONS**

First respondent

PARSONS

Second respondent

INDEPENDENT CHILDREN'S LAWYER

Third respondent

SUBMISSIONS OF THE THIRD RESPONDENT

Legal Aid NSW
323 Castlereagh Street
Haymarket NSW 2000
DX 5, Sydney

Telephone: 02 9219 5711
Fax: 02 9219 5029
Email: Matthew.Butt@legalaid.nsw.gov.au
Ref: Matthew Butt

PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the internet.

PART II ISSUES

2. The third respondent (**the Independent Children's Lawyer**) agrees with the statement of the issue in this proceeding in the appellant's submissions filed 8 February 2019 (**AS**).

PART III SECTION 78B NOTICE

3. The Independent Children's Lawyer does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is required beyond that filed by the appellant (CAB 146).

PART IV FACTS

4. The Independent Children's Lawyer does not contest any of the facts stated at AS [6]–[18]. A further fact, the significance of which is explained below, is that at the time of B's conception, the first and second respondents were not in a *de facto* relationship (CAB 21–24 [59]–[84]).

PART V ARGUMENT

5. The Independent Children's Lawyer supports the submission made by the appellant that the Full Court of the Family Court erred in concluding that, when determining whether the appellant was a "parent" for the purposes of the provisions of the *Family Law Act 1975* (Cth) at issue in the proceeding, the primary judge was required to apply s 14(2) of the *Status of Children Act 1996* (NSW) by reason of s 79 of the *Judiciary Act*.

6. In summary, the Independent Children's Lawyer makes the following submissions:

   (a) s 14(2) of the *Status of Children Act* is not the kind of State law to which s 79 of the *Judiciary Act* applies;

   (b) even if it were, the *Family Law Act* "otherwise provides";

   (c) the word "parent" when used in the *Family Law Act* does not, of itself, pick up State laws which specify who is and who is not a parent;

   (d) instead, where not expressly affected by provisions such as s 60H (which had no application in this case), the word "parent" in the *Family Law Act* bears its ordinary meaning, which clearly encompassed the appellant; and

(e) it is not necessary on the facts of this case to determine, exhaustively, who is a "parent" for the purposes of the *Family Law Act*.

(a) Section 14(2) of the *Status of Children Act* is not the kind of State law to which s 79 of the *Judiciary Act* applies

7. The appellant submits that s 14(2) of the *Status of Children Act* is not the kind of State law to which s 79 of the *Judiciary Act* applies, having regard to this Court's decision in *Rizeq v Western Australia*[1] (AS [49]–[57]). In his submissions filed 22 February 2018 (**Cth**), the Attorney-General for the Commonwealth (**the Commonwealth**) makes the opposite submission (Cth [8]–[12]). The resolution of this debate is of no consequence to the present matter if, as the appellant, the Commonwealth and the Independent Children's Lawyer submit, the *Family Law Act* "otherwise provides" in any event. However, for the following reasons, the Independent Children's Lawyer supports the appellant's position.

8. The kinds of laws to which s 79 of the *Judiciary Act* applies are "State laws conferring or governing powers that State courts have when exercising State jurisdiction".[2] Section 14(2) of the *Status of Children Act* is not a law of that kind. While cast in the terms of a "presumption", it is irrebuttable. More importantly, s 14(2) is not on its face limited in its application to court proceedings. It would apply, for instance, where the Minister must consider an application by a "parent" under s 71 of the *Education Act 1990* (NSW) for their "child" to be registered for home schooling. Section 14(2) of the *Status of Children Act* is a substantive rule as to status. It "is a law having application independently of anything done by a court".[3]

9. The Commonwealth's contrary submission (Cth [9]), that s 14(2) is directed to the regulation of the exercise of jurisdiction, not laying down a norm or rule of law, should not be accepted.

10. *First*, the Commonwealth's construction reads a limitation into the terms of s 14(2) which is simply not there. Nothing in s 14(2) limits its application to court proceedings. It is, rather, stated as a generally applicable rule of law.

---

1 (2017) 262 CLR 1.

2 (2017) 262 CLR 1 at [87] per Bell, Gageler, Keane, Nettle and Gordon JJ.

3 (2017) 262 CLR 1 at [105] per Bell, Gageler, Keane, Nettle and Gordon JJ.

11. *Secondly*, the fact that s 14(2) is not expressly limited in its application to proceedings has even greater significance because ss 14(5) and (5A) *are* expressly limited in their application to proceedings.

12. *Thirdly*, the Commonwealth's construction would render s 14(2) inapplicable in administrative contexts, of the kind referred to above. That would lead to anomalous results:

(a) It would mean that an administrative decision-maker, not applying s 14(2), might reach a different conclusion as to who is a "parent" from that which would be reached by the Supreme Court of New South Wales in proceedings for judicial review of their decision. To continue the example above, the Minister might accept an application under s 71 of the *Education Act* from a person the Minister considers to be a "parent" over the objection of a person the Minister considers not to be a "parent" notwithstanding that, on judicial review of that decision at the instance of the objector, the Supreme Court is bound by s 14(2) of the *Status of Children Act* to conclude that the applicant is not a parent (and by, say, s 14(1) or (1A) to conclude that the objector is a parent).[4]

(b) On an application to the Supreme Court for a declaration of parentage under s 21 of the *Status of Children Act*, the presumption in s 14(2) would apply and, following the making of a declaration, an administrative decision-maker would be bound to follow it. Yet, on the Commonwealth's construction, even in a case where the operation of s 14(2) renders the outcome of such an application a foregone conclusion, an administrative decision-maker would not be bound to apply it if no such application had yet been determined.

(c) Section 19 of the *Births, Deaths and Marriages Registration Act 1995* (NSW) permits applications to the District Court of New South Wales for orders that registrable information about a child's parents be included in the Register. In such proceedings, the presumption in s 14(2) of the *Status of Children Act* would apply. Yet, on the Commonwealth's construction, the Registrar would not be required to apply that presumption when performing the ordinary task of including parentage

[4] The same would apply to an appeal to the Supreme Court on a question of law from a decision of the New South Wales Civil and Administrative Tribunal on review of the recommendation of an "authorised person" for which ss 71 and 72 of the *Education Act* provide: see, eg, *Board of Studies, Teaching and Educational Standards v Vandenbovenkamp* [2016] NSWCA 268.

information in the Register. Further, that is directly contrary to the application of s 14(1A)(a) to the Registrar by cl 17 of sched 3 to the *Births, Deaths and Marriages Registration Act*.

13. *Fourthly*, the Commonwealth's construction would be a considerable limitation upon s 14(2) of the *Status of Children Act* when compared with its predecessor, s 6 of the *Artificial Conception Act 1984* (NSW).[5] It established an irrebuttable presumption "for all purposes". There was no indication that the presumption applied only in court proceedings.

14. *Fifthly*, the indications relied upon by the Commonwealth to limit the application of s 14(2) of the *Status of Children Act* do not support the conclusion. The fact that ss 16 and 17 provide for the resolution of conflicting presumptions by reference to what "appears to the court to be more or most likely to be correct" evidently reflects an assumption about the circumstances in which the presumptions in the preceding provisions will often come to be applied. But that should not be understood to *limit* them to that context. Even absent ss 16 and 17, an administrative decision-maker would no doubt resolve conflicting presumptions in essentially the same way, as a matter of common sense (cf Cth [9]).

15. The fact that s 14(2) might not apply in the limited circumstance where it conflicts with the irrebuttable presumption for which s 12(1) provides does not deny that s 14(2) establishes a rule as to status (cf Cth [10]). Like many legal rules, it simply admits of a limited qualification.

16. No assistance can be gained from regarding s 14(2) as establishing a "statutory fiction" and thus akin to a deeming provision (cf Cth [11]). It is not self-evident that a sperm donor would, in all cases, fall within the ordinary meaning of the word "father": an example may be an anonymous sperm donor (see further paragraph 39 below). In this sense, any "deeming" by s 14(2) is more akin to the use of that expression by way of definition, rather than to establish a fictional state of affairs.[6] In any event, for the Commonwealth to rely on the proposition that a deeming provision or statutory fiction should not be construed so as to have a greater operation than that required to achieve its

---

5 This Act was repealed by s 37 of the *Status of Children Act*.

6 *Commissioner for Railways v Bain* (1965) 112 CLR 246 at 273 per Windeyer J; *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65 per Windeyer J.

object, is circular: it assumes the correctness of the Commonwealth's contention that the object of s 14(2) is no more than to regulate the exercise of jurisdiction.

17. *Sixthly*, reference to what was said by the Supreme Court in the case quoted in Cth [12] is inapt. The case concerned whether s 14(2) applied to adoption proceedings in that Court where the underlying facts occurred before the commencement of s 14(2). The question was one of "retrospectivity" in its extended sense — in relation to which a characterisation of a statute as "procedural" has a particular significance[7] — not whether s 14(2) applied outside the context of court proceedings. In any event, for the reasons above, the characterisation of s 14(2) as "procedural" was wrong: it was a substantive provision, which replaced the previously applicable general presumptions. The conclusion in the case, that s 14(2) applied to underlying facts occurring before its commencement, may well have been correct. But that was not because it was "procedural". It was because s 14(2) was, of its nature and in circumstances where it replaced a previous irrebuttable presumption that was not continued after its repeal by any transitional provision, the kind of provision which must have been intended to apply where the underlying facts occurred before its commencement.

(b) The *Family Law Act* "otherwise provides"

18. If, as the Commonwealth submits, s 14(2) of the *Status of Children Act* is a law of the kind to which 79 of the *Judiciary Act* applies, for the reasons in AS [35]–[48] and Cth [15]–[21], the *Family Law Act* "otherwise provides". The Independent Children's Lawyer supports those submissions and makes the following further submissions.

19. The issue before the primary judge was what "parenting orders" should be made in respect of the children, pursuant to the power in s 65D(1) of the *Family Law Act*. Parenting orders may be made in favour of "parents" or other persons (s 64C), and both parents and others may apply for parenting orders (s 65C). However, in deciding what parenting orders to make in respect of a child, various provisions of the *Family Law Act* require the Court to know who the "parents" of the child are.

20. For instance, s 60CA provides that the paramount consideration in the making of a parenting order is the child's best interests and s 61DA(1) requires the Court to "apply a

---

7 *Maxwell v Murphy* (1957) 96 CLR 261 at 267 per Dixon CJ, 285–286 per Fullagar J; *Mathieson v Burton* (1971) 124 CLR 1 at 22 per Gibbs J; *Carr v Finance Corp of Australia Ltd [No 2]* (1982) 150 CLR 139 at 147 per Mason, Murphy and Wilson JJ; *Rodway v The Queen* (1990) 169 CLR 515 at 518; *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595 at 615–616 per Deane, Dawson, Toohey and Gaudron JJ.

presumption that it is in the best interests of the child for the child's *parents* to have equal shared parental responsibility for the child" (emphasis added). See also the various references to "parent" in s 60CC, including, pursuant to s 60CC(2)(a), that a primary consideration in determining what is in a child's bests interests is "the benefit to the child of having a meaningful relationship with both of the child's *parents*" (emphasis added).

21. It was in this way that the issue of whether the appellant was a parent of B became relevant before the primary judge. Put precisely, the question before the primary judge was the meaning of the word "parent", and in particular whether it captured the appellant, when used in the provisions of the *Family Law Act* relevant to the making of parenting orders. Put simply, the question was: where the *Family Law Act* uses the term "parent", do those sections apply to the appellant?

22. Section 4(1) of the *Family Law Act* provides: "***parent***, when used in Part VII in relation to a child who has been adopted, means an adoptive parent of the child". But there is no exhaustive definition of the word "parent" in s 4 or elsewhere in the *Family Law Act*. The application squarely raised the issue of "parentage" and so it fell to the primary judge to determine how the provisions of the *Family Law Act* which contain the term "parent" should be construed. Accordingly, the primary judge was presented with a question of construction of the word "parent" in the provisions relating to parenting orders.

23. That was, and was only, a question of construction of the *Family Law Act*. The meaning of the word "parent" could be affected by expansions or limitations of the status of parenthood effected by State and Territory laws, such as s 14(2) of the *Status of Children Act*, if and only if the word as used in the *Family Law Act* was to be construed as encompassing such changes. That was not a question in relation to which s 79 of the *Judiciary Act* had any relevance.

24. As this Court explained in *Rizeq*,[8] s 79 applies only to State laws which (broadly speaking) provide powers necessary for the hearing or determination of matters in federal jurisdiction where there is a "gap" in federal law. That was not the circumstance at issue here. The *Family Law Act* conferred upon the Family Court all of the powers it required to resolve the application for parenting orders. The Family Court did not require State law to provide it with further powers necessary to hear and determine the matter.

---

[8] (2017) 262 CLR 1 at [12]–[23] per Kiefel CJ, [63]–[92] per Bell, Gageler, Keane, Nettle and Gordon JJ, [120]–[121], [181]–[205] per Edelman J.

25. The real issue, which was not addressed by the Full Court, is thus whether the word "parent" in provisions of the *Family Law Act* relevant to the making of parenting orders is to be construed as encompassing expansions or limitations of the status of parenthood effected by State and Territory laws, such as s 14(2) of the *Status of Children Act*, where the *Family Law Act* does not expressly authorise this. If it is construed in this way, then provisions such as s 14(2) of the *Status of Children Act* apply because of this construction, not because of s 79 of the *Judiciary Act*.

26. Conversely, if the word "parent" is construed as not encompassing expansions or limitations effected by State and Territory laws such as s 14(2) of the *Status of Children Act*, but rather to have its ordinary meaning, those provisions cannot apply — whether by force of s 79 of the *Judiciary Act* or of their own force — because that would contradict the *Family Law Act*. In the language of s 79 of the *Judiciary Act*, the *Family Law Act* would "otherwise provide". In the language of s 109 of the Constitution, such a construction would alter, impair or detract from the *Family Law Act*. In short, the word "parent" in the *Family Law Act* means what it means.

(c) The word "parent" when used in the *Family Law Act* does not, of itself, pick up State laws which specify who is and who is not a parent

27. For at least the following reasons, the word "parent" in the relevant provisions of the *Family Law Act* should not be construed as encompassing expansions or limitations of the status of parenthood effected by State and Territory laws where the *Family Law Act* does not expressly authorise this.

28. *First*, in the absence of any exhaustive definition in the *Family Law Act*, the word "parent" is *prima facie* to be given its natural and ordinary meaning, save as modified by the Act itself.[9] The application of a natural and ordinary meaning is, indeed, suggested by the inclusive definition provided in s 4, referred to in paragraph 22 above: it is implicit in the definition that what is meant by the word "parent" is understood in common usage and need only be explicitly enlarged by ensuring that the definition also encompasses those whose relationship with the child has been created by law. As a matter of ordinary

[9] *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 398 per *curiam*. See recently, eg, *SZTAL v Minister for Immigration and Border Protection* (2017) 91 ALJR 936 at [14], [26] per Kiefel CJ, Nettle and Gordon JJ, [68], [82], [87], [92], [101]–[103] per Edelman J.

language, the word "parent" has a more fixed and stable content than simply "whatever State or Territory law provides at any given time".

29. *Secondly*, the careful way in which s 60H applies only in *certain* circumstances and only where State or Territory laws have been *prescribed* would be undermined if, in *other* circumstances, and *whether or not* State or Territory laws have been prescribed, those laws gave content to the word "parent". That is especially so given the variety of different ways in which State or Territory laws could deal with the kinds of issues with which s 60H is concerned.[10] Conversely, if State and Territory laws dealing with the identity of persons who are the parents of children born as a result of artificial conception procedures had effect simply through the word "parent" in the *Family Law Act*, there would have been no need for a provision such as s 60H.

30. *Thirdly*, and similarly, the same may be said about s 60HB. As the section heading makes clear, its purpose is to deal with surrogacy arrangements. It expressly gives effect to orders under *prescribed* State and Territory laws. The effect of orders made under such laws — for instance "parentage orders" made under s 12 of the *Surrogacy Act 2010* (NSW) — is, first, to render the birth mother of a child carried pursuant to a surrogacy arrangement no longer the parent of that child and, secondly, to render the persons to whom it is agreed the parentage of a child is to be transferred under a surrogacy arrangement the parents of the child (see s 39 of the *Surrogacy Act*). For these laws to operate of their own force through the definition of the word "parent" in the *Family Law Act* would undermine the fact that s 60HB gives effect only to such laws as are *prescribed*. Conversely, there would have been no need for s 60HB if such laws had effect simply through the word "parent" in the *Family Law Act*.

31. *Fourthly*, the fact that the word "parent" is defined in s 4(1) of the *Family Law Act* to include, when used in relation to Pt VII — the part of the Act dealing with, among other things, parenting orders — an adoptive parent of a child who has been adopted is significant. That is because the word "adopted" is defined in s 4(1) to mean "adopted under the law of any place (whether in or out of Australia) relating to the adoption of children". That definition *expressly* permits the content of the word "parent" to be

---

[10] Compare, eg, s 14(2) of the *Status of Children Act 1996* (NSW) with s 19C(2) of the *Status of Children Act 1978* (Qld), which provides: "If semen is used in a fertilisation procedure of the woman, the man who produced the semen has no rights or liabilities relating to a child born as a result of a pregnancy for which the semen has been used." This provision does not, in terms, deny the man the status of a "parent" but, instead, is directed to the man's rights or liabilities.

affected by State and Territory (and international) adoption laws. It would have been unnecessary if the word "parent" had this result in any event.

32. *Fifthly*, there is a direct clash between s 69R of the *Family Law Act* and s 14 of the *Status of Children Act*. Section 69R of the *Family Law Act* provides:

> If a person's name is entered as a parent of a child in a register of births or parentage information kept under a law of the Commonwealth or of a State, Territory or prescribed overseas jurisdiction, the person is presumed to be a parent of the child.

Section 69U(1) provides that the presumption is rebuttable by proof on the balance of probabilities. Here, the appellant's name was entered on the New South Wales Register as the parent of B (CAB 15 [8]). The application of the irrebuttable presumption in s 14(2) of the *Status of Children Act* against the appellant being a parent of B is directly inconsistent with the presumption (albeit rebuttable) in s 69R that he *is* a parent of B.

33. For these reasons, Full Court was wrong to conclude that s 14(2) of the *Status of Children Act* gave content to the word "parent" in the provisions of the *Family Law Act* relevant to the hearing before the primary judge. No provision of the *Family Law Act* expressly permitted that result and it was not permitted simply by the word "parent".

(d) The word "parent" bears its ordinary meaning, which encompasses the appellant

34. As noted above, there are provisions of the *Family Law Act* which, in some cases, determine whether a person is a parent of a child. Section 60H is an example. Had the first and second respondents been in a *de facto* relationship at the time B was conceived, s 60H(1) would have determined, in a straightforward way, the question whether the appellant is a parent of B: the effect of s 60H(1)(d), if applicable, would have been that B was not the child of the appellant and, hence, that the appellant was not the parent of B. However, because of the primary judge's finding that the first and second respondents were *not* in a *de facto* relationship at the time B was conceived, s 60H(1)(d) had no application. While that finding was faintly challenged in the Full Court, that challenge failed (CAB 109 [8], 127–128 [98]–[100]).

35. No other part of s 60H, resolved the question whether the appellant was a parent of B. Section 60H(2) deals only with the relationship between a woman and a child born to that woman. While s 60H(3) deals with the relationship between such a child and a man, it applies only if the child is a child of that man pursuant to a law which has been prescribed

for the purposes of s 60H(3) and no such law has been prescribed. No other provision of the *Family Law Act* resolved the question whether the appellant was a parent of B.

36. That fact in itself demonstrates that s 60H cannot have been intended to state, exhaustively, who is and who is not a parent in cases of fertilisation procedures.[11] The Independent Children's Lawyer supports the submissions at Cth [23]–[35] in this regard. If an exhaustive operation were intended, clearer language would have been used. The language of the *Family Law Act* may be compared, for instance, with the definition of "parent" in s 5(1) of the *Child Support (Assessment) Act 1989* (Cth):

> ***parent:***
>
> ...
>
> (b) when used in relation to a child born because of the carrying out of an artificial conception procedure—means a person who is a parent of the child under section 60H of the Family Law Act 1975 ...

No such exhaustive definition is found in the *Family Law Act*.

37. If s 60H is applicable, it must of course be given effect, whether its effect is to render someone a parent for the purposes of the *Family Law Act* who would not otherwise be so or to deny someone that status who would otherwise be so. But where s 60H is *inapplicable*, the question whether a person involved in an artificial conception procedure is or is not a "parent" of a child must be resolved, as the primary judge correctly held, by the ordinary meaning of that word, as explained in Cth [36]–[43].

38. The appellant is the biological father of child B. Further, the findings of the primary judge were that, in addition to contributing genetic material, it was intended that the appellant would help to parent B, by financial support and physical care (CAB 24–26 [85]–[102]). And he in fact did so. The primary judge also found that, from B's perspective (and indeed that of B's sibling), the appellant was a parent: the children called him "daddy" and saw him as a parent (CAB 14 [4], 15 [9], [11], 66–68 [445]). On any view, these facts are sufficient to constitute the appellant a parent of B within the ordinary

---

[11] The Full Court in *Bernieres and Dhopal* (2017) 57 Fam LR 149 (FC) appeared to take a different view of s 60HB of the *Family Law Act*. It is not necessary in this case to consider the correctness of that view.

meaning of the word, as it is used in the provisions of the *Family Law Act* concerning parenting orders.[12]

(e) It is not necessary to determine exhaustively who is a "parent"

39. In these circumstances, it is not necessary for this Court to determine exhaustively who is a "parent" within the ordinary meaning of that term as used in the *Family Law Act*.

40. In the great majority of cases, the parents of a child will satisfy the ordinary meaning of the term "parent": they will both be the biological progenitors of the child, one will be the gestational carrier, and both will be the psychological and day-to-day caregivers of the child.[13] In some contexts, the ordinary meaning of the word "parent" may extend to any person who contributes genetic material to the birth of a child.[14] The provisions in ss 69Vff of the *Family Law Act* concerning "parentage evidence" and "parentage testing" are consistent with this being a relevant meaning.

41. Conversely, especially if viewed from a child's perspective, the word "parent" might extend to a person who contributes no genetic material to the conception of a child but acts, in all other ways, as a parent.[15] The primary judge recognised that, given the ages of the children here, a legal finding as to parenthood would not change the relationship between the appellant and the child as experienced from the child's perspective (CAB 19 [49], 65 [430]–[431]).

42. An intention, before conception, to act as a parent is a relevant part of the factual matrix, especially if accompanied by the contribution of genetic material and subsequent care of a child, though alone it is unlikely to be determinative. Similarly, the manner in which a child identifies those who care for him or her is relevant to the question of whether a person meets the ordinary definition of "parent" albeit, again, this is unlikely to be determinative.

---

12 See generally *Re G* [2006] 1 WLR 2305 (HL) at [32]–[37] per Baroness Hale; *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 (FC) at [46]–[49] per *curiam*.

13 See similarly *Re G* [2006] 1 WLR 2305 (HL) at [36] per Baroness Hale.

14 In *Tobin v Tobin* (1999) 24 Fam LR 635 (FC) at [42], the Full Court of the Family Court held that "in respect of the *Family Law Act* ... the natural meaning of the word "parent" is ... "a person who has begotten or borne a child".

15 See, eg, *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 (FC) at [48] per *curiam*

43. It is not necessary to explore these issues in this case.[16] However, the Independent Children's Lawyer draws attention to one issue that may be of significance.

44. Certain provisions of the *Family Law Act* appear to contemplate that a child will have only two parents. So, for example:

(a) the definition of "major long-term issues" in s 4 refers, by way of example, to a parent moving in such a way that "will make it significantly more difficult for the child to spend time with *the other parent*" (emphasis added);

(b) s 60B(1)(a) refers to "ensuring that children have the benefit of *both of their parents* having a meaningful involvement in their lives" (emphasis added) (see also ss 60B(2)(a), (b), 60CC(2)(a), (3)(e), 60D(1)(b)(i));

(c) s 60CC(3)(d) refers to the likely effect on the child of any separation from "*either of his or her parents*" (emphasis added) (see also s 60CC(3)(g)); and

(d) s 61C(2) refers to the parental responsibility of a child's parents being unaffected "by the parents becoming separated or *by either or both of them* marrying or re-marrying" (emphasis added).

45. Not all of the provisions of the *Family Law Act* take this form. Some use language which need not refer to only two parents. For instance, s 60CC(3)(b) refers to the nature of the child's relationship with "each of the child's parents" (see also ss 60CC(3)(c), (ca), (f), (i), 61C(1)). So too, the reference to "equal shared parental responsibility" in s 61DA(1) and (4). But provisions of the kind above do, on their face, appear to contemplate that a child will have two parents.

46. The issue whether these provisions forbid a conclusion that a child has more than two parents for the purposes of the *Family Law Act* does not arise in this case. The primary judge concluded that the appellant and the first respondent were the parents of B and that the second respondent was not a parent of B (CAB 21–24 [59]–[84]). There is no challenge to the latter conclusion. Accordingly, whatever the disposition of the appeal, B will not have more than two parents for the purposes of the *Family Law Act*.

47. However, depending on the circumstances, if "parent" bears its ordinary meaning, it may be that more than two people could be regarded as parents of a particular child. That is

[16] See further Dr Gillian Black, "Identifying the Legal Parent/Child Relationship and the Biological Prerogative: Who then is My Parent?" [2018] *Juridical Review* 22.

not a surprising conclusion to modern eyes. Whether or not it is legally possible, having regard to the provisions above, need not be finally determined. However, if it were obvious that the *Family Law Act* foreclosed that possibility, that might cast doubt on the correctness of a construction of "parent" which leaves it open. That being so, the Independent Children's Lawyer makes the following submissions.

48. *First*, the provisions of the *Family Law Act* using language such as "either", "both" or "other" with reference to a child's parents cannot be taken too literally. So much is evidenced by the fact that, in a case where one of a child's parents is dead, the provisions obviously cannot refer to that parent. In such circumstances, a child may have only one "parent" to whom the provision applies.[17]

10

49. *Secondly*, words such as "either", "both" or "other" need not be construed only to refer to two parents, though that is their more literal construction:

    (a) The words "either" and "both" may be construed more liberally to mean "each". A loose analogy may be drawn with this Court's decision in *NSW Registrar of Births, Deaths and Marriages v Norrie*:[18] a reference in New South Wales legislation to a sex affirmation procedure being "for the purpose of assisting a person to be considered to be a member of the opposite sex" did not connote that only the sexes "male" and "female" were recognised by the Act, notwithstanding the word "opposite".

20

    (b) As for the expression "other parent", it may be construed to mean "other parents", in accordance with the usual approach that the singular includes the plural pursuant to s 23(b) of the *Acts Interpretation Act 1901* (Cth).

50. For these reasons, provisions of the kind referred to above do not stand in the way of the construction of "parent" supported by the Independent Children's Lawyer.

(f) Orders

51. The Independent Children's Lawyer supports the orders sought by the appellant, save that, having regard to the role of the Independent Children's Lawyer, and consistently

30

---

17 See, eg, *Burton and Churchin* (2013) 50 Fam LR 482 (FC).

18 (2014) 250 CLR 490.

with the position at trial and before the Full Court, no order for costs should be made in favour or against the Independent Children's Lawyer in any event.

PART VII ESTIMATED TIME FOR ORAL ARGUMENT

52. The Independent Children's Lawyer estimates that 30 minutes will be required to present its oral argument.

Dated: 1 March 2019

Stephen Lloyd
T: 02 9235 3753
F: 02 9221 5664
stephen.lloyd@sixthfloor.com.au

Suzanne Christie
T: 02 9221 0083
F: 02 9233 4618
christie@culwulla.com.au

Perry Herzfeld
T: 02 8231 5057
F: 02 9232 7626
pherzfeld@elevenwentworth.com