IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

NO S6 OF 2019

MASSON

Appellant

and

PARSONS

First Respondent

PARSONS

Second Respondent

INDEPENDENT CHILDREN'S LAWYER

Third Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE ATTORNEY-GENERAL OF THE COMMONWEALTH (INTERVENING)

Filed on behalf of the Attorney-General of the Commonwealth (intervening)

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PART I INTERNET PUBLICATION

1. This outline of oral submissions is in a form suitable for publication on the Internet.

PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

I. Section 79 is not relevant to the meaning of words used in a Commonwealth Act

1. Whether the appellant is a "parent" within the meaning of the *Family Law Act 1975* (Cth) (**Act**) raised for the Family Court two sub-questions: ***first***, what is the meaning of the word "parent" in the Act?; ***second***, did the appellant fall within that meaning?

2. The first of those questions is an inquiry into the meaning of words used in a Commonwealth Act. Section 79 has nothing to say about that question.

   2.1. The words in a Commonwealth Act are the medium by which the Commonwealth Parliament exercises legislative power conferred under Ch I of the Constitution. Those words are "the product of deliberative choice on the part of democratically elected representatives to pursue collectively chosen ends by collectively chosen means": *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 93 ALJR 212 at [77] (**Vol 5, Tab 52**). A State or Territory Parliament cannot alter the meaning of the words used to convey that collective choice.

   2.2. Further, no gap in the meaning of a Commonwealth Act can arise from the absence of State legislative power to regulate federal jurisdiction. As such, s 79 has nothing to say the meaning of a Commonwealth Act.

   2.3. The interpretation of a word in a Commonwealth Act can be affected by a State or Territory law only to the extent the Commonwealth Act itself provides: see, for example, s 4 and s 60H of the Act (**Vol 1, Tab 3**).

   2.4. "Parent" in the Act has its ordinary and natural meaning (**CS [37]-[38], [42]**). The ordinary meaning of "parent" is a question of fact: *H v Minister for Immigration and Citizenship* (2010) 188 FCR 393 at 406 [48], 427 [128]-[130] (**Vol 3, Tab 32**). And whether a person falls within the ordinary meaning of "parent" is or involves a question of fact. Section 79 of the Judiciary Act may be relevant in determining that question of fact, as it may pick up State and Territory rules of evidence and other laws directed to regulating the exercise of jurisdiction.

II. Operation of s 79 in this case

3. A State law is picked up and applied as a federal law by s 79 if three requirements are satisfied: ***first***, the State law be of a character that regulates the exercise of jurisdiction; ***second***, the State law be "applicable" in the case; and, ***third***, the Constitution or, for present purposes, the laws of the Commonwealth do not "otherwise provide". The arguments in this case concern the first and third requirements.

First requirement (CS [8]-[13]; cf AS [49]-[58]; ICL [7]-[16]; Vic [37]-[38])

4. Section 14(2) of the State Act is a presumption. Such a law often has the character of a law directed to regulating the exercise of jurisdiction. State parentage presumptions have previously been picked up by s 79 in Family Court proceedings: *McArthur* (1982) 10 Fam LR 962; *Marriage of J and P* (1984) 10 Fam LR 490.

5. The State Act contemplates a conflict between irrebuttable presumptions (s 17(1)) which it contemplates will be resolved by a court. At least when a question to which s 14(2) is relevant arises in a court exercising federal jurisdiction, s 14(2) purports to govern the exercise of federal jurisdiction, and therefore cannot apply of its own force: *Rizeq v Western Australia* (2017) 262 CLR 1 at [90] (**Vol 5, Tab 48**).

Third requirement: the Commonwealth law "otherwise provides"

6. **Legal principles:** A Commonwealth law will "otherwise provide" if it is either "complete on its face" or "leaves no room" for the operation of a State law. The Commonwealth agrees with the appellant's approach (**AS [27]-[24]; CS [21]-[22]; cf RS [27]-[46]**).

7. The clarification in *Rizeq* that s 79 is directed to filling the gap in State legislative capacity to regulate the exercise of federal jurisdiction requires re-examination of the test for determining when a law "otherwise provides": *Rizeq v Western Australia* (2017) 262 CLR 1 at [39], [92] (**Vol 5, Tab 48**); cf *Northern Territory v GPAO* (1999) 196 CLR 553 at [38], [51], [73]-[77], [79]-[81] (Gleeson CJ and Gummow J) (**Vol 4, Tab 37**).

8. Section 79 does not require the Court to approach the question of inconsistency between Commonwealth law and a State law picked up by s 79 as if those laws are laws of the same legislature: cf *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 276 (**Vol 3, Tab 25**). The premise for the presumption that two laws of the same legislature

are not contradictory is absent. Further, to apply the analysis that is appropriate to resolving inconsistency between two laws of the same legislature would be inconsistent with the settled rule that State laws are picked up by s 79 with their meaning unchanged: *Commissioner of Police v Eaton* (2013) 252 CLR 1 at [47]-[48], [98]-[99]; *Rizeq v Western Australia* (2017) 262 CLR 1 at [81], [91] (**Vol 5, Tab 48**).

9. A Commonwealth law can "otherwise provide" even if the contradiction between the Commonwealth and State laws is of the kind associated with "indirect" rather than "direct" approaches to inconsistency: *Macleod v ASIC* (2002) 211 CLR 287 at [21]-[22], [24], [44] (**Vol 3, Tab 36**); *Work Health Authority v Outback Ballooning* (2019) 93 ALJR 212 at [32]-[35], [67]-[72], [105] (**Vol 5, Tab 52**); cf *Austral Pacific v Airservices Australia* (2000) 203 CLR 136 at [17] **(Vol 3, Tab 23)**.

10. **The Act "otherwise provides":** the Act leaves no room for s 79 to pick up State laws relevant to the task of determining whether the facts fall within the ordinary meaning of "parent" for three reasons. ***First***, the presumptions in Part VII, Div 12, Subdiv D of the Act (commencing **s 69P**) leave no room for conflicting presumptions in State legislation: Explanatory Memorandum, Family Law Amendment Bill 1987, p 37 cl 132 **(Vol 6, Tab 54)**. ***Second***, s 60H leaves no room for State or Territory law to operate except in the circumstances its specifies. ***Third***, the Act uses the word "parent" with its ordinary meaning. Section 60H is not exhaustive of the circumstances in which a person may be a "parent" by reason of artificial insemination (**CS [33]-[34]**). If it were, it would yield absurd results that the child at the heart of this proceeding has no parents.

III. Section 109

11. Alternatively, if s 14(2) is properly characterised as creating a norm or rule of law, it is inconsistent with the Act and inoperative by force of s 109 of the Constitution because it "alters, impairs or detracts" from the operation of the Act in the same three ways identified in the paragraph above.

Date: 16 April 2019

STEPHEN DONAGHUE **BRENDAN LIM**